UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MEXICAN GULF FISHING COMPANY, ET AL., Plaintiffs, v. U.S. DEPARTMENT OF COMMERCE, ET AL., Federal Defendants.	No. 2:20-cv-2312 Section "E" (1) Judge Suzie Morgan Magistrate Judge Janis Van Meerveld

Reply in Support of Federal Defendants' Cross-Motion for Summary Judgment

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INTRODUCTION

Plaintiffs hold permits that allow them the exclusive right to take customers for-hire to fish for federally managed reef fish and coastal migratory pelagic species. Holding this federal benefit, they now seek to invalidate the accompanying federal oversight of the Gulf For-Hire Reporting Rule ("Final Rule"). *See* Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries, 85 Fed. Reg. 44005 (July 21, 2020). The Final Rule requires, in part, that each vessel be equipped with a Vessel Monitoring System ("VMS") with GPS capabilities that allows the National Marine Fisheries Service ("NMFS") to validate trip effort and prepare for dockside sampling of catch. Plaintiffs levy a number of statutory and Constitutional attacks on the Final Rule, none of which this Court should entertain.

ARGUMENT

I. The VMS Requirement Falls Within the Authority Appropriately Delegated to NMFS Under the Magnuson-Stevens Act.

The Magnuson-Stevens Act ("MSA") expressly authorizes any fishery management plan ("FMP") to "require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this [Act]." 16 U.S.C. § 1853(b)(4). As explained in the Final Rule and the administrative record, accurate and reliable data about catch, fishing effort, and discards are integral to conducting stock assessments and other analyses required under the MSA and other applicable laws, as well as monitoring landings to constrain harvest to specified catch limits. *See* AR07730-31, AR07737-38, AR07740-41; 83 Fed. Reg. 54069, 54070 (Oct. 26, 2018). In addition to improving the accuracy and reliability of the underlying data collected through the reporting program, thus serving the MSA's conservation goals, the VMS requirement also aids in enforcing

the reporting requirement. AR11232; AR07866. Thus, NMFS reasonably determined that requiring for-hire vessels to install VMS devices is both authorized by the MSA and necessary and appropriate for the conservation and management of the fishery. 85 Fed. Reg. at 44012.

Recognizing that Congress had clearly spoken on NMFS's authority to require the use of VMS devices under the MSA, Plaintiffs assert that NMFS may not require the *purchase* of those devices. Pls.' Mem. in Supp. of Summ. J., ECF No. 86 ("Pls.' Opp'n") at 27. First, Plaintiffs assert that NMFS may not require the purchase of any type of equipment for which a fisherman "has no use." *Id*. But the MSA does not limit NMFS's authority to only require devices which a fisherman determines are useful. Instead, Congress delegated to NMFS the authority to determine what types and quantities of equipment should be required, including what NMFS believes may be "required to facilitate enforcement of the provisions of this [Act]." 16 U.S.C. § 1853(b)(4). Under that authority, NMFS may determine what equipment for fishing vessels is necessary for the conservation and management of the fishery, and this equipment includes devices that may be "required to facilitate enforcement provisions of the Act." 16 U.S.C. § 1853(b)(4). That the regulated industry bears the costs of that equipment is neither novel nor a violation of law. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 652 (2012) ("*NFIB"*) (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting) ("Government regulation typically imposes costs on the regulated industry"). To conclude otherwise would mean that Congress intended the government to subsidize the costs of all conservation measures, including VMS devices and appropriately configured fishing vessels and gear necessary to harvest a public resource. Rather, the MSA requires, where practicable, that NMFS minimize costs and adverse economic impacts on communities. *See* 16 U.S.C. § 1851(a)(7)-(8) (National Standards 7 and 8).

Equally incoherent is Plaintiffs' argument that the VMS requirement violates the Commerce Clause. Relying on *NFIB*, Plaintiffs argue they will be compelled to purchase an unwanted product when they otherwise would not have engaged in commerce. Pls.' Opp'n at 27. As the District of Rhode Island recently explained in an analogous case, the relevant market is not the VMS device market, but the for-hire/charter fishing market in which the Plaintiffs are already engaged. *See*, *Relentless Inc. v. U.S. Dep't of Com.,* -- F. Supp. 3d --, C.A. No. 20-108 WES, 2021 WL 4256067, at *12 (D.R.I. Sept. 20, 2021) (determining that the relevant market "is not the monitoring market, but rather the commercial herring fishing market"). "Unlike the involuntary insurance purchasers—who could not, short of leaving the country, avoid the health insurance requirement—Plaintiffs are voluntary market participants." *Id*. Plaintiffs are free to take customers to fish for any of the non-federally managed species in the federal Exclusive Economic Zone ("EEZ") that do not require a permit if they wish to avoid the VMS requirement.

