No. 22-30105

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEXICAN GULF FISHING COMPANY, CAPTAIN BILLY WELLS, A&B CHARTERS INC., CAPTAIN ALLEN WALBURN, CAPTAIN KRAIG DAFCIK, VENTIMIGLIA LLC, CAPTAIN FRANK VENTIMIGLIA, FISHING CHARTERS OF NAPLES, CAPTAIN JIM RICKEY,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF COMMERCE; GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NOAA, A SCIENTIFIC AGENCY WITHIN THE DEPARTMENT OF COMMERCE; RICHARD W. SPINRAD, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; NATIONAL MARINE FISHERIES SERVICE, A LINE OFFICE WITHIN THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, ALSO KNOWN AS NOAA FISHERIES; NICOLE R. LEBOUEF, IN HER OFFICIAL CAPACITY AS ASSISTANT ADMINISTRATOR FOR NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

Civil Action No. 2:20-cv-2312
Honorable Suzie Morgan, presiding

OPPOSED MOTION UNDER FEDERAL RULE OF APPELLATE PROCEDURE 8 FOR AN INJUNCTION PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Mexican Gulf Fishing Company v. U.S. Dep't of Commerce

No. 22-30105

The undersigned counsel of record certifies that the following listed person and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that judges of this Court may evaluate possible disqualification or recusal.

1. Mexican Gulf Fishing Company is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
2. Captain Billy Wells is a Plaintiff-Appellee.
3. A&B Charters, Inc. is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
4. Captain Allen Walburn is a Plaintiff-Appellee.
5. Captain Kraig Dafcik is a Plaintiff-Appellee.
6. Captain Joey D. Charters is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
7. Captain Joseph Dobin is a Plaintiff-Appellee.
8. Ventimiglia Charters LLC is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
9. Captain Frank Ventimiglia is a Plaintiff-Appellee.

10. Fishing Charters of Naples is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
11. Captain Jim Rinckey is a Plaintiff-Appellee.
12. Gina Raimondo, in her official capacity as Secretary of Commerce
13. Richard W. Spinrad in his official capacity as Administrator of NOAA.
14. Nicole R. LeBouef in her official capacity as Assistant Administrator for NOAA.
15. United States Department of Commerce
16. National Oceanic and Atmospheric Administration
17. National Marine Fisheries Service
18. New Civil Liberties Alliance: John J. Vecchione, Sheng Li, Kara Rollins are counsel for Plaintiffs-Appellants.
19. Gordon, Arata, Montgomery & Barnett: A. Gregory Grimsal is counsel for Plaintiffs-Appellants.
20. U.S. Department of Justice: Daniel J. Halainen, Nicole Smith, Elizabeth A. Chickering, and Shampa Panda are counsel for Defendants-Appellees.

Dated: March 25, 2022

/s/ John J. Vecchione
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INTRODUCTION AND SUMMARY

Appellants will continue to be monitored, their whereabouts relayed at all times to the Government without Constitutional warrant, unless an injunction is granted pending this appeal. The appeal challenges a final rule issued pursuant to the Magnuson-Stevens Act ("MSA") that requires 24-hour GPS tracking of certain permitted recreational fishing vessels in the Gulf of Mexico. Plaintiffs-Appellants seek expedited relief now solely to stop the ongoing, unlawful searches being conducted hourly because of the regulation challenged. *See* Fed. R. App. P. 8(a). The regulation's GPS-tracking requirement violates the Fourth Amendment and inflicts ongoing irreparable harm against Plaintiffs-Appellants during the pendency of this litigation.

STATEMENT

On July 21, 2020, Defendants-Appellees promulgated a final rule which implemented the Gulf For-hire Fishing Amendment ("Final Rule"). *See Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries*, 85 Fed. Reg. 44,005 (July 21, 2020). The Final Rule requires Gulf For-hire vessels (charter boats and head boats) to purchase, install, and operate Vessel Monitoring Systems ("VMS") that store and relay GPS information hourly regardless of whether the vessel is being used for regulated fishing or for purely private un-regulated activities. *Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries*, 83 Fed. Reg. 54,069, 54,076-78 (Oct. 16, 2018).

