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

MEXICAN GULF FISHING COMPANY, *et al.*	:	Civil Action No. 2:20-cv-2312
	:	Section "E" (1)
Plaintiffs,	:	Judge Suzie Morgan
v.	:	Magistrate Judge Janis Van Meerveld
U.S. DEPARTMENT OF COMMERCE, *et al.*	:	Memorandum in Support of Summary Judgment
*Defendant*s.	:	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

In 1791, the philosopher Jeremy Bentham coined the term "Panopticon" to denote a prison wherein all inmates would be subject to 24-hour surveillance by an unseen observer.[1] For centuries, resource and technological constraints thwarted oppressive regimes' ability to envelop their citizenry in such a Panopticon. That is no longer the case: modern surveillance tools enable mass tracking of individuals' every movement at low cost while powerful computer algorithms can process that information to reveal intimate details of each person's life.[2] Now, the administrative state claims power to spread such a Panopticon web not just over convicted criminals, but simply over those whom it has the power to regulate for economic and environmental purposes. With technological surveillance systems and collation-of-data technology falling dramatically in price and increasing exponentially in power, the only things that stand in the way of this dystopian vision of "Big Brother" are our laws and courts that apply them.

The Supreme Court has established two approaches for applying the Fourth Amendment to the new challenges posed by mass surveillance of citizens. The first is a *property-based approach* to outlaw unconstitutional location tracking, *see, e.g.*, *United States v. Jones*, 565 U.S. 400, 404 (2012), while the second is the *"reasonable expectation of privacy" approach* to prohibit long-term warrantless tracking, *see, e.g., Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018). The present Department of Commerce intrusion is *ultra vires* under either approach. The Court should strike down Defendants' attempt to impose Panopticon-style surveillance on over a thousand plaintiffs in this class action merely because they

[1] Jeremy Bentham, *Panopticon, or the Inspection House* (1791).

[2] *See* Ross Andersen, *The Panopticon Is Already Here*, The Atlantic (Sep. 2020) (detailing how the Chinese Communist Party uses tracking and AI technology to surveil citizens), available at https://www.theatlantic.com/magazine/archive/2020/09/china-ai-surveillance/614197/ (last visited Aug. 11, 2021).

take others on chartered fishing trips in the Gulf of Mexico, no matter which constitutional framework prevails. The challenged rule, *Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries*, 85 Fed. Reg. 44,005 (July 21, 2020) ("Final Rule"), fails under both approaches because it subjects all plaintiffs to 24-hour warrantless surveillance by physically affixing GPS-tracking devices on their private vehicles and beams that information to the government with no prohibitions on how it is used or with whom it is shared within the government, thereby invading reasonable expectations of privacy.

What's worse, the Final Rule forces Plaintiffs to purchase, without criminal conviction, their own "anchor bracelets," even though Congress granted Defendants no authority to compel such unwanted purchases. Defendants' exercise of unconstitutional and unauthorized powers is wholly disproportionate to any plausible conservation purpose, given that charter boats targeted for 24-hour surveillance account, in the aggregate, for less than one percent of Gulf fishing. Defendants' deep intrusion into private lives thus provides zero or near-zero benefit to proper regulatory goals. As explained below, the Final Rule's blatant disregard for constitutional rights, limits on statutory authority, and violation of procedural rulemaking requirements under the Administrative Procedure Act (APA) and Regulatory Flexibility Act (RFA) call out for class-wide injunctive and declaratory relief.

BACKGROUND

Commercial fishing vessels catch 93% of the 1.5 billion pounds of fish harvested each year in the Gulf of Mexico, with recreational fishing accounting for the remaining 7%.[3] While most

[3] In 2019, Gulf of Mexico commercial fishing accounted for 1,402,833,781 pounds, while recreational fishing account for 105,084,987 pounds. *NOAA Fisheries Statistics*, available at https://www.fisheries.noaa.gov/foss/f?p=215:200:9410340215107::NO::: (last visited August 11, 2021).

recreational fishing is conducted by individuals who operate their own private boats, some anglers hire boats operated by others. There are two types of "for hire" recreational fishing vessels. The first involves charter boats, which "are vessels that take a group of anglers—usually six or fewer—on a fishing trip with a licensed captain and crew."[4] The second uses headboats, which "are generally larger than charter boats, and almost always take more than six anglers on a given trip."[5] There are approximately 1,300 federally permitted charter boats and 70 federally permitted headboats in the Gulf of Mexico. 85 Fed. Reg. at 44,014. Unlike commercial fishing vessels and headboats, charter boats are frequently used in part for personal purposes unrelated to fishing.

Charter boats operating in the Gulf of Mexico are small businesses—"the average charter vessel operating in the Gulf is estimated to receive approximately $88,000 (2018 dollars) in gross revenue and $26,000 in net income (gross revenue minus variable and fixed costs) annually." *Id.* The following table uses Defendants' data to summarize charter-boat fishing as a proportion of total recreational fishing in the Gulf for the most popular recreational-fishing species:[6]

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[4] NOAA Fisheries, *Recreational Fishing Data Glossary,* available at https://www.fisheries.noaa.gov/recreational-fishing-data/recreational-fishing-data-glossary (last visited August 11, 2021).

[5] *Id.*

[6] According to NOAA, the most "Popular Recreational Species in the Gulf of Mexico" are: (1) spotted seatrout; (2) gray snapper; (3) red drum; (4) white grunt; (5) sand seatrout; (6) Atlantic croaker; (7) Spanish mackerel; (8) sheepshead; and (9) red snapper. NOAA Fisheries, *Gulf of Mexico Saltwater Recreational Fisheries Snapshot* (Oct. 11, 2017), available at https://www.fisheries.noaa.gov/resource/educational-materials/gulf-mexico-saltwater-recreational-fisheries-snapshot (last visited August 11, 2021).

NOAA's Marine Recreational Information Program maintains statistics on recreational catches by region, species, and method. *See* NOAA Fisheries, *Recreational Fisheries Statistics Queries: Catch Data,* available at https://www.fisheries.noaa.gov/data-tools/recreational-fisheries-statistics-queries (last visited August 11, 2021). The table summarizes 2019 Catch Data for the Gulf of Mexico for the above listed popular fish species. The year 2019 was chosen as the most recent full year for which statistics are available prior to the COVID-19 pandemic, which may have affected customers' willingness to hire charter boats.

Recreational and Charter Boat Fishing

Gulf of Mexico 2019	Recreational Catches	Charter Boat Catches	Percent Charter Boat
Spotted Seatrout	23,135,443	305,959	1.3%
Gray Snapper	16,764,430	571,474	3.4%
Red Drum	13,131,675	242,321	1.8%
White Grunt	6,425,170	626,284	9.7%
Sand Seatrout	5,892,550	56,900	1.0%
Atlantic Croaker	12,202,376	18,406	0.2%
Spanish Mackerel	18,218,778	339,395	1.9%
Sheepshead	4,829,033	145,322	3.0%
Red Snapper	9,066,534	822,389	9.1%
TOTAL	**109,665,989**	**3,128,450**	**2.9%**

According to Defendant's own statistics, recreational anglers in the Gulf caught 110 million fish among the most popular species in 2019, with charter boats contributing merely 3 million. Charter-boat fishing thus is estimated to make up less than 3% of total recreational fishing in the Gulf, which in turn represents only 7% of all Gulf fishing. These calculations indicate that charter-boat fishing comprises approximately only 0.2% of total Gulf fishing.[7]

The Magnuson-Stevens Fishery Conservation and Management Act ("MSA") of 1976 authorizes the Department of Commerce ("Commerce") to regulate fisheries resources "for the purposes of exploring, exploiting, conserving, and managing all fish," 16 U.S.C. § 1801(b)(1), in the United States' Exclusive Economic Zone, which "extends 200 nautical miles from the seaward boundary of each coastal state," *Goethel v. U.S. Dep't of Comm.*, 854 F.3d 106, 108 (1st Cir. 2017); *see also* 16 U.S.C. § 1802(11). Commerce in turn delegated this role to the National Oceanic and Atmospheric Administration ("NOAA"), which regulates fisheries through its sub-agency, the National Marine Fisheries Service ("NMFS").

