No. 22-30105

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEXICAN GULF FISHING COMPANY, ET AL.,
Plaintiffs - Appellants,

v.

DEPARTMENT OF COMMERCE, ET AL.,
Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
No. 2:2020-cv-02312 (Hon. Susie Morgan)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Appellant Mexican Gulf Fishing Co. et al.[1] All parties were timely notified and have consented to the filing of this brief.

Since 1973, PLF has worked to advance the principles of individual rights and limited government at all levels of state and federal courts, representing the views of thousands of supporters nationwide. In particular, PLF is known for its defense of private property rights, including *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), *U.S. Army Corps of Engineers v. Hawkes Co.,* 578 U.S. 590 (2016); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), *Sackett v. E.P.A.*, 566 U.S. 120 (2012), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has experience in cases concerning the constitutionality of administrative

[1] In accordance with Fed. R. App. P. 29(a)(4)(E), counsel for all parties have consented to the filing of this brief. *Amicus* affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *Amicus*, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

searches. *See Vondra v. City of Billings*, No. 1:22-CV-00030 (D. Montana, filed Apr. 6, 2022); *Stavrianoudakis, et al., v. United States Fish & Wildlife Service, et al.*, No. 1:18-cv-01505 (E.D. Cal. filed Oct. 30, 2018); *Caniglia v. Strom*, 141 S. Ct. 1596 (2021) (*amicus curiae*); *LMP Services, Inc. v. City of Chicago*, 2019 WL 2218923 (Ill., 2019) (*amicus curiae*); *United States v. Spivey*, 870 F.3d 1297 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2620 (2018) (*amicus curiae*). PLF believes that this experience and its unique point of view will assist this Court in resolving the questions presented.

ISSUE ADDRESSED BY *AMICUS*

Whether and to what extent the closely-regulated-industry doctrine of the Fourth Amendment applies to claims against physical, trespassory searches and the Fourth Amendment's guarantee against invasions of property.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment protects against unreasonable government intrusions upon both privacy and property rights. U.S. Const. amend. IV. These distinct interests are subject to Fourth Amendment protection under different lines of Supreme Court precedent. PLF urges this Court to hold with respect to vessels that the Fourth Amendment "provides *at a minimum* the degree of protection it afforded when it was adopted," which includes a "guarantee against unreasonable searches," *United States v. Jones*, 565 U.S. 400, 411 (2012), of persons, houses, papers, *and effects*. The district court's opinion below should be reversed because it overlooked "the Fourth Amendment's property-rights baseline," *Florida v. Jardines*, 569 U.S. 1, 11 (2013), by focusing primarily on Mexican Gulf Fishing's diminished expectations of privacy. In doing so, it conflated the privacy-interest line of Supreme Court precedents under the Fourth Amendment with the property-interest line of cases. Because no property-based precedent, background principle, or common-law doctrine supports the constitutionality of the government's GPS installation and monitoring requirements, this Court should hold that

the regulation effects an unreasonable search and seizure prohibited by the Fourth Amendment.

ARGUMENT

I. INSTALLATION OF GPS DEVICES ON VESSELS EFFECTS A *JONES* TRESPASS TO PROPERTY

The Fourth Amendment defends the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A court's first task is to determine whether the challenged conduct was a "search." U.S. Const. amend. IV. Two lines of precedent have emerged from the Supreme Court to answer that question: one grounded on the security of self and property against physical government trespasses, *United States v. Jones*, 565 U.S. 400, 411 (2012), and another that focuses on reasonable expectations of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967).

The district court erroneously "assum[ed] without deciding that the tracking requirement [for charter fishing vessels] constitute[ed] a Fourth Amendment search" by focusing on expectations of privacy and misapplying the property-rights line of reasoning that has been amplified in recent years by the Supreme Court. *Mexican Gulf Fishing Co. v. United States Dept. of Commerce*, No. 20-2312, 2022 WL 595911, at *33 (E.D.

Louisiana Feb. 28, 2022) (slip copy). Focusing on the property rights rather than the privacy line of cases makes it clear that the "closely-regulated industry" exemption from a warrant requirement invoked by the district court is narrow and insufficient to sustain searches that involve a physical trespass on a commercial fishing vessel, as here.

The categorization of a search as either a trespass to property or invasion of a privacy is necessary to determine which exceptions to the warrant requirement may be considered by the court. Commensurate with its defense of a fundamental liberty against arbitrary intrusions on property and privacy, all "'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable … subject only to a few specifically established and well-delineated exceptions.'" *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (alteration in original). The burden of proving that a challenged warrantless search fits within one of these exceptions falls on the government. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The exceptions available turn upon the type of search at issue.