On August 20, 2020, Plaintiffs-Appellants filed a class action suit challenging the Final Rule as unconstitutional and unlawful. ECF No. 1. The class was certified on June 2, 2021. ECF No. 48. An amended complaint was filed on June 9, 2021. ECF No. 54. On August 11, 2021, Plaintiffs-Appellants moved for summary judgment and the Defendants-Appellees cross-moved for summary judgment on September 24, 2021. ECF Nos. 73, 79. While the summary judgment motions were pending, the Government announced that the GPS-tracking requirement would go into effect on December 13, 2021. *See* 86 Fed. Reg. 51,014, 51,015 (Sept. 14, 2021). Subsequently, Plaintiffs-Appellants petitioned Defendants-Appellees to delay the effective date of the GPS-tracking requirement under 5 U.S.C. § 553(e). *See* 86 Fed. Reg. 60,374 (Nov. 2, 2021). The GPS-tracking requirement was delayed until March 1, 2022. *Id.*

On February 28, 2022, the district court denied Plaintiffs-Appellants' motion for summary judgment, denied their request for stay of the regulation, and granted Defendants-Appellees' cross-motion for summary judgment. ECF No. 91 ("Order"). Plaintiffs-Appellants immediately appealed. ECF No. 95. The next business day, March 2, 2022, the district court issued an Order ending the case and Plaintiff-Appellants amended their appeal to reflect it. ECF Nos. 96 and 97. This motion is made under Rule 8 of the F.R.A.P.

The futility and impracticability of yet another motion to enjoin the Final Rule in the district court is apparent from the record. Plaintiff-Appellants moved for expedited consideration of their motion for summary judgment so it would be

completed before the rule went into effect ECF No. 83. This was denied. ECF No. 85 n. 3. After its motion for expedited review of the issue under the Magnuson-Stevens Act was denied by the court below, Plaintiffs-Appellants moved for a stay of the regulation while the district court considered the matter. ECF No. 90-1. The district court waited until issuing its merits decision to deny the motion for stay as moot. Plaintiffs-Appellants, to comply with the rule, the next day had to purchase equipment or stop using their vessels. Given the motions for expedited review under Magnuson-Stevens was denied, the motion to stay, and the long period of time the district court would have to take to decide another stay it has already denied on the merits, any motion in the district court would be futile, and this motion is made so that the hourly constitutional Fourth Amendment violations do not continue until the conclusion of this appeal.

ARGUMENT

Courts consider four factors when considering whether the movant met its burden for issuance of a stay or injunction pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The "most critical" factors are "whether an applicant "has made a strong showing that [they are] likely to succeed on the merits" and that they "will be irreparably

injured absent a stay[.]" *E.T. v. Paxton*, 19 F.4th 760, 764 (5th Cir. 2021) (quoting *id.*). When, as here, "the Government is the opposing party" the remaining factors "merge." *Nken*, 556 U.S. at 435.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR FOURTH AMENDMENT CLAIMS

A. The GPS-Tracking Requirement Is a Search Under Both the Property-Based and Privacy-Based Approaches to the Fourth Amendment

Plaintiffs are likely to succeed on the merits of whether the Final Rule's GPS-tracking requirement violates the Fourth Amendment.[1] The permanent installation of GPS devices on charter boats to track them constitutes a property-based warrantless search under *United States v. Jones*, 565 U.S. 400 (2012). Under *Jones*'s property-based approach, "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). The property owner's expectation of privacy is not relevant. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). It does not matter that the trespass is *de minimis* or if the information obtained lies in plain view—chalking a vehicle's tire to verify the duration it was parked in a public space is a property-based search. *Taylor I*, 922 F.3d at 332. The GPS-tracking requirement results

[1] Plaintiffs-Appellants base their arguments for likelihood of success on the merits solely on their Fourth Amendment claims as those harms are ongoing, irreparable and warrant extraordinary relief while this Court considers the entire Appeal in full.

in far greater invasion of private property than that. It also obtains far more detailed information—24-hour location data.