[7] This is calculated based on the estimates that 7% of all fishing is recreational, and 2.9% of recreational fishing is by charter boat (0.07 x 0.029 = 0.00203).

The MSA provides for the development and implementation of fishery management plans and establishes eight Regional Fishery Management Councils ("Councils") to manage those plans. *Id.* §§ 1801(b)(4), (b)(5). All fishery management plans must be prepared in accordance with "National Standards" defined by statutes at 16 U.S.C. § 1851(a). National Standard Seven requires conservation efforts to "minimize costs and avoid unnecessary duplication." *Id.* § 1851(a)(7). If a Council determines certain information is necessary to implement or revise a fishery management plan, it may request the Secretary of Commerce ("Secretary") to implement an information-collection program. 16 U.S.C. § 1881a(a)(1). The Secretary shall promulgate regulations implementing the collection if he or she determines the "need is justified." *Id.*

The Gulf of Mexico Fishery Management Council ("Gulf Council") manages fishery resources in the Gulf of Mexico. Charter boats are required to have a "for-hire" permit to operate in the Gulf. There are two types of "for hire" permits: one for reef fish and one for coastal migratory pelagic ("CMP" or "pelagic") fish. The vast majority of Gulf charter-boat operators have both permits. *See* 85 Fed. Reg. 44,014 ("Among the 1,368 vessels with at least one Gulf charter vessel/headboat permit, 1,260 for-hire vessels had Federal permits for both Gulf reef fish and Gulf CMP species"). On October 26, 2018, NMFS published a notice of proposed rulemaking, pursuant to a request from the Gulf Council, to collect information from "for-hire" charter boats and headboats in the Gulf of Mexico. NOAA, *Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries*, 83 Fed. Reg. 54,069 (Oct. 16, 2018) ("NPRM"). The NPRM proposed to amend 50 CFR part 622 to impose two information-collection requirements on charter boats described below.[8]

First, the proposed electronic-fishing-report requirement would require charter boats to "submit an electronic fishing report for each trip before offloading fish from the vessel, or within 30

[8] These information-collection requirements also apply to headboats in the Gulf of Mexico, which are not part of this class action.

minutes after the end of each trip if no fish were landed." *Id.* at 54,076-77. The fishing report must be sent electronically to the Science and Research Director (SRD) of NMFS's Southeast Fisheries Sciences Center. *Id.* The proposed regulatory text stated that the report must contain information regarding "all fish harvested and discarded, and *any other information requested* by the SRD," *id.* (emphasis added), but did not specify what "other information" means. The NPRM's preamble stated that fishing reports must include information regarding "any species that were caught or harvested, … as well as information about the permit holder, vessel, location fished, fishing effort, discards, and socio-economic data." *Id.* at 54,071. These electronic fishing reports are new as previously charter fishing boats did not have to report catches electronically and instead submitted paper logs, a practice that continues in other fisheries such as Alaska's.

Second, under the proposed GPS-tracking requirement, charter boats must install onboard an NMFS-approved VMS tracking device that continuously transmits the boat's GPS location to NMFS, regardless of whether the boat is being used for a charter-fishing trip or for personal reasons. *Id.* at 54,076-78. Further, charter boat operators must use the same equipment to submit electronic fishing reports to notify NMFS of the vessel's identification number and type of trip when departing from port, even when not fishing. If departing on a for-hire fishing trip, operators must also report the expected return time, date, and landing location. *Id.* This GPS-tracking requirement would replace an existing requirement that charter boat operators report the general locations where they fished.

The NPRM provided for a public-comment period through November 26, 2018, which was extended to January 9, 2019. *See* 83 Fed. Reg. 54,071. On July 21, 2020, NMFS published the Final Rule, which adopted the electronic-fishing-report and GPS-tracking requirements as proposed. *See* 85 Fed. Reg. 44,005.

The Final Rule's electronic-fishing-report requirement is codified at 50 C.F.R. § 622.26(b)(1) for reef-fish permitted charter boats and at § 622.374(b)(1)(i) for pelagic-fish permitted boats. "The

owner or operator of a charter vessel … must submit an electronic fishing report of all fish harvested and discarded, and any other information requested by SRD for each trip …. The electronic fishing report must be submitted to the SRD via NMFS approved hardware and software as posted on the NMFS Southeast Region website." 50 C.F.R. § 622.26(b)(1); *see also* 622.374 (b)(1)(i). As with the NPRM, the regulatory text did not define what "other information" means. The Final Rule's preamble stated that "NMFS will require the reporting of five economic values per trip: The charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." *Id.* at 44,011.

The Final Rule's GPS-tracking requirement is codified at 50 C.F.R. § 622.26(b)(5) and (b)(6) for reef-fish permitted charter boats and at § 622.374(b)(5)(ii)-(v) and (b)(6) for pelagic-fish permitted boats. Each charter boat must be "equipped with NMFS-approved hardware and software with a minimum capability of archiving GPS locations …. The vessel location tracking device … must be permanently affixed to the vessel and have uninterrupted operation." 50 C.F.R. § 622.26(b)(5); *see also* § 622.374(b)(5)(ii). The "permanently affixed" tracking device must "archive[] the vessel's accurate position at least once per hour, 24 hours a day, every day of the year." *Id.* § 622.26(b)(5)(ii)(B); *see also* § 622.374(b)(5)(iv)(B). And the charter-boat operator "must allow NMFS, the U.S. Coast Guard, and their authorized officers and designees access to the vessel's position data[.]" *Id.* § 622.26(b)(5)(iii)(B); *see also* § 622.374(b)(5)(v). Prior to taking a trip, the charter-boat operator "must notify NMFS and report the type of trip, the U.S. Coast Guard vessel documentation number or state vessel registration number, and whether the vessel will be operating as a charter vessel or headboat … If the vessel will be operating as a charter vessel or headboat during the trip, the owner or operator must also report the expected trip completion date, time, and landing location." *Id.* § 622.26(b)(6); *see also* § 622.374(b)(6).

The Final Rule conducted a regulatory flexibility analysis of the economic impact on charter boats, all of whom were small businesses under the Regulatory Flexibility Act ("RFA"). 85 Fed. Reg. at 44,014. The economic impact of the electronic-fishing-report requirement consisted of $262 to $878 per boat in additional labor costs, which was "up to 3.4 percent of average annual charter vessel net income" of $26,000. *Id.* The economic impact of the GPS-tracking requirement was estimated to include a startup cost of $850 for the tracking device, "equivalent to … 3.1 percent of average annual charter vessel net income," plus a $40 monthly fee, "equivalent to … 1.8 percent of average annual charter vessel net income." *Id.* at 44,015. Additionally, some charter-boat operators may need to purchase an unlimited data plan to comply with the GPS-tracking requirement, which will cost "approximately $60 to $85 per month." Finally, the trip-declaration requirement was estimated to require 2 minutes to complete per trip. The regulatory flexibility analysis further considered lower-cost alternatives to the electronic-fishing-report requirement and the trip-declaration aspect of the GPS-tracking requirements, as required under the RFA. *Id.* at 44,015-17; *see* 5 U.S.C. § 604. But it did not consider alternatives to the rest of the GPS-tracking requirement, *i.e.*, the forced purchase and installation of a VMS device on boats and 24-hour transmission of GPS data to NMFS.

NMFS received 109 comments during the comment period, including numerous objections. *See generally* ECF Nos. 67-2 at 16-40, 67-3, 67-4, 68-1, 68-2, and 68-3 at 1-26 (collectively listing NPRM comments). The Final Rule attempted to address some but not all comments. Several commenters objected that 24-hour GPS surveillance was an unconstitutional invasion of privacy. *See, e.g.,* ECF No. 67-4 at 8 ("To require detailed GPS data for vessels utilized by the for hire community … is also a violation of our 4th Amendment rights."); *id.* at 21 (same); ECF No. 68-2 at 21 (same). The Final Rule supplied no response to these privacy concerns, even though the Supreme Court struck down long-term location tracking as an unconstitutional invasion of privacy mere months before the issuance of

the NPRM. *See Carpenter*, 138 S. Ct. 2206. The word "privacy" does not appear in the NPRM or Final Rule.