The Supreme Court's invasion-of-privacy cause of action originated from the 1967 case of *Katz v. United States*, in which Justice Harlan penned in concurrence that one may assert a Fourth Amendment search when state action invades a person's "reasonable expectation of privacy." 389 U.S. 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Between 1967 and 2012, it appeared that much of the judiciary had identified the *Katz* expectation-of-privacy test to be the only manner of proving a search under the Fourth Amendment.[2] It was during this period that the case law governing regulatory searches developed.[3] Thus, much of the case law surrounding regulatory searches must be viewed as a product of this time when the focus was on societal expectations of privacy.

But in a 2012 case very much like the one at bar, the Supreme Court ruled that an invasion of privacy is not the only type of search governed

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[2] In *Warden v. Hayden*, for example, Justice Brennan wrote that "[t]he premise that property interests control the right of the Government to search and seize has been discredited." 387 U.S. 294, 304 (1967). And "by 1979, the Court was describing Justice Harlan's test as the "lodestar" for determining whether a 'search' had occurred." *Carpenter v. United States*, 138 S. Ct. 2206, 2237-38 (2018) (Thomas, J., dissenting) (quoting *Smith v. Maryland*, 442 U.S. 735, 739 (1979)).

[3] *See New York v. Burger*, 482 U.S. 691 (automotive junkyards); *Donovan v. Dewey*, 452 U.S. 594 (1981) (underground mines); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquors).

by the Fourth Amendment. In *United States v. Jones*, a case involving the attachment of a GPS device to a car, the Supreme Court ruled that the mere attachment of the device effected a "search" by trespassing against an "effect" (the vehicle) for the purpose of revealing information. 565 U.S. at 404. By so ruling, the Court revitalized the Fourth Amendment's cause of action against physical trespasses. Thus, a search need not constitute an invasion of privacy to trigger the "18th-century guarantee against unreasonable searches, which . . . provide[s] *at a minimum* the degree of protection [the Fourth Amendment] afforded when it was adopted." *Id.* at 411. In this regard, *Jones* effected a "sea change" in recent Fourth Amendment jurisprudence. *E.g.*, *United States v. Richmond*, 915 F.3d 352, 357 (5th Cir. 2019); *see also United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.) ("*Jone*s held that the *Katz* formula is but one way to determine if a . . . 'search' has taken place".); *United States v. Sweeney*, 821 F.3d 893, 899 (7th Cir. 2016) ("[T]he Supreme Court has revived a 'property-based approach' to identify unconstitutional searches."); *United States v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014) (en banc) ("*Jones* fundamentally altered [the] legal landscape by reviving—after a forty-five year hibernation—the Supreme

Court's prior trespass theory."); Nancy Foster, *Back to the Future: United States v. Jones Resuscitates Property Law Concepts in Fourth Amendment Jurisprudenc*e, 42 U. Balt. L. Rev. 445 (2013).

Since *Jones*, the Supreme Court has reaffirmed the importance of the property interests the Fourth Amendment protects through a string of recent decisions. In *Collins v. Virginia*, 138 S. Ct. 1663 (2018), it held that warrantless physical intrusions into the curtilage of a home were *per se* unreasonable, even for the purpose of searching a vehicle for which there was probable cause of criminal involvement. *Id.* at 1671–72. And in *Jardines*, the Court quoted *Entick v. Carrington* to emphasize the importance of the property interests involved in a search that trespasses against the house and its curtilage, recognizing that the "law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave[,]" 569 U.S. at 7–8 (quoting *Entick v. Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807, 817 (K.B. 1765)), including agents of the state.

Jones and its progeny represent a return to the text of the Constitution. The Fourth Amendment's language, in extending protection to persons, houses, papers, and effects, "reflect[s] its close

connection to property." *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (quoting *Jones*, 565 U.S. at 405). Thus, since *Jones*, the Supreme Court has made clear that a physical trespass against property without a warrant is presumed to violate the Fourth Amendment's prohibition on unreasonable searches without consulting privacy expectations. *See Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). This reflects the importance of the property "owner's right to exclude others," which is "perhaps the most fundamental of all property interests." *Lingle v. Chevron*, 544 U.S. 528, 539 (2005); *see also Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019) (The Founders included property rights among those fundamental rights secured by the Bill of Rights). This understanding was solidified in *Florida v. Jardines*, 569 U.S. 1 (2013), in which the Court held that the trespassory nature of a search alone is a sufficient basis for finding a violation of the Fourth Amendment. In that case, police officers exceeded an implied license to knock on a homeowner's door by using a drug dog in the curtilage of a house without a warrant. *Id.* at 11. The Fourth Amendment violation turned not on any expectation of privacy by the homeowner, but the trespassory nature of the officers' search that violated background

property principles, as have subsequent Supreme Court decisions. *See id.* at 6 (consulting the scope of implied licenses to enter property and solicit the residents of private houses).[4]

If the district court had inquired first into the *type* of search at issue, it might have determined that the NMFS rule requiring the physical installation of GPS tracking devices constitutes a trespassory search of property ("effects") within the meaning of the Fourth Amendment. *Jones*, 565 U.S. at 404 ("It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment.") (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). This failure by the district court resulted in a decision that cannot be reconciled with on-point precedent from the Supreme Court.

