No. 22-30105

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEXICAN GULF FISHING COMPANY, partially owned by Billy Wells; BILLY WELLS, Captain, partially owns Mexican Gulf Fishing Company; A&B CHARTERS INCORPORATED, owned by Allen Walburn; ALLEN WALBURN, Captain, owns A&B Charters, Incorporated; KRAIG DAFCIK, Captain, part owner of the Alabama with A&B Charters; VENTIMIGLIA, L.L.C., owned by Frank Ventimiglia, doing business as Sanibel Offshore Fishing Charters; FRANK VENTIMIGLIA, Captain, owns Ventimiglia, L.L.C.; FISHING CHARTERS OF NAPLES, owned by Jim Rinckey; JIM RINCKEY, Captain, owns Fishing Charters of Naples; CAPT. JOEY D. CHARTER, INCORPORATED, owned by Joey Dobin; JOEY DOBIN, Captain, owns Capt. Joey D. Charter, Incorporated,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF COMMERCE; GINA RAIMONDO, in her official capacity as Secretary of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NOAA, a scientific agency within the Department of Commerce; RICHARD W. SPINRAD, in his official capacity as Administrator of National Oceanic and Atmospheric Administration; NATIONAL MARINE FISHERIES SERVICE, a line office within the National Oceanic and Atmospheric Administration, also known as NOAA Fisheries; NICOLE R. LEBOUEF, in her official capacity as Assistant Administrator for National Oceanic and Atmospheric Administration,
Defendants-Appellees.

Appeal from the U.S. District Court for the Eastern District of Louisiana
No. 2:20-cv-02312 (Hon. Susie Morgan, U.S. District Judge)

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CERTIFICATE OF INTERESTED PERSONS

Mexican Gulf Fishing Co. v. U.S. Department of Commerce, No. 22-30105

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

1. Appellants
    a. Mexican Gulf Fishing Co.
    b. Billy Wells, Captain, *partially owns Mexican Gulf Fishing Co.*
    c. A&B Charters Inc.
    d. Allen Walburn, *Captain, owns A&B Charters, Inc.*
    e. Kraig Dafcik, *part owner of the Alabama with A&B Charters*
    f. Ventimiglia, L.L.C., *doing business as Sanibel Offshore Fishing Charters*
    g. Frank Ventimiglia, *Captain, owns Ventimiglia, L.L.C.*
    h. Fishing Charters of Naples
    i. Jim Rinckey, *Captain, owns Fishing Charters of Naples*
    j. Capt. Joey D. Charter, Inc.
    k. Joey Dobin, *owns Capt. Joey D. Charter, Inc.*
2. Counsel for Appellants
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    b. Sheng Li, *New Civil Liberties Alliance*

c. Kara Rollins, *New Civil Liberties Alliance*

d. A. Gregory Grimsal, *Gordon Arata Montgomery Barnett McCollam Duplantis & Eagan*

3. Appellees

a. U.S. Department of Commerce

b. Gina Raimondo, *Secretary of Commerce*

c. National Oceanic & Atmospheric Administration

d. Richard W. Spinrad, *Administrator of NOAA*

e. National Marine Fisheries Service

f. Nicole R. LeBouef, *Assistant Administration of NOAA*

4. Counsel for Appellees

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c. Andrew C. Mergen, *U.S. Department of Justice*

d. Elizabeth Chickering, *U.S. Department of Justice*

e. Daniel Halainen, *U.S. Department of Justice*

f. Rachel Heron, *U.S. Department of Justice*

g. Shampa A. Panda, *U.S. Department of Justice*

h. Nicole M. Smith, *U.S. Department of Justice*

i. Mara Levy, *U.S. Department of Commerce*

j. Katharine M. Zamboni, *U.S. Department of Commerce*

/s/ *Daniel Halainen*
DANIEL HALAINEN

Attorney of Record for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument. This appeal involves several claims raising broad challenges to the agency's authority, and argument may be helpful to the Court.

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GLOSSARY

APA	Administrative Procedure Act
EEZ	Exclusive Economic Zone
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NMFS	National Marine Fisheries Service
VMS	Vessel monitoring system

INTRODUCTION

Since the Founding era, Congress has regulated the fishing industry and vessels that fish in federal waters. In modern times, Congress has tasked the National Marine Fisheries Service ("NMFS") with the conservation and management of the Nation's fisheries to guard against overfishing and to promote the long-term health and stability of fishing stocks. The Magnuson-Stevens Fishery Conservation and Management Act ("MSA") establishes a comprehensive regulatory program that requires fishing vessels seeking to participate in federal fisheries to comply with fishery management plans implemented through NMFS regulations. Data collection to detect overfishing is integral to the effective conservation and management of the Nation's fishery resources, and to that end, the MSA grants NMFS information-collection authority.

After extensive consideration by the local fishery management council responsible for the Gulf of Mexico, NMFS adopted regulations to improve the data collected from for-hire fishing vessels (including charter boats) that have federal permits to fish for certain federally regulated species in the Gulf. Under these regulations, permit-holding vessels must submit declarations when departing on a fishing trip, submit reports upon returning, and install a vessel monitoring system ("VMS")—a GPS device—that provides trip location data once per hour. These measures mirror existing regulations that apply to vessels in other fisheries around the country, including other fishing vessels in the Gulf.