Finally, the Court should reject Plaintiffs' argument that the VMS requirement violates the "nondelegation doctrine." Pls.' Opp'n at 29-31. First, Plaintiffs raised this argument for the first time in their reply brief, and thus have waived it. *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) (a claim raised in response to a motion for summary judgment but which has not been raised in the complaint is not properly before the court). Even if not waived, the argument fails. When conferring authority upon agencies, Congress must lay down "an intelligible principle" to which the person authorized to act is directed to conform. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). In applying the "intelligible principle" test to congressional delegations, the Supreme Court "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general

directives." *Mistretta v. United States,* 488 U.S. 361, 372 (1989). The guidance required from Congress need not be explicit in the statutory text: a court must consider "the 'purpose of the [statute], its factual background and the statutory context.'" *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 866 (D.C. Cir. 2006) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)). Because this is a lenient standard, it is no surprise that "[i]n the history of the [Supreme] Court [it has] found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman*, 531 U.S. at 474 (citing *Panama Refin. Co. v. Ryan,* 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935)). The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 U.S. at 474-75 (citation omitted).

Plaintiffs propose that this Court should impose a new test that would require NMFS to prove that any benefits of the VMS requirement outweigh costs imposed on the regulated entities to avoid any alleged nondelegation violations. Pls.' Opp'n at 29. That interpretation is not necessary given the plain language of the statute. *Gundy v. United States*, 139 S. Ct. 2116, 2123 ("Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation…the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides."), *reh'g denied*, 140 S. Ct. 579 (2019). Here, Congress has directed NMFS to determine, based on its scientific expertise and with input from the relevant fisheries councils, what equipment for fishing vessels is necessary of the conservation

and management of the fishery. 16 U.S.C. § 1853(b)(4). That is sufficient to demonstrate the existence of an intelligible principle.

NMFS plainly has the authority to require VMS devices on vessels used to fish for federally managed species and the agency reasonably determined that requiring VMS devices would facilitate the reporting program and serve the MSA's conservation goals.

II. NMFS Complied with the Administrative Procedure Act.

NMFS satisfied the Administrative Procedure Act's ("APA's") due process requirements to provide notice and an opportunity to comment. Plaintiffs' arguments to the contrary lack merit.

First, the Final Rule's economic data requirement to report economic data is adequate under the APA's notice requirement. The Final Rule requires trip reports to be submitted that include socio-economic data in addition to information about species that were caught or harvested, the permit holder, vessel, location fished, fishing effort, and discards. 85 Fed. Reg. at 44005. NMFS explains that the collection of this information will "increase the accuracy of economic impacts and value estimates specific to the for-hire industry; and will support further value-added research efforts and programs aimed at increasing net benefits to fishery stakeholders and the U.S. economy" as well as "help generate estimates of lost revenue when a disaster occurs (e.g., hurricane, oil spill)." 85 Fed. Reg. at 44011. The proposed rule required "any other information requested," which would include "socio-economic data." 83 Fed. Reg. at 54071, 54076, 54077. The Final Rule does not contain a requirement that was not in the proposed rule. The requirement to report the five specific socio-economic data elements falls well within the scope of the proposed rule as the content of the Final Rule is a "logical outgrowth" of NMFS's rulemaking proposal. *Aeronautical Radio, v FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991) (internal citations omitted). Contrary to Plaintiffs' assertions, agencies need not supply comprehensive

explanations and record citations for each and every conclusion. *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 311-12 (1st Cir. 1979). As required under the APA, NMFS adequately explained the facts and policy concerns underlying the Final Rule.

Next, NMFS adequately responded to Fourth Amendment concerns. It reasonably interpreted the text of comments that "[p]roviding all confidential transiting details is a violation of our 4th Amendment right to privacy," AR08179-AR08180, AR08192-AR08193, AR08237-08328, reflected a concern about the confidentiality of the GPS data acquired from the VMS. And it fully responded to this category of comments, stating that the data "shall be confidential and shall not be disclosed, except under the limited circumstances specified in the [MSA]." 85 Fed. Reg. 44010.