Many commenters objected that 24-hour GPS surveillance was unnecessary and unduly burdensome. *See, e.g.,* ECF No. 67-2 at 20 ("Putting gps and reporting restrictions on charter boat operators will not give usable information that cannot be gained from current reporting); ECF No. 67-4 at 10-11, 17, 19 ("We are strongly opposed to any type of GPS monitoring system which tracks a vessel each hour which only adds additional costs and safety concerns when operating."); *id.* at 12 ("Tracking does not provide any additional data that would be provided by filling out a vessel trip report."). Several explicitly complained that it was unnecessary and inappropriate to subject charter boats to the same tracking requirements as commercial fishing vessels. *See, e.g.*, ECF No. 67-4 at 4 ("I can see how this works on commercial offshore vessels where their trips are usually 3-5 days—however, we do mostly 4.5 hour trips."); *id.* at 5-6 (same); *id.* at 11, 17, 19, 22 ("Common sense should be used here and not treat … charter boats similar to large commercial fishing vessels[.]"); ECF No. 68-1 at 1 ("Your proposal would treat [charter boats] like larger commercial fishing enterprises with greater compliance resources"). The Final Rule responded that GPS tracking of all charter boats "best balances the need to collect and report timely information with the need to minimize the cost and time burden to the industry." 85 Fed. Reg. 44,012. The response contained no detail about how NMFS achieved that cost-benefit balance or what factors it weighed. Nor did it explain why preexisting trip-reporting procedures were inadequate.

Some commenters expressed concern over the financial cost of purchasing, installing, and operating GPS-tracking VMS devices. *See, e.g.,* ECF No. 68-1 at 1 ("GPS monitoring systems will only add additional costs and work burdens to charter/headboat operators with limited financial and personnel resources."); ECF No. 68-2 at 16 ("It's extremely alarming that there is no mention of a price for the device (several thousand dollars) or monthly fee for the GPS tracking device that would

be required to have my boat tracked on my dime"). According to the Final Rule, "VMS that are currently approved for the commercial Gulf reef fish program cost approximately $3,000 per unit" plus monthly service fees that "range from approximately $40 to $75." 85 Fed. Reg. at 44,013. The Final Rule, however, expected lower-cost VMS devices that "range in purchase price from $150 to $800" and with monthly service fees that "range from $10 to $40 per month" would become available. *Id.* These lower-cost VMS devices did not exist when the Final Rule was promulgated and were instead being tested by NMFS. *Id.* More than a year later, they still do not exist. *See Approved Software and Hardware for the Southeast For-Hire Reporting Program* (last visited Aug. 11, 2021) available at https://bit.ly/VMSHardwareandSoftware. The Final Rule did not explain why VMS devices NMFS was testing would cost much less than existing devices. It nonetheless used the lower-cost ranges to estimate the economic impact on charter boats, concluding that such costs "would not materially alter cash flows, profits, or the solvency of for-hire businesses." *Id.* at 44,013.

The Final Rule further stated that some commenters objected to "reporting of economic information" in electronic fishing reports. 85 Fed. Reg. at 44,011. According to the Final Rule, these commenters claimed that "[r]equiring operators to submit their financial information leads to a lack of buy-in and trust among participants" and that commenters preferred "other methods to collect this information such as surveying websites, directly surveying permit holders, or simply asking the question on a random basis rather than for every trip." *Id.* However, none of the 109 comments to the NPRM made this objection.[9] The Final Rule nonetheless responded that "NMFS will require the reporting of five economic values per trip: The charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." 85 Fed. Reg. at 44,011.

[9] One commenter objected to collection of "information about expenses and profits." *See* ECF No. 68-3 at 13. But he did not discuss "trust" or "buy in." Nor did he indicate a preference for using survey data to collect financial information.

This was the first time a document published in the Federal Register indicated any of these specific business data elements would be part of the electronic fishing report. The Final Rule explained collection of such data "will improve the best scientific information available for regulatory decision-making; 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." *Id.*

The Final Rule's electronic fishing report and trip declaration requirements became effective on January 5, 2021. *Id.* at 44,005. Since that date, charter-boat operators have been making electronic fishing reports and trip declarations using a smartphone app they were required to download.[10] The app further requires them to report certain business data: charter fee, fuel usages, fuel price, number of passengers, and crew size. The GPS-tracking requirement was "delayed indefinitely." *Id.* On August 20, 2020, Named Plaintiffs filed a putative class action seeking declaratory and injunctive relief against Defendant from enforcing the Final Rule against federally permitted charter boats in the Gulf of Mexico. *See* ECF Nos 1, 54. Plaintiffs do not challenge the transmission of fish-related information in electronic fishing reports. Rather, they challenge requirement to transmit "other information" not specified in the regulatory text, including business data articulated for the first time in the Final Rule's preamble. *See* 85 Fed Reg. at 44,011. Plaintiffs also challenge the GPS-tracking requirement in its entirety. The Court certified the class under Federal Rule of Civil Procedure 23(b)(2) on July 7, 2021. *See* ECF Nos. 48 and 60. Plaintiffs now move for summary judgment on the ground that the Final Rule violates the Fourth and Fifth Amendments of the Constitution, the MSA (including the National Standards), the APA, and the RFA.

[10] Defendants implemented one portion of the Final Rule by requiring permitted charter-boat operators to download the smartphone app. Defendant have not yet implemented the GPS-tracking requirement.

STANDARD OF REVIEW

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)).

"This formula adjusts, however, when it arises in the context of judicial review of an administrative agency's decision. In such cases, the motion for summary judgment stands in a somewhat unusual light, in that the administrative record provides the complete factual predicate for the court's review." *Town of Abita Springs v. U.S. Army Corps of Eng'rs*, 153 F. Supp. 3d 894, 903 (E.D. La. 2015) (internal quotation marks and citation omitted). Thus, in evaluating a challenge under the APA on summary judgment, the court applies the standard of review from the APA. *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001); *see Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998). "A reviewing court must set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" *Markle Ints., LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 754 (E.D. La. 2014), *aff'd*, 827 F.3d 452 (5th Cir. 2016), *vacated and remanded sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) (citing 5 U.S.C. § 706(2)). "[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

ARGUMENT

The Final Rule is both constitutionally and statutorily defective. Twenty-four hour GPS tracking of all charter boats in the Gulf of Mexico without any suspicion of wrongdoing is an obvious

violation of the Fourth Amendment's prohibition against unreasonable searches.[11] Next, the permanent installation of GPS-tracking devices on charter boats constitutes an uncompensated taking, in violation of the Fifth Amendment. By requiring charter-boat operators to purchase these unwanted devices, the Final Rule exercises power that Congress did not and could not have granted in the MSA. The Final Rule further flunks several APA requirements: the inclusion of business information in electronic fishing reports was not a logical outgrowth of the NPRM and thus violates the APA's notice requirements; and failure to consider relevant factors, including significant objections raised by commenters, renders the Final Rule arbitrary and capricious. Finally, by not considering *any* lower-cost alternatives to GPS tracking, the Final Rule falls short of the RFA's usually easy-to-clear hurdle and violates the National Standards of the MSA. Each of these grounds by itself provides enough reason to enjoin the Final Rule and declare it unlawful. Together they call for its immediate demise.

I. THE FINAL RULE'S GPS-TRACKING REQUIREMENT VIOLATES THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," providing that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "The 'basic purpose of this Amendment' … 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter*, 138 S. Ct. at 2213 (quoting *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967)). "The Founding generation crafted the Fourth Amendment as a 'response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.'" *Id.* (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)).

[11] Tellingly neither the NPRM nor Final Rule even intimates that charter boats are violating any fishing regulations with greater frequency or more deleterious effect in comparison to other types of fishing participants.