Plaintiffs, a class of federally permitted charter vessel owners and operators, brought a kitchen-sink challenge to the final rule adopting these regulations, and the district court correctly granted summary judgment to NMFS in a well-reasoned decision. *First*, as the district court concluded, the MSA authorizes NMFS to require vessels to use equipment like VMS devices, and Plaintiffs' claims to the contrary cannot be reconciled with the plain meaning of the statute (and are not justified by Plaintiffs' broad gestures to constitutional avoidance). *Second*, exercising this clear statutory authority, NMFS adopted the rule through a notice-and-comment rulemaking that gave proper notice and robust consideration to comments. *Third*, VMS does not violate the Fourth Amendment's right against unreasonable searches, particularly given the long tradition of pervasive regulation of fishing vessels. And lastly, Plaintiffs ask the Court to permit them to litigate a new Fifth Amendment takings claim, but the district court did not abuse its discretion in rejecting this claim.

The judgment below should be affirmed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; the MSA, 16 U.S.C. § 1801 et seq.; and the Constitution. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered final judgment. ROA.12509-10. Plaintiffs timely appealed. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the MSA authorizes NMFS to require federally permitted for-hire vessels to use a vessel monitoring system.

2. Whether NMFS complied with the APA in adopting the final rule.

3. Whether the final rule's vessel monitoring system requirement is consistent with the Fourth Amendment.

4. Whether the district court correctly concluded that Plaintiffs did not adequately present a claim under the Just Compensation Clause.

STATEMENT OF THE CASE

A. Statutory and regulatory background

The MSA establishes a national program for conservation and management of fishery resources, with federal jurisdiction over resources within the Nation's exclusive economic zone ("EEZ"). 16 U.S.C. §§ 1801(a)(6), 1811(a). For purposes of the MSA, the EEZ extends from the seaward boundary of each State out 200 nautical miles. *Id.* § 1802(11). The MSA's purposes include "conserve[ing] and manag[ing] the fishery resources found off the coasts of the United States" and "promot[ing] domestic commercial and recreational fishing under sound conservation and management principles." *Id.* § 1801(b)(1), (3). Congress also declared that "collection of reliable data is essential to the effective conservation, management, and scientific understanding" of fishery resources. *Id.* § 1801(a)(8). NMFS, acting under authority delegated from the Secretary of Commerce, manages fisheries under the MSA.

Regulation of fisheries is accomplished through fishery management plans, amendments, and implementing regulations. *N.C. Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008). The MSA lists required provisions for plans, including measures "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. § 1853(a)(1)(A). Where NMFS determines that a species is overfished, a plan must be developed to rebuild the affected stocks and end overfishing. *Id.* § 1854(e).

To assist in fishery management, the MSA establishes regional fishery management councils. *Id.* § 1852(a). "Each Council is granted authority over a specific geographic region and is composed of members who represent the interests of the states included in that region." *C&W Fish Co. v. Fox*, 931 F.2d 1556, 1557-58 (D.C. Cir. 1991). Councils prepare and submit to NMFS fishery management plans "for each fishery under [their] authority that requires conservation and management," as well as proposed regulations to implement the plans. 16 U.S.C. §§ 1852(h)(1), 1853(c). When councils transmit plans to NMFS, the agency must approve, disapprove, or partially approve them based on consistency with law. *Id.* § 1854(a)(1)(B), (a)(3). NMFS then reviews proposed regulations for consistency with the plan and applicable law, and under a statutorily-prescribed process, publishes proposed rules, solicits public comment, and promulgates final rules. *Id.* § 1854(b).

Fishery management plans must contain measures "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." *Id.* § 1853(a)(1)(A). To that end, the MSA requires plans to "specify the pertinent data" that must be submitted to NMFS "with respect to commercial, recreational, [and] charter fishing." *Id.* § 1853(a)(5); *see also id.* § 1851(a)(2) (measures must be based on "best scientific information available"). Congress also authorized NMFS to "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement" of the MSA. *Id.* § 1853(b)(4).

B. Factual background

Two fishery management councils, the Gulf Council and the South Atlantic Council, jointly developed a fishery management plan for coastal migratory pelagic fish species, which currently includes three species. *See* NOAA Fisheries, *Gulf of Mexico and South Atlantic Coastal Migratory Pelagic Fishery Management Plan* (Sept. 2, 2021), https://www.fisheries.noaa.gov/management-plan/gulf-mexico-and-south-atlantic-coastal-migratory-pelagic-fishery-management-plan. The Gulf Council also developed a fishery management plan for reef fish that currently includes thirty-one species. NOAA Fisheries, *Gulf of Mexico Reef Fish Fishery Management Plan* (Aug. 12, 2021),

https://www.fisheries.noaa.gov/management-plan/gulf-mexico-reef-fish-fishery-management-plan. These plans date to the 1980s.

NMFS issues permits to vessels seeking to participate in these federally regulated fisheries, including both commercial vessels and for-hire vessels. *See generally* 50 C.F.R. § 622.20 (reef fish); *id.* § 622.370 (coastal migratory pelagic species); *id.* § 622.373 (same). The term "for-hire" refers to charter vessels and headboats. Federal for-hire permits allow charter vessels to take paying passengers to fish for federally managed species in the Gulf of Mexico EEZ. *Id.* §§ 622.20(b), 622.370(b), 622.373. No federal permit is required to take paying passengers to fish for non-federally-managed species or in state waters.[1]

In 2018, the Gulf Council and the South Atlantic Council submitted to the Secretary an amendment to these two plans—for reef fish and coastal migratory pelagic species—that would modify for-hire permittees' reporting requirements to include new electronic reporting requirements. 83 Fed. Reg. 28,797 (June 21, 2018). After notice and comment, the Secretary approved the amendment.