Twenty-four-hour GPS tracking for years without end violates Plaintiffs' reasonable expectations of privacy and also constitutes a warrantless and unconstitutional search under the privacy-based approach to the Fourth Amendment articulated in *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan J., concurring). In *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018), the Supreme Court recognized "the line between short-term tracking of public movements … and prolonged tracking that can reveal intimate details through habits and patterns. The latter form of surveillance invades the reasonable expectation of privacy that individuals have in the whole of their movements and therefore requires a warrant." *Leaders of a Beautiful Struggle, et al. v. Baltimore Police Dept., et al.*, 2 F.4th 330, 341 (4th Cir. 2021) (*en banc*) (citing *id.*). The Fourth Circuit recently concluded Baltimore's aerial surveillance program violated the reasonable expectation of privacy because "the program enables … retrospective location tracking in multi-hour blocks, often over consecutive days, with a month and a half of daytimes for analysts to work with. That is enough to yield 'a wealth of detail,' greater than the sum of the individual trips." *Id.* at 342. Permanent GPS tracking of all trips under the Final Rule reveals an even greater "wealth of detail," and violates the reasonable expectation of privacy, particularly as there is no exception for non-fishing use of the vessels.

The district court did not dispute that GPS tracking constitutes warrantless searches under both the property- and privacy-based approaches. Order at 63. It assumed that "the tracking requirement constitutes a search," but held "the search is reasonable under the closely regulated industry exception." *Id.* The closely-regulated-industry doctrine does not excuse the warrantless property-based search as a categorical mater. Nor does it excuse the privacy-based searches of the charter fishing industry here.

B. The Closely-Regulated-Industry Exception Is a Privacy-Based Doctrine that Does Not Apply to Property-Based Searches

The district court correctly articulated the closely-regulated-industry exception as a privacy-based doctrine that recognizes "some industries have such a history of government oversight that no *reasonable expectation of privacy* exists" and therefore "a warrantless search is permissible if certain criteria are met." Order at 63-64 (quoting *Zedeh v. Robinson*, 928 F.3d 457, 464 (5th Cir. 2019)) (cleaned up). The court erred because any Fourth Amendment doctrine based on Plaintiffs "hav[ing] a significantly reduced expectation of privacy in the location of their vessels … is irrelevant because *Jones*'s property-based definition of Fourth Amendment search does not depend on a person's reasonable expectation of privacy." ECF No. 86-1 at 15.

The Supreme Court held in *Jones* that ("the *Katz* reasonable-expectation-of privacy test has been added to, not substituted for, the common-law trespassory test."). 565 U.S. at 409. The Court confirmed that expectations of privacy are irrelevant in the

context of a property-based violation in *Jardines*, 569 U.S. at 11. There, the Court explained 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 too is an easy case. Appellees are tracking Appellants by requiring them to install an unwanted GPS device on their private vessels. There is no need to consider expectations of privacy to find a Fourth Amendment violation. *Jardines*, 569 U.S. at 11. The closely-regulated-industry doctrine is based entirely on diminished expectations of privacy of actors in certain industries, *Zedeh*, 928 F.3d at 464, and cannot negate the warrant requirement in a property-based search. The district court's misapplication of that exception establishes Plaintiffs' substantial likelihood of success on the merits, obviating a privacy-based analysis at all.

C. The 'Closely Regulated Industry' Exception Does Not Apply to Privacy-Based Searches in this Case

The closely-regulated-industry exception does not excuse the Final Rule's warrantless privacy-based searches. *First*, recreational charter fishing does not "pose[] a clear and significant risk to the public welfare," which the Supreme Court held in *City of Los Angeles v. Patel*, 576 U.S. 409, 427 (2015), was required for the exception. *Second*, the Final Rule fails the criteria for warrantless search of a closely regulated industry as

articulated in *New York v. Burger*, 482 U.S. 691, 702-03 (1987). Finally, in neither case is there any warrant for requiring the device to transmit during non-charter fishing trips.