Twice in the past decade, the Supreme Court has held that installation of GPS-tracking devices are unconstitutional Fourth Amendment searches. *Jones*, 565 U.S. at 404 (2012); *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015). In the same span, the Supreme Court also affirmed that businesses do not forfeit Fourth Amendment protection simply because they are regulated. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015). The Court more recently expressed concern over the emergence of "remarkably easy, cheap, and efficient" technology that enables the government to track ordinary citizens with accuracy that is "rapidly approaching GPS-level precision." *Carpenter*, 138 S. Ct. at 2219. The Final Rule's unconstitutional GPS-tracking requirement would transform that concern into a reality for charter-boat operators in the Gulf of Mexico. *See Jones*, 565 U.S. at 430 (Sotomayor, J., concurring) (worrying that "Government will [soon] be capable of duplicating the [location] monitoring undertaken in this case by enlisting … owner-installed vehicle tracking devices").

A. The Final Rule's GPS-Tracking Requirement Is a Fourth Amendment Search

The Final Rule's GPS-tracking requirement is plainly a "search" under the Supreme Court's precedent applying both the traditional property-based approach of the Fourth Amendment and the "reasonable expectation of privacy" test first articulated in *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan J., concurring).

In *Jones*, the government attached a GPS device to a criminal suspect's vehicle without his consent and recorded his location for four weeks. The Supreme Court unanimously concluded a search had occurred. 565 U.S. at 404. A five-justice majority applied the pre-*Katz* property-based approach to find a search because "[t]he Government physically occupied private property for the purpose of obtaining information." *Id. Grady* clarified this analysis applies with equal force in the civil context. 135 S. Ct. at 1371. In that case, a convicted sex offender challenged a North Carolina statute requiring him to wear a GPS ankle bracelet upon release. The lower court attempted to distinguish *Jones* by placing "decisive weight on the fact that the State's monitoring program is civil in nature." *Id.*

The Supreme Court unanimously rejected that logic, applied *Jones*, and held that forcing an individual to wear a GPS ankle bracelet "effects a Fourth Amendment search" because "[i]t is well settled … that the Fourth Amendment's protection extends beyond the sphere of criminal investigations." *Id.* (quoting *City of Ontario v. Quon*, 560 U.S. 746, 755 (2010)). The Final Rule interferes with charter-boat operators' private property by forcing them to "permanently affix" a GPS-tracking VMS device on their vehicles for the purpose of obtaining information. That is a clear trespassory search under the *Jones* majority's property-based analysis.

Five concurring justices in *Jones* also agreed that "longer term GPS monitoring in investigations … impinges on expectations of privacy" and therefore constitutes a search under *Katz*'s "reasonable expectation of privacy" test. *Id.* at 430 (Alito, J., concurring); *id.* at 415 (Sotomayor, J., concurring). The Court confirmed that long-term tracking violates a person's reasonable expectation of privacy in *Carpenter*, where it applied Fourth Amendment principles to "a new phenomenon: the ability to chronicle a person's past movements through the record of [their] cell phone signals." 138 S. Ct. at 2213. Reaffirming that Fourth Amendment analysis "must take account of more sophisticated systems that are already in use or in development," *id.* at 2018 (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001)), the Court drew a distinction between short-term surveillance of public movements achievable through traditional methods and prolonged tracking using modern technology to create "a deep repository of historical location information." *id.* "As with GPS information, the time-stamped [cell phone] data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.* (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J. concurring)). The Court therefore concluded that collection of a person's cell-phone location data—which is less precise than GPS data at issue in this case—for 127 days was a Fourth Amendment search that invades the person's reasonable expectation of privacy. *Id.* at 2218. As the *en banc* Fourth Circuit recently stated:

> Thus, *Carpenter* solidified the line between short-term tracking of public movements—akin to what law enforcement could do "[p]rior to the digital age"—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*) (citations omitted).

Carpenter squarely forecloses GPS tracking imposed by Final Rule, which collects more precise location data, for a longer duration, and from more citizens than what the Supreme Court held was unconstitutional in that case. *See, e.g.,* 50 C.F.R. § 622.26(b)(5)(ii)(B) (requiring 1,300 charter-boat operators to "ensure that the required [GPS-tracking] VMS unit achieves the vessel's accurate position at least once per hour, 24 hours a day, every day of the year"). While each charter-boat operator will not at all times be in his or her boat, the long-term collection of snippets of movement data is more than enough to open "an intimate window into a person's life." *Id.* at 2218. GPS tracking in *Jones*, for instance, occurred only where the suspect travelled in his vehicle, and all nine Justices nonetheless concluded that was a search. More recently, the Fourth Circuit concluded Baltimore's aerial surveillance program violated the reasonable expectation of privacy even though "the tracks are often shorter snippets of several hours or less." *Leaders of a Beautiful Struggle*, 2 F.4th at 342. That is 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.* Permanent GPS-tracking of all trips under the Final Rule would reveal an even greater "wealth of detail." This is particularly true because charter-boat owners—unlike operators of commercial fishing vessels—frequently use their vessels for personal business that have nothing to do with fishing. *See* ECF Nos. 25-2 at ¶ 4 and 25-3 at ¶ 4. Thus, for example, if a boat owner took someone on a romantic getaway on a GPS-tracked vessel, the government would know when the trip took place, the precise route taken, and duration at each stop.

That is the sort of creepy and intrusive power no American wants any of its governments (federal, state, or local) to possess unless it is directly relevant to investigating a crime and all prerequisites for complying with the Fourth Amendment have been met. Accordingly, collecting such snippets "24 hours a day, every day of the year" is indisputably a Fourth Amendment search infringing on the boat owner's reasonable expectation of privacy.

B. The GPS-Tracking Requirement Is Unreasonable

"[A]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 135 S. Ct. at 2452. The Final Rule's GPS-tracking requirement is thus "*per se* unreasonable" under the Fourth Amendment unless one of "a few specifically established and well-delineated exceptions" applies. *Id.*

One such exception exists for "pervasively regulated" industries. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74 (1970); *see also United States v. Biswell*, 406 U.S. 311 (1972). The Supreme Court explained the warrant framework is not needed for "[c]ertain industries [that] have such a history of government oversight that no reasonable expectation of privacy … could exist[.]" *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). Lower courts expanded this exception to virtually any regulated industry, covering a wide swath of occupations.[12] In particular, some courts ruled commercial fishing was pervasively regulated on the ground that "[f]ederal regulation of the fishing industry dates back to a 1793 federal license requirement for fishing vessels." *United States v. Raub*, 637 F.2d 1205, 1209

[12] *See, e.g.*, *United Taxidermists Ass'n v. Ill. Dep't of Natural Resources*, 2011 WL 3734208, at *3 (7th Cir. Aug. 25, 2011) (taxidermy); *Heffner v. Murphy*, 745 F.3d 56 (3d Cir. 2014)(funeral homes); *Rush v. Obledo*, 756 F.2d 713, 720–21 (9th Cir. 2009) (day cares); *Lesser v. Espy*, 34 F.3d 1301, 1307 (7th Cir. 1994) (sale of rabbits); *United States v. Chuang*, 897 F.2d 646, 651 (2d Cir. 1990) (banks); *Professional Dog Breeders Advisory Council v. Wolff*, 2009 WL 2948527, at *9 (M.D. Pa. Sept. 11, 2009) (dog breeder); *Midwest Retailer Associated, Ltd. v. City of Toledo*, 563 F. Supp. 2d 796, 805–06 (N.D. Ohio 2008) (convenience stores); *Stogner v. Kentucky*, 638 F. Supp. 1, 3 (W.D. Ky. 1985) (barbershops).

n.5 (9th Cir. 1980); *see also Lovgren v. Byrne*, 787 F.2d 857, 865 n.8 (3d Cir. 1986) ("The fishing industry has been regulated since at least 1793 when licenses were required for vessels engaged in cod and macker[e]l fishing.").