[1] Plaintiffs' brief characterizes for-hire vessel activity inaccurately in several respects. Brief 4-7. Plaintiffs produced their own calculations (Brief 4 n.3) and a chart (Brief 6) purporting to show "the Government's own statistics" about charter fishing as a share of fishing in the Gulf. NMFS does not manage all fish species, and Plaintiffs' data includes species that are not federally managed. On Plaintiffs' chart, for example, only four of the species are federally managed. Calculations based on "all species" in the Gulf do not reflect the fisheries at issue here, which include only the 34 species covered by the two fishery management plans. NMFS disputed Plaintiffs' supposedly "undisputed" characterizations. ROA.12277-80. But the Court need not resolve these issues because Plaintiffs' numbers are legally irrelevant.

NMFS then published a proposed rule to implement the amendment. 83 Fed. Reg. 54,069 (Oct. 26, 2018). The proposed rule explained that accurate and reliable data about fishing effort (i.e., fishing trips), catch, and discards is important to effective conservation and management of the Nation's fishery resources. *Id.* at 54,070. NMFS previously had collected data from for-hire vessels through surveys, samples, and dockside monitoring. *Id.* The proposed rule would improve this process by adopting electronic recordkeeping and reporting requirements, resulting in more "[a]ccurate and reliable fisheries information" about a "substantial portion of the total recreational catch for some species." *Id.* After considering public comments, NMFS published a final rule. 85 Fed. Reg. 44,005 (July 21, 2020). The final rule adopts three management measures to strengthen the data that are integral to meeting the MSA's requirements.

First, for-hire vessels must submit a "trip declaration" to NMFS indicating whether a trip is commercial, for-hire, private recreational, or non-fishing. 85 Fed. Reg. at 44,006. If the vessel is not making a for-hire fishing trip, no additional information is required. *Id.* Vessels departing on for-hire trips must report an expected completion date, time, and landing location. *Id.* These trip declarations "improve effort estimation for for-hire vessels and improve the ability of port agents and law enforcement to meet a vessel at [the] end of a trip for biological sampling and landings validation." *Id.*

Second, for-hire vessels must submit an electronic fishing report before offloading fish on a for-hire trip, or within thirty minutes of the trip's conclusion if no fish are landed. 85 Fed. Reg. at 44,005. The electronic fishing report "must include any species that were caught or are harvested in or from any area," along with "information about the permit holder, vessel, location fished, fishing effort, discards, and socio-economic data." *Id.* These reports (or "logbooks") are submitted on NMFS-approved software. *Id.* at 44,006.

Third, for-hire vessels must have an approved VMS unit to validate the reported information. 85 Fed. Reg. at 44,006. The VMS unit collects vessel location data at least once per hour every day. *Id.* at 44,006-07. This location data allows NMFS "to independently determine whether the vessel leaves the dock," which "will help validate [fishing] effort and aid with enforcement of the reporting requirements." *Id.* at 44,012. In other words, NMFS uses VMS location data to verify "when a fishing trip was taken, and the length of that trip," not to determine fishing locations. *Id.* at 44,009. The VMS unit, which can be satellite-based or cellular, must be permanently affixed to the vessel and either transmit data to NMFS as it is collected or archive data until it can be transmitted. *Id.* at 44,006-07. The owner or operator may apply for an exemption to power-down the unit under specified conditions, like when a vessel is removed from the water for repair. *Id.* Notably, commercial reef fish vessels in the Gulf already were required to have a VMS unit "to enforce area-specific regulations for the commercial fishery," 71 Fed. Reg. 45,428, 45,429 (Aug. 9, 2006), and VMS

units are required in many fisheries for various purposes. *See, e.g.*, 50 C.F.R. §§ 622.205, 635.69, 648.10, 660.14, 660.712(d), 660.713(g), 679.28(f), 680.23(d).

In the final rule, NMFS set January 5, 2021, as the effective date for the trip declaration and electronic fishing report requirements. 85 Fed. Reg. at 44,005. The rule delayed implementation of the VMS requirement indefinitely pending NMFS's publication of an effective date in the Federal Register to allow time for device approvals and for vessels to obtain devices. *Id.* at 40,007. In September 2021, NMFS set a December 2021 effective date for the VMS requirement. 86 Fed. Reg. 51,014 (Sept. 14, 2021). Plaintiffs petitioned NMFS to further delay the effective date, and NMFS set an effective date of March 1, 2022. 86 Fed. Reg. 60,374 (Nov. 2, 2021).

C. Procedural background

Plaintiffs, a group of charter boat captains holding Gulf for-hire permits, filed suit challenging the final rule in August 2020. Plaintiffs alleged that the VMS requirement is unconstitutional, that the MSA does not authorize the VMS requirement, and that the final rule violates the MSA, the APA, and the Regulatory Flexibility Act. ROA.39-43. The district court certified a class in June 2021, and Plaintiffs filed an amended complaint. ROA.404-29.

In February 2022, the district court granted summary judgment for the government. ROA.12426-506. In a thorough 81-page decision, the district court carefully considered and rejected Plaintiffs' challenges to the final rule. *First*, the district court concluded that the MSA authorized NMFS to adopt the VMS

requirement and rejected Plaintiffs' constitutional avoidance arguments. ROA.12458-69. *Second*, the court concluded that the final rule complied with the APA's procedural and substantive requirements. ROA.12446-58, 12469-81. *Third*, the court held that the VMS requirement does not violate the Fourth Amendment. ROA.12487-506. *Fourth*, the district court concluded that Plaintiffs had abandoned a Fifth Amendment due-process challenge and failed to plead a Fifth Amendment takings challenge. ROA.12484-87.