1. Recreational Charter Fishing Is Not 'Closely Regulated'

The Supreme Court upheld the warrantless search of a liquor dealer in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74 (1970), on the ground that the dealer belonged to a closely regulated industry with diminished expectation of privacy. It has extended this doctrine to only three other industries: firearms sales, *United States v. Biswell*, 406 U.S. 311 (1972); mining, *Donovan v. Dewey*, 452 U.S. 594 (1981); and automobile junkyards, *Burger*, 482 U.S. 691.

Three dissenting justices warned in *Burger* that a lax test for closely regulated industry means "few businesses will escape such a finding" and the "warrant requirement [would become] the exception not the rule." *Id.* at 721 (Brennan, J., dissenting). That warning proved prescient as lower courts promiscuously expanded the exception to circumvent warrants in an endless list of industries, ranging from childcare, *Rush v. Obledo*, 756 F.2d 713, 720–21 (9th Cir. 2009), to pet sales. *Lesser v. Espy*, 34 F.3d 1301, 1307 (7th Cir. 1994).

The Supreme Court corrected course in *Patel*, which held the exception does not apply to hotels. 576 U.S. 424. *Patel* reminded lower courts that the closely-regulated-industry doctrine "has always been a narrow exception" that must not "swallow the rule" of the warrant requirement. *Id.* To this end, *Patel* announced that hotels do not fall within the exception because "nothing inherent in the operation of hotels poses a

clear and significant risk to the public welfare." *Id.* at 424. An attenuated connection to public welfare is not enough, and the industry instead must be "intrinsically dangerous." *Id.* at 424 n. 5. The regulation must address an intrinsic public danger.

The district court brushed past *Patel*'s intrinsic public danger criterion and relied solely on the history of *commercial* fishing regulations to apply that doctrine to *recreational* charter fishing. *See* Order at 65-69. This analysis conflated commercial fishing, which accounts for upwards of 95% of fish caught, with recreational fishing that poses little conservation risk.[2] The MSA recognized that "recreational fishing and commercial fishing are different activities" and mandates different regulatory "approaches should be adapted to the characteristics of each sector." 16 U.S.C. § 1801(a). The district court determined when applying the closely-regulated-industry doctrine, "the proper classification of the industry is fishing industry as a whole, not merely the charter fishing industry." Order at 72 n. 416. But the authorities cited say the opposite. The closely-regulated-industry analysis in *U.S. v. Raub*, 637 F.2d 1205, 1209 (9th Cir. 1980), cited at Order at 72 n. 416, is based on "[c]ommercial fishing hav[ing] a long history of being closely regulated," stretching back to 1793, which cannot be said of recreational fishing.

[2] Plaintiff-Appellants relied on statistics available on Defendant-Appellee' website to estimate that "charter-boat fishing comprises approximately only 0.2% of total Gulf fishing." ECF No. 73-1 at 10-11.

Raub thus concluded "that there is no reasonable expectation of privacy regarding identification stops of *commercial* fishermen[.]" *Id.* at 1210 (emphasis added).

The district court's assertion that "it is not required [to] address[] the public welfare factor" from *Patel*, *see* Order at 71, directly contradicts this Court's instruction for "courts [to] consider … whether the industry would pose a threat to the public welfare if left unregulated." *Zadeh*, 928 F.3d at 465. The fact that *Zadeh* "did not [specifically] address the danger to the public welfare," Order at 70, is of no moment because *Zadeh* ruled that "the medical industry … is not a closely regulated industry" for an independent reason and so did not need to analyze dangerousness. 928 F.3d at 466. Intrinsic danger is a necessary but not sufficient condition—while a court may *reject* the closely-regulated-industry exception without addressing dangerousness, it cannot *apply* the exception without doing so.