The resemblance between this case and *Jones* is striking. The regulation at issue in this litigation mandates the installation of a GPS tracking device on private fishing vessels, *Mexican Gulf*, 2022 WL, at *1 (quoting 50 C.F.R. § 622.26(b)(5)(i)), and those vessels are no less "effects" than the vehicle in *Jones*. Thus, the court below should have properly

[4] *See also, e.g.*, *Lange v. California*, 141 S. Ct. 2011, 2022 (2021); *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018); *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018); *Carpenter*, 138 S. Ct. at 2235; *id.* at 2267–68.

categorized the search as a *Jones* trespass rather than a *Katz* invasion of privacy. As the next section will describe, a court proceeding under *Jones* must not evaluate the reasonableness of an individual's expectations of privacy, but instead must consult common-law search-and-seizure practices and background principles of property law to determine the reasonableness of physical, trespassory searches.

II. DIMINISHED PRIVACY INTERESTS DO NOT RENDER TRESPASSORY SEARCHES REASONABLE UNDER THE FOURTH AMENDMENT

A. The District Court Erred by Evaluating the Reasonableness of a Physical Search Under a Privacy-Based Warrant-Exception Doctrine.

The district court additionally erred by relying on charter fishermen's diminished privacy interests to justify the government's pervasive warrantless GPS monitoring scheme. As discussed above, the search at issue was a trespass to property, not an invasion of privacy. The closely-regulated-industry doctrine is an exception to the warrant requirement only in cases arising under the Supreme Court's privacy-based Fourth Amendment jurisprudence. In this case, the district court should have asked instead whether background principles of property and common-law search-and-seizure procedures would render the

warrantless installation of tracking devices on charter fishing vessels reasonable.

Under the *Katz* privacy framework, courts often weigh an individual's privacy interests against government objectives to determine the reasonableness of a search that is asserted to fit within a privacy-based warrant exception. In this manner, the expectations-of-privacy analysis from Justice Harlan's test for a "search" bled into the *reasonableness* inquiry in a great many cases, including cases asking whether warrantless searches of regulated industries were prohibited. *See, e.g. New York v. Burger*, 482 U.S. 691, 701 (1987) (quoting *Donovan v. Dewey*, 452 U.S. 594, 606 (1981)) ("[T]he [closely-regulated-industry] doctrine is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy.").

But intrusions into property challenged under *Jones* are different. "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Jardines*, 569 U.S. at 11. It's the "*physical intrusion*" that matters, not what the government discovers. *Id.* (citation omitted, emphasis in original). The question thus is not whether the

degree of intrusion is "reasonable," even without a warrant, but instead becomes *whether* a warrantless trespass occurred. *See Kyllo v. United States*, 533 U.S. 27, 37 (2001) (noting that "there is certainly no exception to the warrant requirement" for a physical intrusion into a protected area, "by even a fraction of an inch," and even when police "see nothing") (citation omitted). A warrantless trespass is categorically forbidden. *See Jardines*, 569 U.S. at 11 (warrantless trespass violated the Fourth Amendment regardless of whether it was "reasonable"); *Jones*, at 413 (refusing to consider whether warrantless trespass was nevertheless reasonable).

B. The Closely-Regulated-Industry Doctrine Does Not Apply to Trespassory Property Searches.

Having concluded that the warrantless search at issue in this case involves a trespassory search subject to *Jones*, the court below should have considered not the reasonableness of Appellants' privacy expectations, but whether the NMFS regulation was a *trespass*. That is, whether the physical intrusion was permissible as it complied with the background principles of property law codified by the Fourth Amendment from the time of the Founding. In such cases, courts apply the "18th-century guarantee against unreasonable searches, which . . . provide[s]

at a minimum the degree of protection [the Fourth Amendment] afforded when it was adopted." *City of Los Angeles v. Patel*, 576 U.S. 409, 411 (2015) (emphasis omitted). That approach would limit the exemption to those traditionally regulated industries that are not contrary to a background-principles inquiry. Indeed, the Supreme Court has only applied it to the industries of underground mining, firearms, liquor, and automobile junkyards. *Burger*, 482 U.S. 691; *Donovan*, 452 U.S. 594; *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). These traditionally closely regulated activities would either have been subject to reasonable warrantless searches under the common law as it existed at the time of the Founding, or else involve activities that impose such a risk of grave externalities on their neighbors that close supervision is consistent with background principles of nuisance and property law. "A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the [. . .] law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Lucas v. S.C. Coastal Council*, 505

U.S. 1003, 1029 (1992).