The VMS requirement took effect on March 1. Plaintiffs appealed and moved for an injunction pending appeal. This Court denied the motion in an unpublished order. Order (May 4, 2022) (per curiam).

SUMMARY OF ARGUMENT

The district court correctly rejected Plaintiffs' sundry challenges to the final rule.

1. The MSA's plain language authorizes the VMS requirement. Congress expressly authorized NMFS to require for-hire vessels to use equipment specified by the agency, including devices that facilitate enforcement of the MSA. NMFS exercised this authority in requiring vessels to use VMS units that are critical to validating fishing effort and increase the enforceability of the reporting program. If that were not enough, Congress also authorized NMFS to adopt measures that are "necessary and appropriate" under the MSA, and the VMS requirement fits

comfortably within that authority. Plaintiffs' constitutional avoidance arguments are unfounded.

2. The final rule complies with APA rulemaking requirements. NMFS engaged in a textbook notice-and-comment rulemaking that robustly responded to comments. Plaintiffs object that the final rule's fishing report requirements were not a logical outgrowth of the proposed rule, but the rule ultimately adopted was the same as the proposed rule. Plaintiffs also challenge NMFS's response to comments about Fourth Amendment issues, but the agency directly responded to these commenters' privacy concerns. Similarly, Plaintiffs contend that NMFS's consideration of the VMS requirement's costs was defective, but NMFS engaged with these issues and reasonably explained its conclusions.

3. The VMS requirement also does not violate the Fourth Amendment. Even assuming that VMS is a Fourth Amendment search, the district court properly concluded that fishing is a pervasively regulated industry and that the VMS requirement is reasonable under the Supreme Court's criteria for administrative inspections. Plaintiffs' contrary arguments find no footing in precedent or the facts. In any event, Plaintiffs' Fourth Amendment challenge has other flaws. Most fundamentally, Plaintiffs have not established that the VMS requirement intrudes on a reasonable expectation of privacy or effects a physical trespass of their property. And Plaintiffs' facial challenge improperly rests on hypotheticals and as-applied objections.

4. Plaintiffs first raised a Fifth Amendment takings claim in their motion for summary judgment, and the district court reasonably concluded that this claim came too late. Plaintiffs contend that they pleaded a takings claim in their complaint, but the district court correctly held that their complaint lacked any allegations providing notice of a takings claim. In any event, the district court lacks jurisdiction over a claim under the Just Compensation Clause of the Fifth Amendment.

For these reasons, the district court's judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment, *Baylor Cnty. Hosp. Dist. v. Price*, 850 F.3d 257, 261 (5th Cir. 2017), and purely legal issues of statutory interpretation and constitutionality, *Chamber of Com. v. Dep't of Labor*, 885 F.3d 360, 368 (5th Cir. 2018); *NRA v. ATF*, 700 F.3d 185, 192 (5th Cir. 2012). Review of agency action under the APA is subject to a "highly deferential standard of review." *Coastal Conservation Ass'n v. Dep't of Commerce*, 846 F.3d 99, 111 (5th Cir. 2017) (quotation marks omitted).

ARGUMENT

I. The final rule complies with the MSA.

Congress authorized NMFS to require fishing vessels to use equipment like VMS, and Plaintiffs' challenge to the agency's authority is unfounded. Even if the MSA were ambiguous, the agency's interpretation of the statute is reasonable. Plaintiffs briefly suggest that the district court's conclusions raise constitutional

avoidance concerns, but they misread the authority on which they rely. The VMS requirement fits comfortably within Congress's authority to legislate and NMFS's authority to regulate.

A. The MSA authorizes the VMS requirement

The MSA authorizes NMFS to "require the use of specified types and quantities of fishing gear, fishing vessels, or equipment." 16 U.S.C. § 1853(b)(4). And the statute further specifies that the range of equipment NMFS may require includes "devices which may be required to facilitate enforcement of the provisions" of the MSA. *Id.* When interpreting a provision like § 1853(b)(4), the "words Congress chose" generally must be given their "ordinary" or "plain meaning." *Vitol, Inc. v. United States*, 30 F.4th 248, 253-54 (5th Cir. 2022). And a VMS unit is "equipment" or a "device[]" by any ordinary definition. *See* 85 Fed. Reg. at 44,006-07 (providing link to list of devices); *see also* NOAA, *NOAA Fisheries Type-Approved VMS Units* (Feb. 28, 2022), https://www.fisheries.noaa.gov/national/enforcement/noaa-fisheries-type-approved-vms-units. The VMS requirement therefore falls squarely within NMFS's authority under the plain text of § 1853(b)(4).

In the MSA, Congress also authorized NMFS to adopt additional measures "necessary and appropriate for the conservation and management of the fishery." 16 U.S.C. § 1853(a)(1)(A), (b)(14). This authority is broad. *Conservation L. Found. of New Eng. v. Franklin*, 989 F.2d 54, 61 (1st Cir. 1993) (describing "broad discretion" under identically phrased MSA provision); *Lovgren v. Byrne*, 787 F.2d 857, 864 (3d Cir. 1986)

(similarly describing "broad authority" under § 1853(b)(14)). Yet Congress also circumscribed the agency's authority in important ways. Measures must be necessary and appropriate for "conservation and management" as defined in 16 U.S.C. § 1802(5). And MSA regulations must also comply with national standards that provide substantive limits on the agency's rulemaking authority. *Id.* § 1851. The VMS requirement falls within these boundaries.

