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

MEXICAN GULF FISHING COMPANY, *et al.*,	:	
Plaintiffs,	:	
v.	:	
U.S. DEPARTMENT OF COMMERCE, *et al.*,	:	Civil Action No. 2:20-cv-2312
	:	Judge Suzie Morgan
	:	Magistrate Judge Janis Van Meerveld
Defendants.	:	

PLAINTIFFS' REPLY

Plaintiffs, Captain Billy Wells and Mexican Gulf Shipping Company ("Mexican Gulf"), Captain Allen Walburn and A&B Charters, Inc. ("A&B"), Captain Kraig Dafcik, Captain Joseph Dobin and Captain Joey D. Charters ("Joey D. Charters"), Captain Frank Ventimiglia and Ventimiglia Charters, and Captain Jim Rinckey and Fishing Charters of Naples ("Fishing Charters"), on their own behalf and on behalf of the class they represent reply to the Defendants' Opposition to their motion for a stay of the GPS-tracking requirement for federally permitted charter boats in the Gulf of Mexico. *Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries*, 86 Fed. Reg. 60,374 (November 2, 2021) (the "VMS Requirement").

This Court's Order allowed Plaintiffs a reply brief, and they submit this short Reply to the Defendants' brief, which confused the inherent power of this Court to stay a matter within its jurisdiction, inexplicably relying on cases from outside this Circuit and *Thunder Bay Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), for the proposition that, in passing the Magnuson-Stevens Act ("MSA"), Congress intended to deny jurisdiction even in constitutional cases. Defendants made these arguments without acknowledging that the *en banc* Fifth Circuit recently distinguished *Thunder Basin* to allow a district court to adjudicate constitutional claims regardless of assertions akin to those made by Defendants here. *See Cochran v. U.S. Sec. & Exch. Comm'n*, 20 F.4th 194 (5th Cir. 2021) (*en banc*). As the *Cochran* court recognized, and the Defendants ignore, "Congress gave federal district courts jurisdiction over 'all civil actions arising under the Constitution.'" *Id.* (citing 28 U.S.C. § 1331); *see also* First Amended Complaint ("FAC") ECF No. 54, ¶¶ 3, 4 (pleading this Court's jurisdiction under 28 U.S.C. § 1331); *see also id.* at ¶¶ 76-84 (pleading constitutional violation under Count I).[1]

Defendants' arguments are not well taken. Plaintiffs are not seeking a stay of the VMS requirement under the APA, or even the MSA. Rather, they are asking this Court to use its inherent power, which Congress has never taken away, to preserve the status quo while it rules on the merits. Tellingly absent from Defendants' response are any citations to any legal authority where a court refused to stay a case claiming constitutional violations while the court ruled on the matter. Not one case even hints that the inherent Article III powers, argued in Plaintiffs' moving brief, were

[1] Defendants make the curious argument that Plaintiffs "do not appear to allege any cause of action directly under the Constitution[,]" *see* ECF No. 92 at 6 n.2, but that is simply not true as evidenced by the FAC. ECF 54, Count I ("Warrantless GPS Surveillance is Unconstitutional") Their reliance on *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), is misplaced. *Carlson* is not an APA review case, it is a *Bivens* case dealing with the right to recover damages against federal agents and is totally inapplicable here. *Carlson* makes no mention of the APA. It does not establish anything relevant to this case, let alone preclude Plaintiffs from a constitutional right of action parallel to an APA claim, as Defendants claim it does.

withdrawn by statute.[2] Even the statute the Defendants cite, 16 U.S.C. § 1855(f)(1), simply states that preliminary remedies under "section 705 of [the APA] [are] not applicable." "If the statutory language is plain, [courts] must enforce it according to its terms," *King v. Burwell*, 576 U.S. 473, 486 (2015). Those plain terms are limited to a specific APA section and do not include the Court's inherent powers or its authority under the All Writs Act. "Vague notions of statutory purpose provide no warrant for expanding [16 U.S.C. § 1855(f)'s] prohibition beyond the field to which it is unambiguously limited." *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012).