The Supreme Court provided a much-needed course correction to lower courts' widespread finding of "pervasively regulated" industries in *Patel*, which concerned a city law requiring "that hotel guest records shall be made available to any officer of the Los Angeles Police Department for inspection." 576 U.S. at 409. The Court struck down the inspection regime as facially unconstitutional because it did not provide hotel operators an opportunity for pre-compliance review and rejected the city's argument that hotels are exempt from such review as a "pervasively regulated" industry. *Id.* at 424. In doing so, the Court reminded lower courts that the "pervasively regulated" exception "has always been a narrow exception" that must not "swallow the rule," and that "[o]ver the past 45 years, the Court has identified only four industries" falling within that exception. *Id.* at 424-25 (citing *Colonnade*, 397 U.S. 72 (liquor sales); *Biswell*, 406 U.S. 311 (firearm sales); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining); and *New York v. Burger*, 482 U.S. 691 (1987) (automobile junkyard)). *Patel* prescribed two guardrails to ensure the "pervasively regulated" exception remains narrow.

First, the Court clarified that historical regulation, while relevant, is not enough. Otherwise "it would be hard to imagine a type of business that would not qualify." *Patel*, 576 U.S. at 424–25. Rather only a historical regulatory scheme "that distinguishes [an industry] from numerous other businesses" may be considered in analyzing pervasiveness. *Id.* at 425.[13] In contrast, regulations widely applicable

[13] Defendants also cannot rely on MSA's inspection regime to show that charter fishing is "pervasively regulated" such that inspections under the MSA may bypass the warrant framework. *See Patel*, 576 U.S. at 425 ("The City wisely refrains from arguing that [the challenged ordinance] itself renders hotels closely regulated."); *see also Burger*, 482 U.S. at 720 (Brennan J., dissenting) ("Of course, the inspections themselves cannot be cited as proof of pervasive regulation justifying elimination of the warrant requirement; that would be obvious bootstrapping.").

to "numerous other businesses" within a jurisdiction, including being required to "maintain a license," do not indicate pervasiveness. *Id.* at 425. Under this reasoning, lower-court decisions holding commercial fishing to be pervasively regulated based on historical licensing requirements are no longer valid. *See Lovgren*, 787 F.2d at 865 n.8; *Raub*, 637 F.2d at 1209 n.5.

Second, the Supreme Court added a new requirement: an industry falls within the "pervasively regulated" exemption only if it inherently "poses a clear and significant risk to the public welfare." *Patel*, 576 U.S. at 424; *see also Zadeh v. Robinson*, 928 F.3d 457, 465 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (asking "whether the industry would pose a threat to the public welfare if left unregulated"). That is, the reason why the industry has been regulated must be due to a need to protect the public from inherent danger posed by the industry. Nothing in the record remotely suggests charter fishing poses any inherent public danger. And the reason for regulating fishing under the MSA—conservation of an economic resource—has nothing to do with public safety.[14] As such, the "pervasively regulated" exception to the warrant requirement does not apply, and any GPS tracking of Named Plaintiffs' charter boats must be accompanied by "an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 576 U.S. at 420. The Final Rule's GPS-tracking requirement provides for no such review and is therefore *per se* unreasonable. *Id.*

Even if recreational fishing were deemed "pervasively regulated," 24-hour GPS tracking must still satisfy the Fourth Amendment's reasonableness requirement. To do so, (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." *Burger*, 482 U.S. at 702–03. "A warrantless inspection, … even in the context of a pervasively regulated business,

[14] Plaintiffs do not challenge the electronic submission of fish-related information through a smartphone app, which serves the MSA's conservation purpose.

will be deemed to be reasonable only so long as [all] three criteria are met." *Id.* at 702; *see Zadeh*, 928 F.3d at 465 (striking down warrantless inspection regime that satisfied only two out of three criteria).

While the government has an interest in conservation, warrantless 24-hour GPS surveillance of charter boats is far from "necessary" to further that interest. Defendants' own statistics indicate charter-boat fishing accounts for perhaps 0.2% of Gulf of Mexico fishing.[15] Warrantless GPS-tracking of such a miniscule segment of the industry and fishery cannot be "necessary" to achieve the MSA's conservation purpose. That is particularly so because charter-boat operators already report their general fishing areas, and they would further report number and types of fish caught in electronic fishing reports. According to the Final Rule, 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 ensure accurate records.[16] But the Supreme Court "has previously rejected this exact argument, which could be made regarding *any* recordkeeping requirement." *Patel*, 576 U.S. at 427 (emphasis added). Warrantless GPS tracking must be justified by rationales other than validating records, but NMFS supplies none. On the one hand an enormous intrusion on constitutional rights and on the other a miniscule, and perhaps non-existent advancement of regulatory goals. Constitutional rights cannot be jettisoned so lightly at administrative whim.

The GPS-tracking requirement is also devoid of "a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702–03. To satisfy this condition, "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* This articulation presupposes that the agency is not, as here,

[15] *Supra* note at 7.

[16] Nothing in the Administrative Record suggests widespread inaccuracy in reports of charter boats' locations.

constantly and permanently present in the commercial premise being searched. The Final Rule places on charter boats a NMFS-approved GPS-tracking devices that continuously records and transmits location data. There is no way for NMFS to meaningfully "advise" the boat owner that "a search is being made" because a search is always being made. Nor is there any limit on inspection officers. In *Zadeh*, the Fifth Circuit concluded a Texas statute allowing the inspection of medical records from certain licensed physicians failed *Burger*'s warrant-substitute requirement because it provided no limits on when and from whom records could be inspected and thus was "purely discretionary." The Final Rule likewise provides no limits on collection of GPS location data: NMFS would collect all such data at all times from all regulated persons. Such ubiquitous surveillance cannot possibly serve as a "constitutionally adequate substitute for a warrant."

In sum, there can be no dispute that 24-hour GPS tracking of all charter boats in the Gulf "24 hours a day, every day of the year" constitutes searches under the Fourth Amendment. *See* 50 C.F.R. §§ 622.26(b)(5)(ii)(B); 622.374(b)(5)(iv)(B). These searches are *per se* unreasonable because they are not supported by pre-compliance review that safeguards individuals from unwarranted intrusions. Even if such searches were exempt from pre-compliance review, they would still be unreasonable when judged against *Burger*'s three-part test. They are not necessary to further any legitimate purpose and offer no substitute to warrants that protect against limitless surveillance. In fact, limitless surveillance is the raison d'être of this regulatory regime.

II. THE MANDATORY INSTALLATION OF A VMS DEVICE IS A PER SE PHYSICAL TAKING UNDER THE FIFTH AMENDMENT

The Fifth Amendment of the U.S. Constitution states that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court held that "a permanent physical occupation of property" by the government constitutes a taking *per se* regardless "whether the action achieves an important public

benefit or has only minimal economic impact on the owner." 458 U.S. 419, 434 (1982). There, a New York law required landlords to allow cable companies to install equipment—a ½ inch diameter cable and two 1½-cubic-foot cable boxes—on their properties. *Id.* at 423. Even though the equipment took up little space and had "minimal economic impact," the Court concluded an uncompensated taking occurred. *Id.* at 434-35. This was because "[t]o the extent that the government permanently occupies physical property, it effectively destroys" "the rights to possess, use and dispose of it." *Id.* at 435; *see also Mongrue v. Monsanto Co.*, 1999 WL 219774, at *3 (E.D. La. Apr. 9, 1999) ("The permanent physical occupation of another's property is the most serious form of invasion of an owner's property interests."). The Supreme Court recently reaffirmed this principle and clarified that even temporary physical intrusions are *per se* takings—the length of physical occupation only determines the amount of just compensation—not whether a taking occurred. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2066, 2072 (2021).

Charter-boat operators must "permanently affix" NMFS-approved VMS devices on their vessels. 50 C.F.R. §§ 622.26(b)(5); 622.374(b)(5)(ii). Such permanent physical occupation is an obvious Fifth Amendment taking under *Loretto*. It is of no moment that the physical occupation occurs on a boat rather than home. As the Court explained in *Home v. Department of Agriculture*: "Nothing in the text or history of the Takings Clause, or our precedents, suggests that the [*Loretto*] rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." 576 U.S. 350, 358 (2015).