The district court's contention that "other courts post-*Patel* have not required there to be a risk to the public welfare when extending closely regulated status" is error and not supported by the cases it cites. Order at 70. The Sixth Circuit rejected the closely-regulated-industry exception based solely on its conclusion that the industry "does not pose a clear and significant risk to the public welfare." *Taylor v. City of Saginaw*, 11 F.4th 483, 488 (6th Cir. 2021) ("*Taylor II*") (cleaned up). And other cases cited by the district court reinforce the need to demonstrate public danger. The first case involved inspections of massage parlors "to better control illicit operations and protect and promote the *public health, safety and welfare*," which the Ninth Circuit held were needed to

"curtail[] prostitution and human trafficking." *Kilgore v. City of South El Monte*, 3 F.4th 1186, 1188, 1192 (9th Cir. 2021) (emphasis added), cited at Order at 70. The next case, *United States v. Hamad*, 809 F.3d 898, 907 (7th Cir. 2016), cited at Order at 70, concerned the cigarette sales, which likewise poses obvious public dangers. *Free Speech Coalition v. Attorney General*, 825 F.3d 149 (3d Cir. 2016), cited at Order at 71, is wholly inapposite because, like *Zadeh*, it relied on independent reasons to conclude the "exception to the warrant requirement for closely regulated industries is inapplicable" and thus had no need to address dangerousness

The only post-*Patel* authority cited by the district court that categorized an industry as closely regulated without addressing public danger is unpublished and unpersuasive dicta from an out-of-circuit district court. *Goethel v. Pritzker*, 2016 WL 4076831, at *9 (D.N.H. July 29, 2016), cited at Order at 71. The claims in *Goethel* were dismissed on statute-of-limitations grounds, *id.* at *4, and thus the closely-regulated-industry discussion is dicta; besides, *Goethel* was a commercial fisherman. What's more, *Goethel*'s treatment of *Patel* is error. The *Goethel* court relied on criteria listed in *Rivera-Corraliza v. Morales*, 794 F.3d 208, 217 (1st Cir. 2015), which did not address dangerousness, to analyze whether an industry is closely regulated under *Patel*, because it mistakenly believed *Morales*'s "criteria post-dates *Patel*." 2016 WL 4076831, at *9 n. 14. But *Morales* was a qualified-immunity case that deliberately applied pre-*Patel* law because "the key question for qualified-immunity purposes is whether the law was clearly established when the complained-of actions occurred" and "*Patel* was not around

when the events here went down." 794 F.3d at 223 n. 12. *Goethel* thus failed to address *Patel*'s public danger criterion because it mistakenly relied on *Morales*'s recitation of pre-*Patel* law, and this Court should not import that mistake into the Fifth Circuit.

The district court's contention in the alternative that "there is a risk to public welfare" in charter fishing is mistaken. *See* Order at 71. According to the court, "the fishing industry, if left unregulated, would overfish and deplete the United States's fishery resources, which would endanger the public welfare by harming the nation's food supply[.]" *Id.* at 72. But virtually all regulated industries because of externalities would endanger the public welfare in some way. Such reasoning improperly dilutes *Patel*'s dangerousness criterion to mean "regulated for public welfare," because if "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. An attenuated connection to public danger is not enough. The Supreme Court emphasized that, while "[h]otels—like practically all commercial premises or services—can be put to use for nefarious ends," they still do not qualify because the industry must be "intrinsically dangerous." *Id.* at 424 n.5. Recreational charter fishing is not intrinsically dangerous, and so, is not a closely regulated industry.