Finding that the Court can enter a stay because Plaintiffs allege likely constitutional injuries would not render 16 U.S.C. § 1855(f) a nullity, as Defendants argue. *See* ECF 92 at 8. That provision would still bar preliminary injunctions authorized under Section 705 for claims that arise specifically under the APA, such as arbitrary and capricious, excess of statutory jurisdiction, etc. But it would not affect Plaintiffs' constitutional claims that could proceed separately from the APA. *See Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (finding CIA's discharge of homosexual employee was not subject to APA review but "a constitutional claim for individual discharge may be reviewed by the District Court."). Thus, for instance, 16 U.S.C. § 1855(f) would prevent a stay in an APA challenge against Defendants' catch limit for being arbitrarily high or low. However, if Defendants were to limit catches only to members of certain races, 16 U.S.C. § 1855(f) would not bar a stay to prevent the obvious equal-protection violation. So too, it does not bar a stay to prevent the obvious Fourth Amendment violation presented by 24-hour GPS-tracking of personal vehicles. Every case Defendants cite either deals with the statute of limitations—which, of course, *can* even cut off constitutional claims—or attempts to halt regulations without any constitutional claims. *See, e.g., Goethel v. U.S. Dept. of Com.*, 854 F.3d 106 (1st Cir. 2017) (statute of limitations); *Turtle Island Restoration Network v. U.S. Dep't of*

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[2] This would, of course, raise constitutional separation-of-powers concerns, but as Congress did not attempt such a thing, it need not delay us here.

Com., 438 F.3d 937 (9th Cir. 2006) (no constitutional claims and statute of limitations) ("We conclude that Turtle Island's claims are a challenge to the regulations reopening the swordfish fishery. Accordingly, the thirty-day time limitation of § 1855(f) applies and we affirm the district court's dismissal of Turtle Island's complaint.").

The near absence of Fifth Circuit precedent is also telling. The elementary proposition that "[s]tatutes should be so construed as to give effect to all their parts" is not at play here because if this were a catch-limit or the like there would be no constitutional implications. *See* ECF No. 92 at 7 (citing *S. D'Antoni, Inc. v. Great Atl., & Pac. Tea Co., Inc.*, 469 F.2d 1378 (5th Cir. 1974). But here, the Defendants have sought fit to track vessel movements even when they are engaged in non-regulated purely private activities. As Plaintiffs have explained in their Complaint and briefing, the VMS Requirement violates Plaintiffs' fundamental constitutional rights and constitutes *ultra vires* action outside the scope of the MSA. To now claim that the MSA bars Plaintiffs from asking this Court to protect those same rights, which Defendants infringed through their *ultra vires* actions, while the Court prepares its determination on the merits, is a further erosion of the Plaintiffs' constitutional rights, including the ability to seek redress in this Court.

Plaintiffs have challenged many aspects of the Final Rule, including, for instance, reporting the amount they charge, or the cost of fuel used, and declaring to Defendants when they leave the dock even when not fishing. But Plaintiffs have not asked for a stay of those measures while the Court rules. Those rules have gone into effect already, and the status quo would not be preserved, even though they cause harm *now*.

This case differs from every case cited by Defendants because it both asserts strong and serious constitutional claims, and the Court has jurisdiction over every person and organization affected by the rule. The Class has been granted. The Government minimizes the harm by stating it is just requiring purchasing the devices, but it is only reimbursing units that transmit constitutionally

challenged information to the Government. Stated another way, Defendants propose that Plaintiffs could mitigate their financial harm by permitting their constitutional privacy harms to occur. All the actors are before this Court, the perpetrators and the victims, but the Government has said nothing about this Court's inherent authority. This Court is not an agency. Once created, it has inherent Article III power—to control actions by the litigants before it to preserve the effectiveness of its orders—that Congress has not taken away.