Congress has made clear that data collection is important for conservation and management of fisheries. *Id.* § 1801(a)(8); *see also, e.g.*, *id.* §§ 1851(a)(2), 1853(a)(5) (requiring that measures be based on best scientific information available and that fishery management plans "specify the pertinent data which shall be submitted" to NMFS). NMFS adopted the reporting requirements in the final rule because improving the accuracy and reliability of data about catch, fishing effort, and discards is important to stock assessments and analyses required under the MSA. 83 Fed. Reg. at 54,070; *see also* ROA.8244-45, 8251-52, 8254-55. The VMS requirement improves the accuracy and reliability of fishery data by providing trip validation—in other words, corroborating whether a vessel has left the dock—and thereby "aid[s] with enforcement of the reporting requirements." 85 Fed. Reg. at 44,012; *see also* ROA.8380, 11758. More specifically, the VMS unit "verifies vessel activity without a report having to be completed by the vessel operators" and "allow[s] NMFS to independently determine whether the vessel leaves the dock." *Id.* This "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.

For these reasons, the plain language of § 1853(b)(4)—on its own and in conjunction with § 1853(a)(1) and (b)(14)—authorizes NMFS to adopt the VMS requirement. But even if the Court were to conclude that the MSA does not unambiguously authorize the final rule, NMFS's interpretation is reasonable under the standards that "govern[] judicial review of agency interpretations of statutes." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1014 (5th Cir. 2019). When interpreting a statute, the Court first asks "whether Congress has directly spoken to the precise question at issue." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)). "[I]f the statute is 'silent or ambiguous,'" the Court "must determine whether the [agency's] interpretation is 'based on a permissible construction.'" *Garcia v. Barr*, 969 F.3d 129, 132 (5th Cir. 2020) (quoting *Chevron*, 467 U.S. at 834). "If both criteria are met," the Supreme Court "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Acosta v. Hensel Phelps Contrs.,* 909 F.3d 723, 730 (5th Cir. 2018) (quotation marks omitted).

NMFS's interpretation of its authority under § 1853(b)(4), as well as § 1853(a)(1) and (b)(14), is reasonable. As discussed (pp. 13-14), the statute authorizes NMFS to require equipment for fishing vessels that is necessary and appropriate for

the conservation and management of federally regulated fisheries, and NMFS explained why these measures were appropriate in the final rule. The Court need not determine whether this reading of the MSA is "the only possible interpretation, nor even the interpretation deemed most reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). The "whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quotation marks omitted). Because the MSA's broad grant of authority does not foreclose the agency's reading and that reading is reasonable, it must be upheld.

B. Plaintiffs misread the statute.

Plaintiffs do not quarrel with the core of this analysis. Plaintiffs do not contest that a VMS unit is "equipment" or a "device[]" under § 1853(b)(4); that NMFS may require them to use equipment under this authority; that VMS is used to enforce the reporting requirements; or that Congress empowered NMFS to interpret the MSA. Brief 41-45. Rather, Plaintiffs urge the Court to add new limitations to the MSA.

First, Plaintiffs contend that VMS is not a "device[]" for enforcement of MSA "provisions." Brief 41-42, 45. But § 1853(b)(4) authorizes NMFS to require fishing vessels to use "equipment" generally, not just "devices" that facilitate enforcement. And Plaintiffs' suggestion that VMS does not aid enforcement of MSA "provisions" because VMS it relates to MSA regulations ignores the statutory provisions addressing data collection that the regulations implement. *See* 16 U.S.C. §§ 1801(a)(8), 1851(a)(2),

1853(a)(5). The VMS requirement furthers the MSA's direction that plans be developed to advance the conservation and management of regulated fisheries; as NMFS made clear (pp. 8-9), the requirement helps ensure that the agency has better data on catch and fishing effort within the fishery by facilitating enforcement of the reporting requirements. *See id.* § 1853(a)(1); *see also id.* § 1801(1).

Second, Plaintiffs protest that the provision authorizing NMFS to "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate," 16 U.S.C. § 1853(b)(14), is just a limitation on the authority that other MSA provisions grant to NMFS. Brief 42; *see also* 16 U.S.C. § 1853(a)(1)(A). Plaintiffs do not elaborate on how authority to "prescribe" "other" measures is a limitation of authority and not a source of it. Instead, Plaintiffs rely on *Gulf Fishermens Association v. NMFS*, 968 F.3d 454 (5th Cir. 2020), which they misread. That case said only that this "necessary and appropriate" authority did not authorize measures not tethered to specific fishery management plans; that issue is not presented here, where there are specific plans. *Id.* at 468. Regardless, the plain text of § 1853(b)(4) itself authorizes NMFS to impose the VMS requirement, even before considering the "necessary and appropriate" language in § 1853(b)(14).

Third, Plaintiffs suggest that trip validation and enforcement of reporting requirements is not "necessary" under § 1853(a)(1)(A) and (b)(14). Brief 43. This assertion flies in the face of § 1853(b)(4), which expressly authorizes NMFS to require devices used for enforcement. But in any event, Plaintiffs' assurances that VMS

validation is unnecessary because permittees always follow the law is either utopian or naïve, and Plaintiffs' suggestion that VMS provides "duplicative" information misunderstands the point of verification. Plaintiffs' assertion that VMS is a precursor to ubiquitous wiretapping is also fanciful. The VMS unit provides vessel location data every hour for the specific purpose of validating trips and improving the accuracy of NMFS data on fishing effort. 85 Fed. Reg. at 44,012. The MSA does not authorize Plaintiffs' surveillance dystopia.