2. The GPS-Tracking Requirement Flunks the *Burger* Test for Warrantless Search of a Closely Regulated Industry

Even if charter fishing were intrinsically dangerous, the closely-regulated-industry exception to warrantless searches still would not apply because the GPS-

tracking requirement flunks the three *Burger* requirements for that exception, 482 U.S. at 702–03. Specifically, (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 government must "provid[e] a constitutionally adequate substitute for a warrant." *Id.*

Because only "intrinsically dangerous" industries may qualify as closely regulated, the substantial government interest vitiating warrants under *Burger* must relate to that danger. *Cf., e.g., Kilgore*, 3 F. 4th at 1192 ("curtailing prostitution and human trafficking is a substantial government interest"); *Calzone v. Olson*, 931 F.3d 722, 724 (8th Cir. 2019) ("Missouri has a substantial interest in ensuring the safety of the motorists on its highways"); *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transportation*, 840 F.3d 879, 894 (7th Cir. 2016) ("The public safety concerns inherent in commercial trucking give the government a substantial interest."). The GPS-tracking requirement here is unrelated to the safe operation of charter vessels.

Next, warrantless 24-hour GPS surveillance of charter boats is far from "necessary." Plaintiffs routinely use their vessels for personal trips unrelated to fishing.[3]

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[3] While "the Government disputes the fact that charter vessels are frequently used for personal reasons," Order at 73, it presented no evidence to rebut Plaintiffs' multiple affidavits that they use charter vessels for personal trips. *See* ECF Nos. 25-2, ¶ 4; 25-3, ¶ 4; 25-4, ¶ 4; 25-5, ¶ 5; 25-6, ¶ 5; 25-7, ¶ 5.

Despite recognizing this fact is relevant to the "necessity of the tracking requirement," Order at 73 n. 418, the district court failed to address why Defendants need to track Plaintiffs' *personal* trips. This alone impels likely success on the merits because tracking personal trips is neither necessary nor related to conservation.

GPS tracking of charter fishing trips is also unnecessary because Appellees' own statistics indicate charter fishing accounts for merely 0.2 percent of Gulf of Mexico fishing, *supra* at n. 2 and warrantless GPS-tracking of such a miniscule segment is not "necessary" to achieve the MSA's conservation purpose. The district court noted that "Congress found regulation of the entire fishing industry is required to combat overfishing." Order at 76 n.437 (citing 16 U.S.C. § 1801(a)). But it does not follow that it is necessary to subject charter vessels to the *same* warrantless inspection regulations as commercial vessels. To the contrary, the statute cited by the district court says the exact opposite: "recreational fishing and commercial fishing are different activities. Therefore, science-based conservation and management approaches should be adapted to the characteristics of each sector." 16 U.S.C. § 1801(a)).

Necessity is further undermined by the fact that, when Plaintiffs take fishing trips, they already report their general fishing locations and the types and numbers of fish caught through same-day electronic reporting. The Final Rule says GPS tracking is needed so "NMFS can validate a trip was taken and the location of trips," 85 Fed Reg. at 44,010, *i.e.*, to "validate records," ECF No. 79-1 at 16. But warrantless searches are unnecessary where "there is no basis to believe … spot checks" are "unworkable." *Patel*,

576 U.S. at 427. Defendants concede they could validate reports through spot checks and present no reason why spot checking is unworkable, except by claiming additional staff is needed. ECF No. 79-1 at 40, 46.

The district court relied on *Balelo v. Baldrige*, 724 F.2d 753, 766 (9th Cir. 1984), to conclude Defendants' alleged need for additional staff and funds to pay them makes spot checks unworkable. Order at 75-76. But *Balelo* is inapposite. For one, the unworkable alternatives in that case were "aerial surveillance and the like," which presented technical challenges and fell outside the agency's expertise. *Id.* at 767. Even so, the agency still had to present evidence to "demonstrate[] that the suggested techniques … are prohibitive in terms of cost and are ineffective in terms of data collection." *Id.* at 766. Here, spot checks are simple and fall well within Defendants' expertise of inspecting fishing vessels for unauthorized catches. There is no technological challenge to solve as Defendants admit all they need is more staff. If staffing and funding needs justify warrantless searches, *Burger*'s necessity requirement becomes a nullity. A desire to avoid work and cut costs does not license agencies to ignore the Constitution. Indeed, it would not have been costless to spot-check hotels for records violations in *Patel*, 576 U.S. at 427.