Finally, in arguing that NMFS failed to consider any relevant factors, Plaintiffs ignore the technical data committee's explicit recommendation that NMFS collect "number of crew" because it is an essential data element. AR07842. Although the committee recommended against collecting charter fee information as part of the "eLogbook," the committee acknowledged that information was necessary and recommended collecting it in a "Separate survey." AR07849. However, NMFS explained that collection through the electronic logbooks is superior to other data sources. 85 Fed. Reg. at 44,011. NMFS considered all of the relevant factors and its reasonable determination of the data elements to be collected should be upheld.

III. NMFS Complied with the Regulatory Flexibility Act.

NMFS complied with the Regulatory Flexibility Act, which is purely procedural, when it published an initial and final regulatory flexibility analysis. 83 Fed. Reg. at 54072-75; 85 Fed. Reg. at 44013-17. Plaintiffs fail to offer any counterarguments to the agency's proffered explanations other than to dismiss the rationale behind why NMFS rejected the no-GPS alternative

as "circular." Pls.' Opp'n at 35. But NMFS did not reject the no-GPS alternatives simply because "it would not require [a] GPS unit." *Cf. id*. NMFS explained that any alternative not requiring hardware permanently affixed to a vessel would not provide the level of validation necessary to improve the accuracy and reliability of the collected data, and that the VMS requirement was necessary to aid with enforcement of the Act. *See*, 83 Fed. Reg. at 54075; 85 Fed. Reg. at 44012, 44016. NMFS is entitled to reject alternatives that would not have achieved equivalent success in meeting the objectives of the applicable statutes. *Alenco Commc'ns v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000). Plaintiffs offer nothing to undermine that conclusion.

V. The VMS Requirement is Not an Unconstitutional Taking and the Court Does Not Have Jurisdiction to Hear Plaintiffs' Claim.

A. Plaintiffs Failed to Provide Defendants with the Requisite Notice of a Fifth Amendment Takings Claim, and Even if they Had, Plaintiffs Fail to Show that this Court Would Have Jurisdiction Over that Claim.

Plaintiffs' First Amended Complaint is devoid of any reference to a *per se* physical taking of Plaintiffs' vessels. Recognizing their failure to properly raise such a claim, Plaintiffs now assert that their reliance on the Fifth Amendment's due process clause along with the use of the word "seizure" should be sufficient. Pls.' Opp'n at 23. "Federal Rule of Civil Procedure 8(a)(2) requires 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Defendants did not have "fair notice" of a takings claim when any "seizure" alleged is specifically referred to in the context of the due process clause, not the takings clause. First Am. Compl., ECF No. 54, ¶ 82. Moreover, the only "seizure" alleged is of the data generated by the VMS units, a theory that Plaintiffs have since abandoned in their response brief.

In addition to this procedural defect, Plaintiffs fail to show that the Court has jurisdiction to hear their takings claim. "[T]he Fifth Amendment does not automatically waive sovereign immunity" for a takings claim. *Sammons v. United States*, 860 F.3d 296, 300 (5th Cir. 2017). Instead, through the Tucker Act, 28 U.S.C. § 1491(a)(1), Congress has waived the United States' immunity to suit in the Court of Federal Claims for compensation owed to anyone whose property has been taken by the federal government. *See United States v. Bormes*, 568 U.S. 6, 10 (2012) (Tucker Act is a jurisdictional provision which operates to waive sovereign immunity, but does not create any substantive rights). District courts do not have jurisdiction to hear takings claims for more than $10,000 because "there is no waiver [of sovereign immunity] except to have the claims heard in the Court of Claims." *Wilkerson v. United States*, 67 F.3d 112, 119 n.13 (5th Cir. 1995); *accord United States v. Land*, 213 F.3d 830, 837 (5th Cir. 2000) (holding that landowners could not challenge certain aspects of a condemnation award because Congress had not waived sovereign immunity).

As long as a plaintiff has the ability to pursue just compensation against the federal government under the Tucker Act, "there is no basis to enjoin the government's action effecting a taking." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2176-77 (2019); *accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984) (stating that a property owner "has no claim against the Government" for a taking in such circumstances). In other words, "the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 697 n.18 (1949). The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power" and is "designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise

proper interference amounting to a taking." *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314-15 (1987) (citations omitted). "[S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *United States v. Riverside Bayview Homes,* 474 U.S. 121, 128 (1985).