Fourth, Plaintiffs argue that the VMS requirement cannot be "appropriate" because the costs outweigh the benefits. Brief 44-45. Plaintiffs urge the Court to write a new cost-benefit analysis into § 1853(a)(1)(A) and (b)(14), but unlike in *Michigan v. EPA*, 576 U.S. 743 (2015), NMFS has not interpreted the MSA to preclude the consideration of costs. To the contrary, the MSA already requires the consideration of costs in the national standards that apply to MSA rules. 16 U.S.C. § 1851(a)(7), (a)(8). Plaintiffs' argument is not about statutory construction; rather, they question how the agency weighed costs under existing standards on the record before it. Brief 44-45. That is not a question of statutory authority. In any event, NMFS gave appropriate consideration to costs (pp. 26-29).

C. There is no Commerce Clause issue to avoid.

Plaintiffs urge the Court to reject the natural construction of the MSA by raising the specter of constitutional avoidance and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"). Brief 40-41. This case is not *NFIB*,

an Affordable Care Act case, by any stretch of the imagination. The MSA has been on the books for decades, and § 1853(a)(1)(A), (b)(4), and (b)(14) fall well within Congress's Article I authority. U.S. Const. art. I, § 8, cls. 3, 8. Yet Plaintiffs contend that Congress could not authorize NMFS to require permit-holding vessels to "use" VMS, equating VMS compliance costs with "compelled commerce." Brief 40.

Plaintiffs misunderstand *NFIB*. In *NFIB*, the Supreme Court upheld the Affordable Care Act's minimum coverage provision as an exercise of Congress's taxing power. 567 U.S. at 563-74. Five Justices concluded that this provision could not otherwise be sustained under the Commerce Clause, but even these Justices agreed that economic activities—like fishing—are properly subject to regulation. *See, e.g.*, *id.* at 536-37 (Roberts, C.J.) ("[o]ur precedents recognize Congress's power to regulate class[es] of *activities*" (quotation marks omitted)); *id.* at 647-48 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (discussing regulation of "economic activity" under "expansive Commerce Clause jurisprudence"). The four dissenting Justices further acknowledged that Congress has "broad power to enact all appropriate legislation to protec[t] and advanc[e] commerce." *Id.* at 562 (quotation marks omitted). *NFIB* did not disturb Congress's power to regulate commercial activity, as this Court's post-*NFIB* decisions confirm. *Perry v. H.J. Heinz Co. Brands*, 994 F.3d 466, 474 (5th Cir. 2021); *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020); *United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019) (per curiam).

Plaintiffs seek to recast regulatory compliance costs as the sort of "compelled purchase" discussed in *NFIB*, but these issues are categorically distinct. Even the *NFIB* dissenters readily acknowledged that "[g]overnment regulation typically imposes costs on the regulated industry." 567 U.S. at 652 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). And Plaintiffs cite no other authority for their novel argument that compliance costs are unconstitutional, just *NFIB*. Every court to have considered Plaintiffs' view has rejected it as a matter of law. *See, e.g., Relentless Inc. v. Dep't of Commerce*, 561 F.Supp.3d 226, 234-35 (D.R.I. 2021), *appeal docketed*, No. 21-1886 (1st Cir.); *Goethel v. Pritzker*, No. 15-cv-497, 2016 WL 4076831, at *7 (D.N.H. July 29, 2016), *aff'd on other grounds*, 854 F.3d 106 (1st Cir.), *cert. denied* 138 S. Ct. 221 (2017). In any event, Plaintiffs' argument fails on the facts: They are not compelled to obtain a NMFS permit, and they are free to take customers fishing for species that do not require a permit or fishing in state waters.

D. There is no delegation issue to avoid.

Plaintiffs press their constitutional avoidance arguments further still, raising delegation concerns, but they have conceded their only argument. Brief 45-46. Although "Congress has delegated power to the President '[f]rom the beginning of the government,'" *Big Time Vapes v. FDA*, 963 F.3d 436, 442 (5th Cir. 2020) (quoting *United States v. Grimaud*, 220 U.S. 506, 517 (1911)), Congress must "provid[e] an 'intelligible principle' by which the recipient of the power can exercise it." *Jarkesy v.*

SEC, No. 20-61007, 2022 WL 1563613, at *9 (5th Cir. May 18, 2022) (quoting *Mistretta v. United States*, 488 U.S. 361, 377 (1989)).

Plaintiffs suggest that the MSA, if construed to authorize the VMS requirement, lacks an "intelligible principle" limiting NMFS's discretion. Brief 45. This "intelligible principle" standard is "not demanding," *Big Time Vapes*, 963 F.3d at 442 (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality)), and easily met here. Congress directed NMFS to determine what equipment for fishing vessels is "necessary" and "appropriate" for the conservation and management of the fishery, based on its scientific expertise and with input from fishery councils. 16 U.S.C. § 1853(b)(4); *see also id.* § 1801(b)(3), (b)(5). That is an intelligible principle. Further, Congress enacted ten "national standards for fishery conservation and management" with which MSA regulations must comply. *Id.* § 1851.