Additionally, *Balelo*'s holding was based on the need to directly collect conservation-related data. Here, the agency already receives data from trip reports electronically every day, and merely wants to validate that data. The question therefore is not whether charter boats' GPS data are necessary for conservation, but rather

whether the *validation* of preexisting location reports is necessary. The Final Rule merely makes the conclusory claim such validation would "aid with enforcement of the reporting requirements." 85 Fed. Reg. 44,013. The Supreme Court "has previously rejected this exact argument, which could be made regarding any recordkeeping requirement." *Patel*, 576 U.S. at 427. *Burger*'s necessity prong requires a more compelling need. In *Owner-Operator*, 840 F.3d at 895, for instance, the need to install electronic devices in vehicles to validate records was supported by extensive records demonstrating "falsification and errors in the traditional paper records are a widespread problem." In contrast, nothing in the record suggests charter-boat operators submit false or incomplete reports.[4]

Nor can a need for warrantless GPS tracking be found in charter boats' mobility. *See* Order at 74. Even on the high seas, searches of vessels must be supported by suspicion of wrongdoing. *See United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir.

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[4] Though Defendant-Appellees did not dispute that charter boat operators submit accurate reports, the district court refused to accept this fact, because "Plaintiffs cite no evidence for their argument that charter vessels have no known propensity for breaking the law." Order at 72 n. 416. It is unclear how Plaintiff-Appellants could prove they are not lawbreakers. *Cf. Smith v. United States*, 568 U.S. 106, 113 (2013) ("It would be nearly impossible for [a party] to prove the negative that an act … never happened."). American law presumes free men to be innocent until proven guilty but in any event, judicial review must be based on the administrative record, which is devoid of any suggestion that Plaintiffs' reports are in any manner false or incomplete.

1980) (*en banc*) (concluding that 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."). The long-term tracking of Plaintiffs' movement invades the expectation of privacy as much as searches of private areas of a vessel, and thus must be justified by at least suspicions of wrongdoing, which is wholly absent from the record. The district court's claim that "warrantless searches of fish caught [are] necessary," Order at 75, is irrelevant because GPS tracking reveals no information about types and quantities of fish caught.

The GPS-tracking requirement is also devoid of "a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702–03. This third criterion requires warrantless searches to be "carefully limited in time, place, and scope.'" *Id.* at 703 (quoting *Biswell*, 406 U.S. at 315). In *Zadeh*, 928 F.3d at 467, this Court held warrantless inspections of medical facilities failed to provide constitutionally adequate limits where "only licensees are subject to the subpoena; only medical records must be produced; and it is the [agency] or its representatives who will be asking for the records." The Final Rule is even worse as it allows Defendants to collect all GPS-location records, from all licensees, and at all times, including when they are engaging in purely personal use of their vessels and not engaged in conduct that Appellees regulate.

The district court concluded "constitutionally adequate" limits exist because the agency exercised no discretion as to when and whom to track. Order at 78-79. But the lack of discretion is simply the byproduct of the limitless and automated GPS

surveillance of all licensees: "since the data collection is automated … there actually is no exercise of discretion; the search is the same as stated in the regulation each time," which is to say 24-hour a day, 365 days a year. The automatic nature of GPS tracking means searches are not only warrantless but also suspicionless, and likely to capture even *unregulated* activities such as personal trips.

II. THE PLAINTIFFS-APPELLANTS CONTINUE TO SUFFER IRREPARABLE INJURY

Plaintiff-Appellants have suffered and continue to suffer irreparable injuries that warrant an injunction pending appeal. Under the Final Rule, Plaintiffs-Appellants must purchase and install a NMFS-approved GPS-tracking device that they must operate so long as their vessels are not in long-term power-down mode, even if the vessels are docked or operating for purely private non-regulated activities, like a sunset cruise with their families or friends. ECF Nos. 25-2, ¶ 4; 25-3, ¶ 4; 25-4, ¶ 4; 25-5, ¶ 5; 25-6, ¶ 5; 25-7, ¶ 5. Since March 1, when the Final Rule took effect and the day after the district court's ruling, Plaintiff-Appellants have been complying with the rule and have purchased, installed, and are operating compliant monitoring systems. By complying with the Final Rule, they suffer irreparable harm.