Plaintiffs ask this Court to ignore this jurisdictional issue and rely on *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), as to why a declaratory judgment against the United States is appropriate in this case. Pls.' Opp'n at 24. But *Koontz* did not involve a waiver of sovereign immunity by the United States. 570 U.S. 595 (2013). The Supreme Court has repeatedly rejected requests for equitable relief where, as here, Congress has not withdrawn the Tucker Act's process for obtaining compensation from the federal government. *See*, *e.g.*, *Hurley v. Kincaid*, 285 U.S. 95, 99, 105 (1932) (rejecting a request to "enjoin the carrying out of any work" on a flood control project because the Tucker Act provided "a plain, adequate, and complete remedy at law"); *Dugan v. Rank*, 372 U.S. 609, 626 (1963) (dismissing a suit against the United States that sought to enjoin the operation of an irrigation system and explaining, "[a proceeding for compensation] is the avenue of redress open to respondents"). Most recently, in *Knick*, the Supreme Court affirmed that, "Federal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim brought under the Tucker Act."139 S. Ct. at 2179.[1]

[1] The Supreme Court has applied the same logic to many federal statutes and other actions. *See*, *e.g.*, *Preseault v. ICC*, 494 U.S. 1, 11-17 (1990) (National Trails System Act Amendments of 1983); *Riverside Bayview*, 474 U.S. at 129 n.6 (Clean Water Act); *Ruckelshaus*, 467 U.S. at 1016-19 (Federal Insecticide, Fungicide, and Rondenticide Act); *Dames & Moore v. Regan*, 453 U.S. 654, 688-689 (1981) (Executive Order); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 & n.40 (1981) (Surface Mining Control and Reclamation Act); *Duke Power Co. v. Carolina Env't Study Grp.*, 438 U.S. 59, 94 n.39 (1978) (Price-Anderson Act); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) (Regional Rail Reorganization Act of 1973).

B. The VMS Requirement is Not an "Unconstitutional Condition."

Even if the Court were to find that Plaintiffs could surmount these hurdles, Plaintiffs' takings claims fails because the VMS requirement serves a necessary conservation and law enforcement function. Critically, Plaintiffs are not compelled by the government to obtain a permit. Plaintiffs must obtain a permit and comply with the VMS requirement only if they want to fish for federally managed fish species within the EEZ. Plaintiffs are thus voluntarily seeking the benefits of fishing in the EEZ through a limited access permit. Thus, there is no *per se* taking. *See*, *Ruckelshaus*, 467 U.S. at 1007; *Yee v. City of Escondido,* 503 U.S. 519, 530-32 (1992).

In an effort to minimize their voluntary participation in the permit program, Plaintiffs assert that the VMS requirement violates the unconstitutional conditions doctrine by requiring them to give up the right to just compensation. Pls.' Opp'n at 25. In doing so, Plaintiffs obscure the actual property interests at stake. Here, it is relevant that the limited access permits grant Plaintiffs the opportunity to access something in which Plaintiffs have no legitimate property interest in the first instance. Fish in EEZ belong exclusively to the sovereign and Plaintiffs have no recognized right to convert those fish for their own economic use. *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1378 (Fed. Cir. 2004) (citing 16 U.S.C. § 1811 (2000)). Nor do Plaintiffs have a right to use their vessels to fish in waters under the exclusive control of the United States unencumbered by the conditions of a permit. *See*, *Am. Pelagic Fishing*, 379 F.3d at 1379; *see also*, *Conti v. United States*, 291 F.3d 1334, 1344–45 (Fed. Cir. 2002). Because Plaintiffs hold no property interest in the limited access permits or the fish in the EEZ, there can be no coercive effect by denying those permits. For that reason, this situation is unlike those presented in Plaintiffs' cited cases where withholding a permit restricted a property interest already held by the party alleging a taking. *See*, *e.g.*, *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 831 (1987) (conditioning

petitioners' ability to build a home on their private property by requiring the grant of a public easement on that land was a taking). Moreover, Plaintiffs have not been asked to permanently cede any property interests to the government. They simply wish that they did not have to install "equipment they do not want" onto their vessels for the duration of time that they hold their permits. Pls.' Opp'n at 25. That wish is insufficient to determine that there has been any taking which requires just compensation.