Plaintiffs concede that these national standards provide an intelligible principle. Brief 46. Yet Plaintiffs still contend that "the district court's decision not to require the agency to follow these National Standards means no intelligible principle" exists. *Id.* Not so. If an intelligible principle exists in the statute, there is no delegation issue. If Plaintiffs' view is that NMFS did not follow the national standards, that is a claim that the rule is unlawful under the standards Congress enacted[2]—not that Congress

[2] Plaintiffs have not presented such a claim, either in district court or in their opening brief. *Chevron USA, Inc. v. Aker Maritime*, 689 F.3d 497 (5th Cir. 2012) (arguments raised for first time on appeal are waived); *Hernandez v. United States*, 888 F.3d 219, 224 n.1 (5th Cir. 2018) (arguments raised for first time in reply are waived).

failed to enact standards. *Cf. Jarkesy*, 2022 WL 1563613, at *11 (examining "Congress's grant of authority"). Plaintiffs have conceded that the statute contains an intelligible principle, so there is no constitutional issue to avoid.

II. The final rule complies with the APA.

NMFS complied with the APA in promulgating the final rule. The APA imposes procedural requirements on agency rulemaking and provides for judicial review of "final agency action," *Peoples Nat'l Bank v. OCC*, 362 F.3d 333, 336-37 (5th Cir. 2004), including final rules promulgated under the MSA. Plaintiffs' claims that the final rule violated the APA, Brief 46-60, are reviewed under the APA's "highly deferential standard." *Ghedi v. Mayorkas*, 16 F.4th 456, 468 (5th Cir. 2021) (quotation marks omitted).

The Court "may not overturn" NMFS's decision, *Medina Cnty. Envtl. Action Ass'n v. STB*, 602 F.3d 687, 699 (5th Cir. 2010), unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2). The Court's task is to "simply ensure[] that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Even when the agency's analysis is "of less than ideal clarity," the Court will uphold the agency's decision if "the agency's path may reasonably be discerned." *Sierra Club v. Dep't of Interior*, 990 F.3d 898, 904 (5th Cir. 2021) (quotation marks

omitted). Applying this deferential standard, the district court correctly concluded that all three of Plaintiffs' APA claims are without merit.

A. NMFS followed rulemaking procedures.

NMFS complied with the APA's procedural requirements for rules. Under the APA, "[s]ubstantive rules" that "have the force of law" and "bind the regulated public" must "be preceded by notice and comment." *Walmart Inc. v. Dep't of Justice*, 21 F.4th 300, 308 (5th Cir. 2021). This procedure requires agencies to publish a notice including the "substance of the proposed rule or a description of the subjects and issues involved," followed by an "opportunity" for comments. 5 U.S.C. § 553(b), (c). Plaintiffs contend that the final rule does not meet these requirements because it is not a "logical outgrowth" of the proposed rule. Brief 47-53. The "logical outgrowth" doctrine holds that agencies "may promulgate a rule that differs from a proposed rule only if the final rule is a logical outgrowth of the proposed rule." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014) (quotation marks omitted). But this requirement is easily satisfied: "A final rule is a logical outgrowth if affected parties should have anticipated that the relevant modification was possible." *Id.*; *accord Huawei Techs. USA v. FCC*, 2 F.4th 421, 447 (5th Cir. 2021).

Here, the agency proposed a rule that vessels holding for-hire permits and operating as a charter vessel would be required to submit "an electronic fishing report of all fish harvested and discarded, and any other information requested by the [Science and Research Director] for each trip." 83 Fed. Reg. 54,076-77. The final rule

adopted the proposed rule, word for word. 85 Fed. Reg. 44,017, 44,019. They are "identical." Brief 48. That should end the inquiry. Yet Plaintiffs seek to compare the rules' preambles—specifically, the discussion of what "other information" the Science and Research Director might require. Brief 48-49. The proposed rule explained that "other information" would include "information about the permit holder, vessel, location fished, fishing effort, discards, and socio-economic data." 83 Fed. Reg. at 54,071. The final rule's preamble is identical. 85 Fed. Reg. at 44,005. But in response to comments, NMFS elaborated that the agency would require "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." 85 Fed. Reg. at 44,011.[3]

That elaboration complied with the APA's procedural requirements. To hold that an agency violates those requirements by responding to comments would put the "logical outgrowth" doctrine on its head. And Plaintiffs' argument fails regardless. The notice of proposed rulemaking "adequately framed the subjects for discussion." *Huawei*, 2 F.4th at 447. Indeed, other commenters raised the concerns Plaintiffs now claim could not have been anticipated in response to the fishery councils' proposed plan amendment and NMFS's proposed rule. *See* ROA.8647, 8772, 12453-54.

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[3] Contemporaneously with the final rule, NMFS was developing a South Atlantic for-hire reporting rule including a similar trip report. 83 Fed. Reg. 14,400, 14,403 (Apr. 4, 2018). In that rulemaking, NMFS received more specific comments about collection of "socio-economic" data. *See, e.g.*, NOAA, *Comment from Tom Roller*, NOAA-NMFS-2017-0152-0053 (May 15, 2018), https://www.regulations.gov/comment/NOAA-NMFS-2017-0152-0053. NMFS included similar language in both rules.

Plaintiffs elide this point by arguing that comments cannot provide notice and mischaracterize the district court as concluding that they could. In any event, the proposed rule gave adequate notice that this sort of data might be required, including through use of the term "socio-economic" data. As the district court explained, "socio-economic" data includes "economic" data, and Plaintiffs' parsimonious construction cannot be reconciled what that term's common usage. ROA.12446-55.