In undertaking the background-law question, the federal courts are not without guidance from the U.S. Supreme Court, which has often consulted background principles of property law and common-law search-and-seizure precedents from the Founding era. In *Lange v. California*, for example, the Court affirmed that "[t]he common law in place at the Constitution's founding . . . may be 'instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable.'" 141 S. Ct. 2011, 2022 (2021) (quoting *Steagald v. United States*, 451 U.S. 204, 217 (1981)); *see also Torres v. Madrid*, 141 S. Ct. 989 (2021) (considering the meaning of a physical "seizure" by consulting the common law).

Most recently, in *City of Los Angeles v. Patel*, 576 U.S. 409, the Court considered whether a hotel was subject to the closely-regulated-industry exception. Instead of asking whether a sufficiently invasive scheme of regulatory oversight exists to eviscerate expectations of privacy, the Court inquired into the historical customs related to regulations and searches of hotels and inns with and without warrants, a practice that was employed both by the majority and dissenting

opinions. *See* 424-27; *id.* at 432-33 (Scalia, J., dissenting). The Court found insufficient evidence that the unannounced, warrantless searches of hotels' guestbooks were supported by historical evidence, noting that "[i]f such *general* regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Id.* at 425 (emphasis added). Thus, the focus in property-based cases is on evidence of the reasonableness of warrantless search powers founded in the common law or background principles of property.

However, instead of consulting common-law precedents and historical search-and-seizure-related customs, the district court mistakenly applied the closely-regulated-industry doctrine to conclude that the NMFS regulation satisfied *New York v. Burger*'s three-pronged expectation-of-privacy-related analysis. *Mexican Gulf Fishing*, 2022 WL 595911, at *42. But *Burger* itself, as with much of its progeny, is based on the diminished expectations of privacy incumbent on participants of industries burdened by pervasive regulation, whereas the search at issue *here* involves a *Jones* search that should be considered without reference to privacy expectations.

Because warrantless searches are presumed unreasonable, and the government bears the burden of rebutting that presumption, this Court should find that this burden has *not* been discharged in the context of the *Jones* searches contemplated by the NMFS regulation because the government has not provided compelling evidence of common-law practices, customs, or precedents that considered trespassory searches of this type reasonable.

C. The Existing Background Evidence of Warrantless Searches and Seizures of Vessels Does Not Support the District Court's Application of the Closely-Regulated-Industry Doctrine.

The closest precedent applicable to searches of vessels in the territorial waters is *Carroll v. United States*, 267 U.S. 132 (1925). The U.S. Supreme Court held, based on historical evidence from the Founding and Reconstruction eras, that brief stops and inspections of vehicles supported by individualized suspicion were regarded as reasonable in the absence of a judicial warrant. The court relied in substantial part on the existence of customs inspection practices. *Id.* at 153–54. But the searches at issue here are neither brief nor supported by individualized suspicion. Instead, they constitute a continuous physical trespass by a tracking device that is installed on the vessel and constantly reveals information

about its location.

This Court has had occasion to consider some of the customs and practices concerning stops more specifically of vessels in the territorial waters and on the high seas, *see generally United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (reviewing history, treaties, and customs related to stops and searches of vessels afloat), and has concluded that certain types of stops are constitutional in the absence even of individualized suspicion. *See id.* at 1086 (referencing "[t]he undoubted constitutionality of customs searches and administrative inspections in the absence of suspicion of criminal activity" but this "does not mean that the Coast Guard's power to search nautical vessels is […] unrestricted"). But there is no need to confront these precedents since they stop well short of authorizing the type of continuous invasion contemplated by the installation of physical GPS tracking devices in every charter fishing vessel.