Plaintiffs agree that it may be perfectly legitimate for the government to "'require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking.'" Pls.' Opp'n at 25 (citing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079-80 (2021)). Where "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Cedar Point Nursery,* 141 S. Ct. at 2079 (quoting *Nollan*, 483 U.S. at 836). The appropriate inquiry "is whether the permit condition bears an 'essential nexus' and 'rough proportionality' to the impact of the proposed use of the property." *Id*. (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994)). In the land-use context, this framework allows "permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out ... extortion' that would thwart the Fifth Amendment right to just compensation." *Koontz*, 570 U.S. at 606 (citations omitted).

As explained above, Plaintiffs have no property interest in the limited access permit or any right to use their vessels to fish in the EEZ unencumbered by the terms of a permit. Accordingly, denial of that permit for failure to comply with the permit's requirements is within the legitimate police-power of the government and is not an unconstitutional condition. Moreover, there is an essential nexus between the VMS requirement and the MSA's conservation goals. The VMS

requirement is a critical component of the for-hire reporting requirements, which NMFS expects to increase the accuracy of the data used to conduct stock assessments and constrain harvest to specific catch limits. AR11232; AR07730-31, AR07737-38, AR07740-41, AR07866. The VMS requirement also satisfies the proportionality requirement. Although Plaintiffs cast the VMS devices as "permanent" fixtures on their vessels, VMS devices are themselves Plaintiffs' property and are only required to remain affixed to the vessel as long as that vessel owner has a permit. If the vessel owner relinquishes the limited access permit, the VMS unit may be removed. Because permittees need only maintain a VMS device on their vessels for the duration of the permit, the proportionality requirement is satisfied. The VMS requirement is not a taking and does not violate the unconstitutional conditions doctrine. The Court should grant summary judgment in Federal Defendants' favor on Plaintiffs' Fifth Amendment claim.

V. The VMS Requirement is Constitutional Under the Fourth Amendment.

Plaintiffs' Fourth Amendment argument is also without merit. NMFS promulgated the Final Rule under the MSA, which explicitly allows for warrantless access to data from VMSs. *See* 16 U.S.C. §1861(b)(1)(A)(vi). The Supreme Court has long upheld warrantless administrative searches of closely regulated businesses. *New York v. Burger*, 482 U.S. 691 (1987). *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), does not disturb the conclusion that fishing is a closely regulated industry, and that the VMS requirement is reasonable under the test articulated in *Burger*. Alternatively, the Final Rule also passes Fourth Amendment muster under both the property-based and reasonable-expectation-of-privacy tests.

A. The VMS Requirement is Constitutional Under the Framework for a "Pervasively Regulated" Industry.

An administrative search of a business in a closely regulated industry is reasonable if a substantial federal interest exists behind the regulatory scheme and the search is necessary to

further that scheme. *Patel*, 576 U.S. at 420. In the MSA, Congress recognized a significant federal interest to "conserve and manage the fishery resources found off the coasts of the United States". 16 U.S.C. §§ 1801(b)(1), (3). Because the fishing industry[2] is subject to pervasive regulation under the MSA, including "access, directly or indirectly, for enforcement purposes . . . [to] data from vessel monitoring systems,"[3] 16 U.S.C. § 1861(b)(1)(A)(vi), any "search" conducted by the VMS's collection of GPS coordinates consists of a reasonable extension of a significant federal interest grounded in the MSA's regulatory scheme.

1. The Fishing Industry is Closely Regulated.

The determination of whether a business is closely regulated turns on the "pervasiveness and regularity of the . . . regulation" and the effect of the regulation on the expectation of privacy of individuals in the industry. *Burger*, 482 U.S. at 701 (citation omitted). Numerous courts have found that fishing is a closely regulated industry, as detailed in Defendants' Cross-Motion for Summary Judgment. ECF No. 79-1 at 26-27. Plaintiffs ask this Court to read *Patel* for the proposition that searches conducted outside the judicial process are per se unreasonable, subject only to a few specially established exceptions, and that fishing is no longer a closely regulated industry. The Court should refuse to do so. *Patel* reaffirmed the validity of warrantless

[2] Plaintiffs once again attempt to frame the applicable industry as charter vessels and not fishing. But this Court has already found that the Final Rule regulates vessels "[i]n the world of *commercial passenger fishing* . . ." ECF No. 48 at 3 (emphasis added). Plaintiffs may not simply characterize their business as charter vessels to avoid the applicability of the administrative search exception. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73–74 (1970) (catering company subject to warrantless inspection because it served alcohol, and search was pursuant to federal statute regulating sale of alcohol); *United States v. Biswell*, 406 U.S. 311, 317 (1972) (pawn shop subject to warrantless searches because pawn shop owner was a federally licensed firearms dealer). A charter vessel may not be "closely regulated as such, but [fishing] [is] highly regulated and licensed and therefore subject to the administrative search exception." *United States v. Hamad*, 809 F.3d 898, 905 (7th Cir. 2016).