While the appropriated physical space may be relatively small, physical occupation by a NMFS-approved VMS device nonetheless "effectively destroys [property] rights." *Loretto*, 458 U.S. at 435. First, the boat owner "has no right to possess the occupied space" taken up by the VMS device or "exclude the occupier from possession and use of the space." *Id.* Second, the boat owner would lose "any power to control the use of the property," such as charging charter customers for using of that

space. *Id.* at 436. Finally, "even though the [boat] owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a [VMS device] will ordinarily empty the right of any value," *id.,* thereby reducing the boat's overall economic value. *Id.* While cable boxes in *Loretto* may have had minimal impact on the sale or rental value of the apartment at issue, not so with VMS devices mandated by the Final Rule. A charter boat that is subject to constant GPS tracking by the federal government is worth substantially less than one that is not, and demand for charter trips on boats subject to constant federal surveillance surely would fall as well. In short, the mandatory installation of a VMS tracking device on a charter boat is a *per se* taking requiring just—and likely substantial—compensation and Plaintiffs are entitled to declaratory relief specifying that this regulatory regime creates a taking.[17] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) ("[W]e hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA ...."). In addition to seeking declaratory relief that a takings would under this regulatory regime, Plaintiffs emphasize that the clear takings here would be relevant to the property-based approach to the Fourth Amendment provided for in *Jones*, 565 U.S. at 404, and its progeny.

III. THE MSA DOES NOT AUTHORIZE MANDATORY PURCHASE OF VMS DEVICES

In addition to taking physical space from charter boats, the Final Rule requires boat owners to purchase VMS devices and pay monthly fees. 85 Fed. Reg. at 44,013 ("Monthly service fees, which NMFS expects to range from approximately $40 to $75, will be the responsibility of the fisherman."). The MSA does not, however, authorize any Defendant to force regulated parties to purchase

[17] In addition to a physical taking, the Final Rule's GPS-tracking requirement further takes proprietary business information by forcing charter-boat operators to disclose the precise locations of "fishing holes" they spent years developing. *See generally Ruckelshaus*, 467 U.S. at 1004-14 (recognizing that trade secrets are entitled to protection under the Takings Clause). The very information in a device purchased by the charter boat owners also belongs to them and is taken if sent to the Government.

equipment for the purpose of collecting information on behalf of the NMFS. *See* 16 U.S.C. § 1881a. And if it did, the MSA would exceed the bounds of Congress's power to regulate commerce. *See NFIB v. Sibelius*, 567 U.S. 519, 552 (2012).

The bedrock foundation of administrative law is that an agency may not act "unless and until Congress confers powers upon it." *La. Publ. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("an administrative agency's power to regulate … must always be grounded in a valid grant of authority from Congress."). Here, the MSA authorizes the Secretary of Commerce to promulgate regulations to collect information needed for developing, implementing, or revising fishery management plans. 16 U.S.C. § 1881a(a). But nothing in the statute authorizes the Secretary or any other Defendant to force regulated persons to purchase equipment needed to collect such information. The absence of such a grant of power means just that: NMFS lacks power to mandate the purchase of information-collection equipment. *Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation."); *see also La. Publ. Serv. Comm'n*, 476 U.S. at 374 ("An agency may not confer power upon itself.").

This conclusion is reinforced by the MSA's limitation on fees that could be charged to pay for information collection. Title 16 U.S.C. § 1854 authorized Defendants to charge fees for only two types of information collection: limited access privilege programs and certain community development quota programs. GPS-tracking falls in neither category; as such, NMFS is prohibited from charging fees to pay for GPS tracking of charter boats. Allowing NMFS to force charter-boat operators to purchase their own "anchor bracelets" would bypass this statutory prohibition against charging fees. The authority to promulgate information-collection regulations in 16 U.S.C. § 1881a(a) therefore cannot be interpreted to grant authority to compel unwanted purchases on behalf of NMFS.

The canon of constitutional avoidance further confirms this interpretation. The Constitution does not grant Congress power under the Commerce Clause to force charter-boat owners to purchase

VMS devices, let alone allow Congress to delegate that power to an agency. In *NFIB*, the Supreme Court held that the power to "*regulate* Commerce" under the Commerce Clause does not translate into power to "compel individuals not engaged in commerce to purchase an unwanted product." 567 U.S. at 549 (emphasis in original). Otherwise, the government could use "mandatory purchase to solve almost any problem." *Id.* at 553. Just as Congress could not under the Commerce Clause force individuals to purchase unwanted health insurance to solve what the government deemed a public-health problem, it cannot force citizens to purchase unwanted GPS-tracking devices so the government can track their movement. Because Congress cannot delegate power to an agency it does not have, the MSA could not have granted such power to NMFS. The forced-purchase of GPS-tracking devices therefore exceeds the authority Defendants may wield under the MSA.

IV. THE FINAL RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

In addition to constitutional and substantive statutory violations, the Final Rule runs afoul of the Administrative Procedure Act, which provides for a set of default rules that governs federal rulemaking. A reviewing court must "hold unlawful and set aside" regulations that violate the APA's requirements. 5 U.S.C. § 706(2). As explained below, the Final Rule's requirement for electronic fishing reports to include unspecified "other information," in particular business information (*e.g.,* charter fees, crew size, etc.), was not a logical outgrowth of the NPRM and therefore violates the APA's notice-and-comment requirement. The reporting of business information is also arbitrary and capricious under the APA because the Final Rule failed to address the Gulf Council's Data Collection Technical Committee's recommendation not to collect data on charter fees and crew size. *See* Gulf Council, "Modifications to Charter Vessel and Headboat Reporting Requirement," Appendix D Minimum Data Elements, March 10, 2017, ECF No. 70-4 at 35. The Final Rule's GPS-tracking

requirement is likewise arbitrary and capricious because NMFS either ignored or failed to provide a reasoned response to significant objections to that requirement.

A. Mandatory Reporting of Business Information Fails the Logical Outgrowth Test and Thus Was Not Promulgated Through Notice and Comment

The APA requires agencies to publish a notice of proposed rulemaking "in the Federal Register" that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 533(b). If the final rule contains a requirement not in the notice, the question is whether interested parties "should have anticipated" the new requirement was possible and "thus reasonably should have filed their comment on the subject during the notice-and-comment period." *Texas Ass'n of Mfrs. v. CPSC* 989 F.3d 368, 381 (5th Cir. 2021). If so, "the rule is deemed to constitute a logical outgrowth of the proposed rule," and thus satisfies the notice requirement. *Id.* "By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts." *CSX Transp., Inc. v. STB,* 584 F.3d 1076, 1079–80 (D.C. Cir. 2009) (cleaned up).

In addition to information regarding "fish harvested and discarded," the Final Rule requires electronic fish reports to include "any other information requested." 50 C.F.R. §§ 622.26(b)(1) and 622.374(b)(1)(i). There is obviously no way for the public to divine what unspecified "other information" NMFS could request and thus there was no meaningful opportunity to comment. As such, any requirement to submit non-fish related information in the electronic fishing report fails the APA's notice-and-comment standard and is thus invalid. This includes the statement in the Final Rule's preamble that charter-boat operators must provide the following business data: "The charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." 85 Fed. Reg. at 44,011. None of these data categories is mentioned in the regulatory text, and the Final Rule's preamble was the first time mandatory reporting of these data was

articulated in the Federal Register. This omission violates the APA's notice requirement because nothing in the NPRM provided notice that the Final Rule could require reporting of any of the above business data.

Notably, only one commenter to the NPRM, Adam Miller, displayed awareness that NMFS might require business information in electronic fishing reports. *See* ECF No. 68-3 at 13. ("I agree with Electronic Log Books, Just not all the information about expenses and profits[.]"). Mr. Miller, however, did not deduce the collection of business information from the NPRM. Rather, he was one of two dozen attendees of the Gulf Council's Data Collection Technical Committee's September 2016 webinar meeting that discussed electronic collection of business information. Gulf Council, Summary for the Data Collection Technical Committee (Webinar), Sep. 29, 2016, ECF No. 66-2 at 176 (listing attendees). Webinars and similar events are not enough to provide public notice under the APA. Rather, the APA requires publication of an NPRM in the Federal Register so that all members of the public—instead of just a handful of event attendees—would have notice of what an agency is proposing and thus have a meaningful opportunity to comment. *See* 5 U.S.C. § 533(b).