A simple thought experiment illustrates the error of Defendants' position. Let's say that Defendants issued a regulation requiring only Vietnamese-, African American-, or women-owned charter boats to place VMS devices on their vessels. Defendants' interpretation of Section 1855(f)(1) would prevent any court from staying or enjoining such a rule while it considered the cross-motions for summary judgment. Such an argument would be laughed out of court, but that is what is happening here on Plaintiffs' 4th, 5th and 9th Amendment claims, no less vital to the Constitution. The Defendants may not usually issue regulations that infringe constitutional right. Here they have. They cannot minimize the inherent powers of this Court, as stated by the precedent in the moving brief, by claiming Section 1855(f)(1) eliminated them when that provision addressed only the APA.

Congress knows how to strip jurisdiction and power. If it wanted to prohibit preliminary injunctions writ large, it would have said so clearly and unambiguously. *See generally Cochran*, 20 F.4th 194; *see also Webster*, 486 U.S. at 603 (where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear…"). But what Congress did instead was prohibit preliminary injunctions specifically *under Section 705 of the APA*. Plaintiffs' Amended Complaint and Summary Judgment Motion clearly allege constitutional claims that were brought independently of the APA claims. Plaintiffs' stay motion seeks relief to prevent violation of those constitutional rights and maintain the status quo while the matter is *sub judice*. Plaintiffs did not move to stay any of the other matters complained of in their Amended Complaint and summary judgment motion, such as

electronic reporting of fees and fuel use. The MSA says nothing about administrative stays in that context. Tellingly, Defendants do not cite a single case holding that Section 1855(f) bars courts from staying a regulation that is likely to inflict pure constitutional injuries like those alleged here.

Finally, this Court knows the standards for issuing stays of regulations which in this Circuit are "regularly enjoined" "to preserve the status quo" pending litigation. *Associated Builders & Contractors of Se. Texas v. Rung*, 2016 WL 8188655 * 5 (E.D. Tex. Oct. 24, 2016). Here, we have constitutional violations which are automatically deemed irreparable harm. We have the preservation of the status quo. All the parties affected are before the Court because it's a class of all the permit holders to which the regulation applies. There are no outside harms. And, on the other side of the balance is a patently absurd argument. The VMS Requirement is, the Government asserts by declaration, needed to confirm information it already gets from electronic logbooks which the class is already complying with. From the Summary Judgment Motion, the Court can also see that all the charter boat captains report the fish catch and have to tell the Defendants when they are leaving and when they come back for regulated trips. Defendants can currently check on them at any time, in any port in the Gulf. As Defendants' summary judgment brief admits, the purpose of 24-hour GPS-tracking is not to gather new information but rather "to independently validate that a trip was taken" as indicated in electronic reports Plaintiffs are already submitting. ECF 79-1 at 40. "The alternative to validat[ing] such a trip" using GPS data, according to Defendants, is to "require plaintiffs to submit 'no fishing' reports and to increase staffing" to validate reports using traditional methods that have been in place for years. *Id.* at 46. Defendants' desire to obtain redundant information in a different manner than it does now while the court considers this case hardly outweighs Plaintiffs' concrete constitutional interests.

In any event, Defendants have never had this VMS data so the idea that it will be some huge imposition on the Government, or massive boon to the public interest, to wait until this Court rules is inherently absurd. *Cf. Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends."). The Strelcheck Declaration states that "[d]elaying the effective date of the VMS requirement will delay the process for certifying the program and developing the transition plan." ECF 92-1 at 3, ¶ 6. All the VMS Requirement would do is allow the Government—which can pull anybody's permit for violating its rules and therefore destroy livelihoods—to double check the information it is already getting from electronic apps the entire Class is sending them. A bureaucratic redundancy of a constitutionally intrusive rule being delayed is not a harm. In fact, it is a public benefit.

Dated: February 9, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this Ninth day of February 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all attorneys of record.

/s/ John J. Vecchione
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