[3] Plaintiffs' complaint about the time and place restrictions is based on an entirely separate provision of the MSA, 16 U.S.C. § 1861(b)(1)(A)(iii), which limits the scope of warrantless searches and seizures of a fishing vessel to situations in which a vessel is reasonably believed to be in violation of the MSA. Because that provision is inapplicable here, Plaintiffs' accompanying discussion of *Gulf of Maine Trawlers v. United States*, 674 F. Supp. 927 (D. Me. 1987) and *Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986), is inapposite.

administrative searches for closely regulated industries, and only addressed whether hotels are closely regulated. *Patel*, 576 U.S. at 424. Nothing in *Patel* undermines the fact that fishing remains a closely regulated industry.

Plaintiffs reliance on *Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019), *cert. denied*, 141 S. Ct 110 (2020), for the proposition that fishing is not a closely regulated industry is misplaced. In *Zadeh*, the Fifth Circuit mused in dicta that the medical industry, as a whole, was not a "closely regulated industry,"[4] and thus the state medical board's warrantless administrative search of medical records of an internal medicine doctor's patients was not within the closely regulated industry exception. Because *Zadeh* is a qualified immunity case, its only holding is that the warrantless search in question did not violate clearly established law. *Zadeh*, 928 F.3d at 468-70. But *Zadeh* is instructive: it suggests that Texas's regulatory scheme did not provide a proper substitute for a search warrant, in part because although the medical profession was extensively regulated and had licensure requirements, it did not have an entrenched history of warrantless searches. *Id.* at 466-68.

Applying the factors articulated by the Fifth Circuit in *Zadeh* to the fishing industry results in a different outcome. Here, the MSA does not just allow warrantless searches it expressly authorizes warrantless inspections or searches of data from fishing vessels regulated under it. These express authorizations in the governing statute are proper evidence that fishing is a pervasively regulated industry. *See, e.g.*, *Zadeh*, 928 F.3d at 466-68 ("We also do not see in the medical profession an entrenched history of warrantless searches. Its absence is relevant, though not dispositive, to our issue."). Moreover, following *Zadeh*'s logic that courts should consider the history and level of regulation in an industry when determining whether an industry is pervasively

[4] *Zadeh* did assume that pain management clinics are part of a closely regulated industry. 928 F.3d at 466.

regulated, there is no question that regulation of the fishing industry has a long history. *Lovgren*, 787 F.2d at 865 n.8 ("[t]he fishing industry has been regulated since at least 1793 when licenses were required for vessels engaged in cod and mackerel fishing." (citations omitted)). These factors weigh heavily in favor of finding that the fishing industry remains a closely regulated industry post-*Patel*.

Plaintiffs' argument that *Patel* requires a showing of "a clear and significant risk to the public welfare" to find that an industry is pervasively regulated is directly contradicted by post-*Patel* caselaw, where courts have made determinations on which industries qualify as closely regulated without considering this factor. For example, in *Free Speech Coalition, Inc. v. Attorney General United States*, the Sixth Circuit held that "producers of sexually explicit images" are not part of a closely regulated industry, in part because they are "not subjected to a level of regulation even approximating the pervasive regulation aimed at the liquor industry, firearms dealing, mining, or independent automobile junkyards," and that "no one is required to obtain a license or register with the Government before producing a sexually explicit image." 825 F.3d 149, 170 (3d Cir. 2016). Similarly, in *Hamad*, 809 F.3d 898, the Seventh Circuit stressed the "long history of regulation and licensing of cigarette sales in Chicago," but never mentioned the risk to the public welfare in determining that the district court did not err in treating retail cigarette sales as closely regulated. *Id.* at 905. Recently, in *Killgore v. City of South El Monte*, 3 F.4th 1186 (9th Cir. 2021), the Ninth Circuit reaffirmed that the California massage industry was closely regulated based on its 30-year history of regulation and the lack of a reasonable expectation to privacy by its business owners, without any discussion of risks to the public welfare. *Id.* at 1191-92.