The nature of a Fourth Amendment harm is such that "[t]he wrong is accomplished by the unconstitutional search itself[.]" *Baldwin Metals Co., Inc. v. Donovan*, 642 F.2d 768, 774 (5th Cir. 1981). The Final Rule's GPS-tracking requirement constitutes irreparable injury to Plaintiffs-Appellants because it is an unlawful search that impermissibly intrudes on their constitutionally protected property and privacy

interests every hour of every day, unless this Court grants relief. *See Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019) (ongoing Fourth Amendment violation constitutes irreparable harm). The Government has no response to collection of such GPS tracking for purely private non-regulated activities. A point the court below erroneously ignored.

Additionally, non-reimbursable "[m]onthly service fees, which NMFS expects to range from approximately $40 to $75," 85 Fed. Reg. 44,013, constitute irreparable harm. Plaintiffs-Appellants' compliance costs are "likely unrecoverable" because "federal agencies enjoy sovereign immunity from any monetary damages." *Wages & White Lion Invs., LLC v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1142 (5th Cir. 2021). When, as here, a "'guarantee of eventual recovery'" is lacking, the alleged harm is irreparable. *Id.* (quoting *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021)).

III. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH IN FAVOR OF ISSUING AN INJUNCTION

The 'public interest is in having governmental agencies abide by the federal laws that govern their existence and operation.'" *Wage & White Lion Invs.*, 16 F.4th at 1143 (quoting *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (per curiam) (quotation omitted)). As such, "there is generally no public interest in the perpetuation of unlawful agency action." *Texas v. Biden*, 10 F.4th at 560 (alteration omitted) (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). The Final Rule is

unlawful agency action and violates Plaintiffs-Appellants' constitutional rights. Even if the Final Rule achieves "desirable ends[,]" the public has no interest in the perpetuation such harms. *Alabama Ass'n of Realtors*, 141 S. Ct. at 2490.

While "the status quo is an important consideration in granting a stay," *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quotation omitted), the only reason the status quo is not in Plaintiffs-Appellants' favor is that the district court's ruling did not come until the evening of February 28, 2022. The GPS-tracking requirement came into effect several hours later on March 1, 2022, when this Court closed for Mardi Gras. As such, there was no way to move for a stay or injunction in this Court to preserve the status quo which was allowed to change by the court below (which is also strong evidence of futility of a new motion in the district court)

IV. AN INJUNCTION PENDING APPEAL IS ALSO WARRANTED UNDER *RUIZ*

This Court may also issue a stay or injunction pending appeal when an applicant has "present[ed] a substantial case on the merits" involving "a serious legal question" and it shows "that the balance of equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle (Ruiz I)*, 650 F.2d 555, 565 (5th Cir. 1981) (per curiam). Whether a federal agency can issue a rule requiring GPS location monitoring of a regulated entity, whether they are engaged in regulated activity or not—is a "serious legal question." Plaintiffs-Appellants have shown that the "balance of equities" are "heavily tilted" in their favor. *Id.* at 565-66; *Ruiz v. Estelle (Ruiz II)*, 666 F.2d 854, 856–57 (5th Cir. 1982).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully ask this Court enjoin the Final Rule pending their appeal of the decision below.

Dated: March 25, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because if contains 5,184 words according to the count of Microsoft Word.

I further certify that this motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the Clerk's Office on March 24th, 2022, and to the offices of opposing counsel on March 23, 2022, advising of the intent to file this motion.

I further certify that the facts supporting consideration of this motion are true and complete.

I further certify under 5th Cir. R. 27.4 that appellees oppose this motion and plan to file a response in opposition.

/s/ John J. Vecchione
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CERTIFICATE OF SERVICE

I hereby certify that, on March 25, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/EFC system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ John J. Vecchione
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