The NPRM merely stated in the preamble that electronic fishing reports would include "socio-economic data," with no further elaboration. 83 Fed. Reg. at 54,071. That is wholly inadequate. "Socioeconomic" is defined by Merriam-Webster as "of, relating to, or involving a combination of social and economic factors."[18] Such a broad term cannot possibly provide a reasonable basis for the public to anticipate that the Final Rule could require reporting "[t]he charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." 85 Fed. Reg. at 44,011. Indeed, none of these five types of economic data relates to social factors, and therefore, they could not reasonably fall within the rubric of "socio-economic data." Unless a

[18] "Socioeconomic." *Merriam-Webster OnlineDictionary*, available at https://www.merriam-webster.com/dictionary/socioeconomic (last visited August 11, 2021).

commenter attended a Gulf Council webinar on the subject like Mr. Miller, he or she would "have had to divine the agency's unspoken thoughts" to understand "socio-economic data" specifically meant charter fee, fuel prices and usages, number of passengers, and crew size. *CSX Transp., Inc.*, 584 F.3d at 1079–80. Reporting of these data was therefore not a logical outgrowth of the NPRM, and therefore the Final Rule violated the APA's notice-and-comment requirement. *See id.*

B. Mandatory Reporting of Business Information Is Arbitrary and Capricious Because Defendants Ignored Relevant Factors Raised by the Gulf Council

As discussed above, the Gulf Council's Data Collection Technical Committee considered electronic reporting of business information at issue in a September 2016 meeting. ECF No. 66-2 at 176. In that meeting, the Technical Committee explicitly recommended *against* collecting charter fee and crew size because such information was "potentially ambiguous" and "difficult to validate." *Id.* at 178. This recommendation was appended as part of the Gulf Council's report to NMFS. ECF No. 70-4 at 35.

An agency violates the APA's prohibition against arbitrary and capricious rulemaking if its decision is not "based on consideration of the relevant factors," or if it failed "to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U. S. 29, 43 (1983). The Gulf Council Data Collection Technical Committee's recommendation not to collect certain business information is undoubtedly a "relevant factor" Defendants were required to consider under 16 U.S.C. § 1881a(a)(1), which authorizes Defendants to promulgate regulations to collect information based specifically on the Gulf Council's request. The Final Rule, however, neither acknowledged nor addressed the Technical Committee's recommendation not to collect charter fee and crew size data from charter boats. Ignoring a known relevant factor renders the Final Rule arbitrary and capricious. *State Farm*, 463 U.S. at 43.

C. The GPS-Tracking Requirement Is Arbitrary and Capricious Because It Did Not Provide Reasoned Responses to Significant Comments

To avoid being arbitrary or capricious, agencies must provide reasoned explanations for each of their decisions. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). "An agency also violates this standard if it fails to respond to 'significant points' and consider 'all relevant factors' raised by the public comments." *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *HBO, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977)). "Comments are 'significant,' and thus require response, if they raise points 'which, if true … and which, if adopted, would require a change in an agency's proposed rule.'" *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 449 (5th Cir. 2021) (quoting *City of Portland v. EPA*, 507 F.3d 706, 714–15 (D.C. Cir. 2007)). Here, the Final Rule completely ignored significant comments objecting to GPS tracking as an invasion of privacy in violation of the Fourth Amendment. And while the Final Rule acknowledged objections to GPS tracking on other grounds, NMFS's responses ignored important points and were unreasoned.

Several charter boat operators commented that continuous GPS tracking invades their privacy and violates their Fourth Amendment rights. *See* ECF No. 67-4 at 8 ("To require detailed GPS data for vessels utilized by the for hire community … is also a violation of our 4th Amendment rights."); *id.* at 21 (same); ECF No. 68-2 at 21 (same). Defendants were required to respond to these comments because they "challenge a fundamental premise underlying the proposed agency decision." *Carlson*, 938 F.3d at 344. An agency response to privacy concerns would have been necessary even without these comments because privacy is an obvious consideration in any long-term GPS-tracking regulation. Indeed, mere months before the 2018 NPRM was promulgated, the Supreme Court held that long-term tracking using methods *less accurate* than GPS constituted an unconstitutional violation of a person's reasonable expectation of privacy. *Carpenter*, 138 S. Ct. at 2219. Yet, the Final Rule failed to even acknowledge—let alone address—commenters' Fourth Amendment concerns. The Final Rule

lists 26 categories of comments. 85 Fed Reg. 44,009-13. But none pertains to the Fourth Amendment or privacy. Indeed, the word "privacy" does not even appear in the Final Rule.

Many commenters also objected to GPS tracking of charter boats as unnecessary and unduly burdensome. Several stated that preexisting reporting of charter boats' general locations before and after each trip meets NMFS's needs. *See, e.g.*, ECF No. 67-2 at 20 ("Putting gps and reporting restrictions on charter boat operators will not give usable information that cannot be gained from current reporting"); ECF No. 67-4 at 12 ("Tracking does not provide any additional data that would be provided by filling out a vessel trip report."). Others pointed out there is little need for tracking charter boats with GPS precision in real time given their limited impact on fisheries in comparison to commercial vessels. *See, e.g.*, ECF No. 67-4 at 4 ("I can see how this works on commercial offshore vessels where their trips are usually 3-5 days—however, we do mostly 4.5 hour trips."); *id.* at 5-6 (same); *id.* at 11, 17, 19, 22 ("Common sense should be used here and not treat … charter boats similar to large commercial fishing vessels[.]"). As these comments make clear, National Standard Seven is also violated by the Defendants' complete failure to address the redundancy and unnecessary costs of the Final Rule. All charter-boat captains already electronically report the fish caught and discarded. They also report the general area they fish in. To burden them with this extra cost and expense to garner virtually no benefit is to violate both the APA and the MSA's National Standards.

The Final Rule's response to these comments was entirely conclusory and unreasoned. It asserted that "[t]the Gulf Council determined, and NMFS agrees, that [the GPS-tracking requirement] best balances the need to collect and report timely information with the need to minimize the cost and time burden to the industry." 85 Fed Reg. at 44,012. Any good-faith balancing would have had to address "significant points" raised by the objecting commenters, including explaining why preexisting location reporting failed to meet the NMFS's needs. Even if commenters did not raise these concerns, National Standard Seven's instruction that conservation measures "minimize costs and avoid

unnecessary duplication," 16 U.S.C. § 1851(a)(7), would have required an analysis of additional benefits 24-hour GPS tracking would provide over traditional reporting and an explanation of why such benefits justify its costs and burdens. Nothing in the Final Rule suggests widespread inaccurate or untimely reporting created a need for 24-hour GPS data. Nor do Defendants profess any need for "real time" location data from charter-fishing boats. This may not be the case for commercial fishing vessels which have quotas and must stop fishing when those quotas are met. The response also needed to explain NMFS's need for real-time GPS location for charter boats to manage fisheries, given their miniscule impact on fishing. Whereas commercial fishing vessels stay at sea for many days at a time and account for 93% of fish caught in the Gulf of Mexico, charter boats take trips that last just a few hours and account for a fraction of one percent of Gulf fishing. Any balancing of need for location data against burden must account for the size of the charter industry. The Final Rule's response is silent on all these counts. There is no rationale other than "because we say so" for this obnoxious and unconstitutional intrusion.