Certainly, as *Patel* notes, safety concerns are often a motivating factor behind pervasive regulatory schemes. *Patel*, 576 U.S. at 424. But risk to the public welfare is not the dispositive

factor in this analysis. Indeed, in *Zadeh* the Fifth Circuit never analyzes the risk to the public welfare. It simply noted without discussing further that one of the factors that defendants "emphasize" is the "risk that the industry could pose to the public welfare." *Zadeh*, 928 F.3d at 465. And, of course the MSA was enacted to "conserve and manage the fishery resources found off the coasts of the United States." 16 U.S.C. § 1801(b)(1). As made clear in the congressional findings in the MSA, Congress believed that if left unregulated, fishing poses a clear and significant risk to the Nation's fishery resources, which is important to the overall public welfare. *See id.* § 1801(a).

2. VMS is Reasonable Under the Test for Warrantless Regulatory Searches.

Having established that fishing is a pervasively regulated industry, we turn to the three-part test for evaluating the reasonableness of warrantless regulatory searches: (1) a substantial governmental interest must motivate the regulatory scheme; (2) warrantless inspections must be "necessary to further the regulatory scheme"; and (3) the statute's inspection program must provide "a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702-703 (citations omitted). Each of these prongs is met here.

First, because Congress was aware that "an important national asset was at stake and that strong measures were necessary [to preserve the asset]," *United States v. Kaiyo Maru No. 53*, 699 F.2d 989, 995 (9th Cir. 1983), the MSA advanced Congress' goal of thwarting the depletion of a valuable natural resource, which includes the ability to collect data from VMSs to assist in compliance with conservation and management objectives. Second, the MSA specifically authorizes warrantless access to data from VMSs and the record supports the need for the VMS for trip validation. *See* AR 11568 ("Validation of vessel activity (or inactivity) is critical to determining compliance with logbook reporting requirements. Information on whether or not a

vessel is in or out of port on a particular day can be matched with logbook records or hail out/hail in requirements to determine if vessel activity was accurately reported."). And third, the VMS provides notice to Plaintiffs that they are subject to inspections and reasonably limits the scope of data collected to the GPS location data, a circumstance delineated by Congress in the provision of the MSA that allows for the warrantless access to any data from VMSs. Therefore, the VMS requirement satisfies the *Burger* test for warrantless inspections in pervasively regulated industries.

B. The VMS is Constitutional Under the Property-Based Approach.

Even assuming that fishing is not a pervasively regulated industry, the VMS requirement still passes Constitutional muster. Under the "property rights" test, a search has occurred when the Government obtains information by physically intruding on persons, houses, papers or effects. *United States v. Jones*, 565 U.S. 400, 406-06 (2012). In this case, there is no physical intrusion. Applying this test here demonstrates that no search has occurred and so there is no Fourth Amendment violation.

Plaintiffs erroneously assert that because the Supreme Court held that the GPS device attached by the Government to a motor vehicle in *Jones* constituted a search, the VMS must also be a search. In doing so, Plaintiffs ignore the key fact that made the GPS device a search in *Jones*: "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." *Jones*, 565 U.S. at 404 & n.2. That is not what is before this Court. First, in *Jones* the Government installed the GPS without the vehicle owner's knowledge or consent. Here, the vessel owners and operators have knowledge of the VMS devices and consent to such devices by virtue of agreeing to the terms and conditions of their fishing permits. The *Taylor v. City of Saginaw* court's determination that there was a "common-

law trespass upon a constitutionally protected area" where a parking enforcement officer made a chalk mark on the tire of a vehicle, 922 F.3d 328, 332-33 (6th Cir. 2019), does not alter this conclusion. There is no similar "intentional physical contact" by NMFS on the Plaintiffs' vessels. *See id.* Rather, it is vessel owners (such as Plaintiffs) themselves who must install the VMS devices to comply with the conditions of their fishing permits—not the Government.

Second, the GPS device at issue in *Jones* was tracking the movements of a vehicle used exclusively by the target—that is, the GPS device was installed to track the target's movements, not the location of the vehicle. In contrast, the purpose of transmitting the GPS positioning data recorded by the VMS is to identify the location of the fishing vessel itself—not the location of the people on the vessel. Indeed, the VMS does not record the identity of any individuals on the vessels. Both of these facts distinguish the VMS requirement at issue here from *Jones*, and therefore the VMS is permissible under the alternative property-based framework.

