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## **NCLA Asks First Circuit to Set Aside NOAA’s Unlawful Rule Forcing Industry to Fund at-Sea Monitors**

*Relentless Inc., et al. v. U.S. Dept. of Commerce, et al.*

**Washington, DC (February 1, 2022)** - Atlantic herring fishermen are having to spend huge sums of money to fund agency-mandated at-sea monitors to police the harvest aboard their ships. The New Civil Liberties Alliance has filed an [opening brief](#) in the appeal of *Relentless Inc., et al. v. U.S. Dept. of Commerce, et al.*, in the U.S. Court of Appeals for the First Circuit. NCLA represents a private fishing company against the regulating agencies.

NCLA, a nonpartisan, nonprofit civil rights group, is suing the Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA), and the National Marine Fisheries Service (NMFS) for threatening the livelihoods of fishermen with a mandate that is both unconstitutional and lacking statutory authority. The lawsuit argues the lower court erred in [holding](#) that the Magnuson-Stevens Act allows these agencies to create an [at-Sea Monitoring Program](#) and force regulated fishermen to pay for it.

NOAA, NMFS, and the New England Fishery Management Council (NEFMC), dissatisfied with the amount of monitoring they could perform with the funds from Congressional appropriations, formulated and implemented the [Industry-Funded Monitoring Omnibus Amendment](#) to “increase monitoring” and “assess the amount and type of catch and more precisely monitor annual catch limits.” This Final Rule ignores Congressional limits on burdening fishers in the New England fisheries. NCLA argues that the federal agencies cannot fund their operations through this mandate, outside of Congressional appropriations. Appellees assert they can require a regulated party to pay for at-sea monitoring of fish stocks when: 1) Congress has explicitly authorized it by statute; or 2) Congress has not authorized it by statute but has allowed the placement of monitors on private vessels.

Appellants Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC are small businesses incorporated in Rhode Island and Massachusetts engaged in commercial fishing of Atlantic herring as well as Loligo and Illex squids, Butterfish, and Atlantic Mackerel. They use a unique at-sea freezing technique that allows the vessels to stay at sea longer than other vessels in the Atlantic herring fishery and provides each vessel flexibility in what catch it harvests during fishing trips. Fishing trips typically last 7-14 days at sea, compared to 2-3 days for other vessels in the herring fleet. It can cost anywhere from \$750 to \$850 a day to have monitors on board. That’s more than they make in profit from the fishing catch a day.

It is arbitrary and capricious to allow some fishers to harvest more herring without monitors, while requiring the *Relentless* and *Persistence* vessels to be monitored when they harvest fewer herring. This is particularly true when the cost of monitoring is higher than for any statutory program Congress has authorized in the fisheries.

### **NCLA released the following statements:**

“The lower court relied on *Chevron* deference to uphold the agencies’ actions here. But such deference, even if it should unfortunately continue to exist, ought not be used to aggrandize agency power to circumvent the very protections Congress has created against those same agencies in statute.”

— **John Vecchione, Senior Litigation Counsel, NCLA**

“This case concerns a conflict between what Congress permitted and what agencies wish Congress had permitted. NOAA and NMFS wish Congress had granted them more authority and budget to obtain the data they want to collect and to develop at-sea monitoring programs in the Atlantic herring fishery. But instead of asking Congress for that power, they took it for themselves and dared industry to object. This unlawful power grab harms our clients financially, but it also offends the Constitution when agencies claim and wield power they do not have.”  
— **Kara Rollins, Litigation Counsel, NCLA**

For more on this topic visit the [case page](#), watch the [case video](#), or watch January’s [Lunch & Law](#).

## **ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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