The response does not even identify benefits or burdens NMFS purported to balance, let alone describe how it struck the balance. Instead, the Final Rule asserted that GPS tracking "is an additional mechanism that verifies vessel activity" and "will allow NMFS to independently determine whether the vessel leaves the dock." 85 Fed. Reg. at 44,012. That simply restates the function of a GPS-tracking device and falls short of cost-benefit balancing. *Id.* In order to avoid being arbitrary and capricious, "an agency must respond sufficiently to enable [courts] to see what major issues of policy were ventilated … and why the agency reacted to them as it did." *Del. Dep't of Nat. Res. & Env't Control v. EPA,* 785 F.3d 1, 15 (D.C. Cir. 2015). The Final Rule's failure to describe methods used and factors considered when balancing needs and burdens makes that task impossible. *See Encino*, 136 S. Ct. at 2125 (rulemaking is arbitrary and capricious unless "agency's explanation is clear enough that its path may reasonably be discerned") (internal quotation marks omitted). The Final Rule's explanation of

why GPS tracking of charter boats is necessary and not burdensome simply asserts that tracking would "help validate effort and aid with enforcement." *See* 85 Fed Reg. at 44,012. Conspicuously missing is any consideration of by how much and at what cost. That is not carefully considered balancing but rather rule by fiat prohibited by the APA's arbitrary-and-capricious standard.

Many commenters objected to the expense of VMS devices, contending that additional costs may jeopardize their charter businesses. *See, e.g.,* ECF No. 68-1 at 1 ("GPS monitoring systems will only add additional costs and work burdens to charter/headboat operators with limited financial and personnel resources."); ECF No. 68-2 at 16 ("It's extremely alarming that there is no mention of a price for the device (several thousand dollars) or monthly fee for the GPS tracking device that would be required to have my boat tracked on my dime"). The Final Rule concluded that such costs "would not materially alter cash flows, profits, or the solvency of for-hire businesses." 85 Fed. Reg. at 44,013. NMFS reached this conclusion based on the premise that VMS devices "NMFS is currently testing" would cost $150 to $800 per unit plus $10 to 40 per month to operate. *Id.* But VMS devices in this price range did not exist at time and still do not exist. The only available VMS device identified in the Final Rule costs $3,000 per unit plus $40 to $75 per month in operating fees. *Id.*

"An agency may exercise its judgment without strictly relying upon quantifiable risks, costs, and benefits, but it must cogently explain why it has exercised its discretion in a given manner and must offer a rational connection between the facts found and the choice made." *Corrosion Proof Fittings v. EPA,* 947 F.2d 1201, 1214 (5th Cir. 1991) (internal quotation marks and citations omitted). Here, the Final Rule failed to "cogently explain" why it used hypothetical lower-cost figures rather than the cost of actual VMS devices to estimate impacts on charter-boat businesses. It simply asserted without explanation or proof that devices NMFS was currently testing would cost less. There was no indication that testing is likely to produce successful devices or any explanation why new devices would enter the market with a unit cost as low as five percent of the existing $3,000 model. The assertion is

particularly perplexing because the Final Rule explicitly stated that NMFS would have no role in setting prices. *Id.* at 44,013 ("The unit vendor determines these costs."). The Final Rule's unexplained confidence in the generosity of vendors is misplaced. Any vendor would have a captive market—charter boats have no choice but to purchase the device—and thus would have little incentive to reduce prices. And because the market is relatively small—only 1,300 boats in the Gulf—the vendor could not rely on economies of scale to lower manufacturing costs. Failure to explain why it relied on unrealistically low rather than actual VMS costs when responding to concern about high VMS prices renders NMFS's response arbitrary and capricious, as well as a violation of National Standard Seven.

V. THE FINAL RULE'S CONSIDERATION OF THE GPS-TRACKING REQUIREMENT VIOLATES THE REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act (RFA) "requires an agency that has proposed a rule to prepare and make available for public comment an initial and final regulatory flexibility analysis." *NFIB v. Perez*, 2016 WL 3766121, at *38 (N.D. Tex. June 27, 2016) (describing requirements of RFA). Such analysis "must identify the potential economic impact of agency regulation on small entities, and discuss alternatives which might minimize adverse economic consequences." *A.M.L. Int'l, Inc. v. Daley*, 107 F. Supp. 2d 90, 104 (D. Mass. 2000) (citing 5 U.S.C. §§ 603, 604); *see also Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 111–14 (1st Cir. 1997) ("Congress, in enacting section 604, intended to compel administrative agencies to explain the bases for their actions and to ensure that alternative proposals receive serious consideration."). "[A] small entity that is adversely affected or aggrieved by

final agency action is entitled to judicial review" under the RFA. 5 U.S.C. § 611(a). Defendants concede that "all entities expected to be affected by this final rule are small entities."[19] 85 Fed. Reg. at 44,015.

The RFA does not impose a particularly rigorous standard: "it does not command an agency to take specific substantive measures, but rather, only to give explicit consideration to less onerous options." *Alenco Comms., Inc. v. FCC*, 201 F.3d 608, 625 n. 20 (5th Cir. 2000) (quoting *A.M.L. Int'l*, 107 F. Supp. 2d at 105). A court reviews only "to determine whether an agency has made a 'reasonable, good-faith effort' to carry out the mandate of the RFA." *Id.* at 625 (quoting *Associated Fisheries,* 127 F.3d at 114). The Final Rule nonetheless falls short because it did not consider *any* alternatives to forcing over a thousand small businesses owners to purchase expensive VMS devices, "permanently affix" those devices on their private boats, and pay fees to have those devices transmit GPS-location data to NMFS "24 hours a day, every day of the year." *See* 85 Fed. Reg. at 44,018-19.[20] Such an overt omission by itself renders the rulemaking inadequate under the RFA because "a final regulatory flexibility analysis … must include an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities." *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 43 (D.C. Cir. 2005) (citing 5 U.S.C. § 604(a)(3)). A rule is invalid as to small businesses where no alternatives were considered. *Id.* (remanding rule for agency to consider alternatives).

The regulatory flexibility analysis was further inadequate because it was neither reasonable nor conducted in good faith. The analysis compared the estimated $26,000 that an average charter boat company earns each year against the hypothetical cost of a VMS device "NMFS is currently testing,"

[19] An agency is allowed to define what constitutes a small business for the purpose of its own regulations. 5 U.S.C. § 601(3). NMFS's "small business standard" includes fishing businesses with an annual revenue of less than $11 million. 50 C.F.R. § 200.2

[20] The Final Rule considered lower-cost alternatives for less burdensome portions of the rule, including the electronic-reporting and trip-declaration provisions. *See* 85 Fed. Reg. 44,015-17. This fact only makes the omission of a similar analysis for the GPS-tracking requirement all the more stark.

which was $800 per unit plus $40 per month. *Id.* at 44,013, 44,015. It concluded that "the estimated startup costs … are equivalent to … 3.1 percent of average annual charter vessel net income" and "recurring monthly cost … will be equivalent to … 1.8 percent of average annual charter vessel net income." *Id.* In total, this implied the GPS-tracking requirement would cost the average charter boat company 4.9 percent of its net income in the first year. The analysis noted that some charter boat owners will have to purchase unlimited data plans that "will range from approximately $60 to $85 per month," but did not incorporate this data-plan cost into the comparison with annual net income. *Id.*

As explained above, however, it was not reasonable to rely on make-believe costs of devices being tested rather than actual costs of commercially available devices: $3,000 per unit plus up to $75 per month. Nor was it reasonable to ignore the cost of unlimited data plans. Using the actual cost of VMS devices and incorporating data-plan expenses results in a very different economic impact analysis. The $3,000 startup cost of a VMS device is equivalent to 11.5% of average annual charter vessel net income while the recurring cost of $160 per month ($75 VMS fee plus $85 data plan) is equivalent to 7.4% of average net income. In total, the GPS-tracking requirement would decrease the average charter boat company's net income by 19 percent in the first year—nearly four times greater than the Final Rule's 4.9 percent estimate. These costs would have an even more severe impact on the half of charter-boat businesses with below-average net earnings and could drive many marginal boats out of business altogether. The regulatory flexibility analysis did not consider this possibility because it relied on unrealistically low costs. Because the Final Rule's economic analysis "failed to provide an adequate factual basis for its cost estimates" on small businesses, Defendants "failed to conduct a proper regulatory flexibility analys[i]s." *NFIB*, 2016 WL 3766121, at *38.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment and enjoin the application of the Final Rule against the Class Plaintiffs.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2021, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/John J. Vecchione