Such a warrantless search power is not revealed by the available evidence of customs, practices, or common-law precedents regarding searches and seizures of vessels afloat. On the contrary, the closest Founding-era analogue to the NMFS regulation would require the

placement of a government inspector on each ship, responsible for constant monitoring of the vessel's path and reporting on demand to his superiors. Given the American colonists' outpouring of popular and legal opposition to the seizure of John Hancock's ship, *The Liberty*—among them John Adams and James Otis—on the grounds that customs inspectors lacked individualized suspicion to detain and search it, there is little doubt that the understanding of the Fourth Amendment at the time it was ratified would not have countenanced a scheme of continuous invasion of private properties. *See* Thomas Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 1019–20 (2011) (citing William Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* 590 (2009)) (discussing the seizure of John Hancock's ship *Liberty* and the growing view among legal scholars and political communities in the American colonies that probable cause was a requirement for the search and seizure of vessels).

In fact, it was against the backdrop of customs searches and seizures of vessels by the British to enforce aggressive taxes like the Sugar Act that raised early colonial litigation over the *type and quantum of cause* required to stop, search, and seize vessels in the absence of a

warrant. *See* Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 Mich. L. Rev. 1049, 1057 (2011) ("While the discussion of probable cause relating to warrantless ship seizures did not itself create a cohesive understanding of probable cause, it does reveal that the concept had applicability in the case of both warrantless and warrant-required searches."); *see also* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 963 (1997) ("The statements on probable cause, by Laurens in the Active case and by the Boston town meeting on the *Liberty*, saturated newspapers from Rhode Island to South Carolina.") (internal quotation marks and citations omitted).

While this Court has ruled that searches of vessels on the high seas in certain contexts do not require a warrant or cause, *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980), it has generally required, at minimum, a showing of individualized suspicion or probable cause for searches of American vessels within the territorial waters. *See, e.g. United States v. Odom*, 526 F.2d 339, 342 (5th Cir. 1976) (requiring searches beyond initial document-and-safety inspections to be supported by probable cause). And even under the United States' "plenary authority

to board a vessel beyond the twelve-mile [territorial waters] limit without probable cause or suspicion," *United States v. Erwin*, 602 F.2d 1183, 1184 (5th Cir. 1979), it may only do so briefly without a warrant "to conduct documentation and safety inspections." *United States v. Warren*, 578 F.2d 1058, 1065 (5th Cir. 1978), *abrogated on other grounds by United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988). Within the territorial waters, searches of this nature are sporadic and only "permit the Coast Guard to conduct a limited administrative 'search' of an American flag vessel pursuant to a safety or documentation check." *Williams*, 617 F.2d at 1086 (citing *United States v. Odom*, 526 F.2d 339, 342 (5th Cir. 1976)).

This standard is little different from the Fourth Amendment's baseline requirement of an administrative warrant for searches exceeding brief inspections of public areas of business properties. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), for example, the Court held that warrantless OSHA searches of nonpublic areas of businesses were unreasonable, *id.* at 313, relying on the precedent set a decade earlier—before the *Katz* doctrine had taken root—in *See v. City of Seattle*, 387 U.S. 541 (1967), which held regulatory inspections of commercial properties unreasonable in the absence of an administrative warrant. *Id.*

at 543. "The businessman, like the occupant of a residence," asserted the Court, "has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant." *Id.*

Thus, no evidence from sources of either common law or circuit precedent support the reasonableness of a pervasive and continuous physical trespassory search of vessels at sea. With no search custom analogous to this power to draw on, this Court must apply the baseline protections of the Fourth Amendment against intrusions to "effects." Because the NMFS regulation exceeds the scope of all suspicionless search practices previously determined reasonable either by this Court or the common-law tradition of searches and seizures of vessels afloat, or other vehicles, this Court should deem the installation of a GPS tracking device on a vessel unreasonable in the absence of a warrant, just as the Court so ruled with respect to a land-based vehicle in *United States v. Jones,* 565 U.S. 400.

CONCLUSION

The adoption of the Fourth Amendment with its warrant requirement was as much a reaction to abuses of *regulatory* inspection powers wielded by the American colonial governments as it was a response to the onerous British customs searches executed under general warrants. *See* William Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791* 192 (2009) ("[C]olonial legislation also indicated that the amendment abrogated a statutory heritage of the general warrant that was as much American as British."); *see also id.* at 193–205 (discussing the regulatory general search schemes enacted in the colonies authorizing warrantless searches of houses and private property to inspect for the quality of bread, leather, and alcohol). No warrant exception, background principle of property law, custom, or common-law practice renders the physical installation and continuous operation of GPS tracking devices onboard charter fishing vessels reasonable in the absence of a warrant. Thus, without further examination of privacy expectations irrelevant to the Fourth Amendment's property-rights baseline, this Court should enjoin the challenged rule mandating the installation and operation of these

devices.

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Respectfully submitted,

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I hereby certify that on May 9, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Caleb Kruckenberg
CALEB KRUCKENBERG