C. VMS is Constitutional Under the Reasonable Expectation of Privacy Approach.

In the alternative, the VMS requirement is also constitutional under the "reasonable expectation to privacy" test. A search is a governmental invasion of an individual's privacy only if the individual has a subjective expectation of privacy which society recognizes as objectively reasonable. *Katz v. United States*, 389 U.S. 347, 362 (1967) (Harland, J., concurring). As permit holders under the MSA, which authorizes warrantless access to any data from VMSs, Plaintiffs are on notice that periodic inspections will take place and that no reasonable expectation of privacy exists in areas where the inspections occur. *Donovan v. Dewey*, 452 U.S. 594, 606 (1981); *Balelo v. Baldrige*, 724 F.2d 753, 764-65 (9th Cir. 1984). Plaintiffs have not demonstrated that the data collected from the VMS intrudes into an area protected by the Fourth Amendment. *Carroll v.*

United States, 267 U.S. 132, 146 (1925) (the Constitution does not forbid searches, it forbids unreasonable searches).

In arguing that the VMS requirement is an unconstitutional long-term recording of activity, Plaintiffs cite to *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987), where the Fifth Circuit found that the individual had a subjective expectation to privacy in his backyard. But Plaintiffs offer no support for this Court to conclude that they have a subjective expectation to privacy in the location of fishing vessels.[5] Plaintiffs cannot assert a subjective expectation of privacy to the location of fishing vessels made freely available to third-party customers during a fishing trip and, to the public when docked. That only paying customers may come aboard the vessels to go on fishing trips does not disturb the conclusion that the customers are still third-parties. And, of course, the backyard in *Cuevas-Sanchez* and the public waterways at issue here are vastly different areas to have subjective expectations of privacy.

But even if Plaintiffs could claim to have a subjective expectation of privacy to their vessel locations, society has not recognized that expectation to privacy as reasonable. While the VMS identifies the location of the fishing vessel, it does not record the people aboard, including the captain. *Compare with Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018) (cell site location information reveals visits to "private residences, doctor's offices, political headquarters, and other potentially revealing locales." (citation omitted)). The VMS requirement applies only to fishing vessels that are used to conduct a transaction between the owners and operators and the paying customers. *See United States v. Turner*, 839 F.3d 429, 435 (5th Cir. 2016) (no reasonable

[5] Plaintiffs assert that some members of the class use the vessels for "purely personal non-fishing movements." Pls.' Opp'n at 11. Because Plaintiffs mount a facial challenge to the Final Rule, a hypothetical scenario involving personal use of the vessels is irrelevant to the Fourth Amendment analysis. *Associated Builders & Contractors of Tex. v. Nat'l Lab. Rels. Bd.*, 826 F.3d 215, 220 (5th Cir. 2016) (Facial challenge to agency regulation must "establish that no set of circumstances exists under which the [Rule] would be valid." (citation omitted)).

expectation of privacy in magnetic stripe of a gift card as it had a "commercial purpose" and was "intended to be read by third-parties," in contrast to cell phones which "collect in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record"). The location of the fishing vessels are revealed to the third parties who have paid for the fishing trip, and the GPS position data obtained from the VMS does not reveal intimate details of an individual's life. *Compare with Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 334, 344 (4th Cir. 2021) (en banc) (Aerial surveillance that captures images that "can be magnified to a point where people and cars are individually visible . . . as blurred dots or blobs" combined with "other available information" including police data systems "enable police to glean insights from the whole of individuals' movements"*)*.

Courts have long recognized that because the governmental interest in the maritime industry—a governmental interest that the MSA makes clear is even higher when regulating fisheries—is significant, individuals operating those vessels have a significantly reduced expectation of privacy in the location of those vessels. Plaintiffs have failed to establish any *constitutionally* protected right that they are being forced to give up in exchange for the benefit of a permit that allows them the exclusive right to take paying passengers to fish for federally-managed species. Because society has not recognized that Plaintiffs' expectation to privacy to such information is reasonable, the VMS does not run afoul of the Constitution under this test either.

CONCLUSION

The Final Rule is lawful under the Constitution and the relevant statutes. The Court should grant summary judgment in favor of Federal Defendants and deny Plaintiffs' cross-motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

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