B. NMFS considered and responded to comments.

NMFS also satisfied its obligations to consider to comments. In notice-and-comment rulemaking, agencies generally "must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). But in adopting the final rule, the agency need not provide a detailed account of its consideration of every issue. *Westar Energy v. FERC*, 568 F.3d 985, 988 (D.C. Cir. 2009). It is enough for the agency to identify significant issues raised in the comments and to explain why the agency resolved the issues as it did. *Nat'l Mining Ass'n v. MSHA*, 512 F.3d 696, 700 (D.C. Cir. 2008).

NMFS received 109 comments on the proposed rule (along with the underlying plan amendment) and provided robust responses. 85 Fed. Reg. at 44,008. Several comments referenced the Fourth Amendment using identical language. For example:

> Providing all confidential transiting details is a violation of our 4th Amendment right to privacy and not necessary to manage the fishery. Such details are considered confidential by NOAA and utilized by other agencies not associated with management of the fishery. This is a dangerous precedent. Fish have tails, they move and with the climatic

> shift and movement of our fish into new areas over the last several years utilizing such historical data for fishery management purposes is flawed and can be misused to deny us access to the fishery. Therefore to require detailed GPS data for vessels utilized by the for hire community is not necessary for fishery management purposes, flawed if used for fishery management purposes due to the climatic shift of our stocks and is also a violation of our 4th Amendment rights.

ROA.8696-97; *see also* ROA.8709-10, 8757-58. NMFS reasonably interpreted these comments to embody privacy concerns about VMS location data. 85 Fed. Reg. at 44,010.

NMFS considered these comments and responded in the final rule, explaining that "NMFS will protect these data in accordance with applicable law" and that data "shall be confidential and shall not be disclosed, except under the limited circumstances specified" in the MSA. 85 Fed. Reg. at 44,010. NMFS additionally explained that data-collection software would be required to meet NMFS standards for "data confidentiality and protection of personal information online." *Id.* NMFS thus considered the comments and explained its response; no more is required. Plaintiffs contend that NMFS "misconstrued" these comments. Brief 53-56. But as the district court explained, NMFS responded directly to the commenters' privacy concerns and also addressed these concerns throughout the rulemaking, even though NMFS did not expressly invoke the Fourth Amendment. ROA.12470-75.

To the extent these commenters had additional Fourth Amendment concerns beyond their express references to privacy, NMFS is not required to "sift pleadings and documents to identify arguments that are not stated with clarity." *Huawei*, 2 F.4th

at 452 (quoting *N.E. Pub. Commc'ns Council v. FCC*, 334 F.3d 69, 79 (D.C. Cir. 2003)). And regardless whether Plaintiffs would interpret these comments another way, "the 'court is not to substitute its judgment for that of the agency.'" *Sierra Club*, 990 F.3d at 904 (quoting *FCC v. Fox Tel. Stations*, 556 U.S. 502, 513 (2009)). What matters is that the agency had a rational basis for its decision. *Luminant Generation Co. v. EPA*, 714 F.3d 841, 857 (5th Cir. 2013).

C. NMFS reasonably considered costs.

NMFS considered and addressed the VMS requirement's costs in the final rule. An agency's obligation to operate "within the bounds of reasoned decisionmaking," *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983), includes consideration of "important aspect[s] of the problem" the agency seeks to address. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Plaintiffs contend that NMFS's consideration of the VMS requirement's costs was unreasonable. Brief 56-60. This Court will uphold NMFS's decision "if its reasons and policy choices satisfy minimum standards of rationality." *Pub. Citizen v. EPA*, 343 F.3d 449, 455 (5th Cir. 2003).

The final rule discusses costs at length. *First*, NMFS explained the costs of VMS units and service fees. 85 Fed. Reg. at 44,013. The agency observed that previously approved satellite-based VMS units cost approximately $3,000, while cellular-based units ranged from $150 to $800. *Id.* Monthly service fees would be $40 to $75 for satellite units and $10 to $40 for cellular units. *Id.* Responding to

comments, NMFS acknowledged these "additional costs to vessel operators" and other financial burdens. *Id.* But NMFS concluded that service fees "would not materially alter cash flows, profits, or the solvency of for-hire businesses" and offered reimbursements for the cost of the device. *Id.*[4] *Second*, NMFS prepared a detailed analysis under the Regulatory Flexibility Act, 16 U.S.C. § 601 et seq., discussing costs under the final rule and various alternatives. 85 Fed. Reg. at 44,013-17.

Plaintiffs mostly do not dispute that NMFS considered the costs to vessel operators and do not appear to contest that the agency addressed comments raising this issue. Instead, Plaintiffs suggest that NMFS had not "justified" these costs by explaining the requirement's benefits. Brief 57. But even a brief review of the rulemaking shows why that argument fails. NMFS is charged with the conservation and management of the Nation's fisheries, and the MSA holds that the "collection of reliable data is essential" to this task. 16 U.S.C. § 1801(a)(8). The MSA also directs fishery management plans to collect "pertinent data" about charter fishing. *Id.* § 1853(a)(5). NMFS collects this data through fishing reports, and the agency is responsible for "performing quality control" and "validating the reports" to ensure the reliability of this data. 85 Fed. Reg. at 44,009.

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[4] NMFS provided reimbursement grants for VMS units of up to $3,100 through March 24, 2022. NOAA, *NOAA Fisheries Announces Change to the VMS Reimbursement Program* (Apr. 4, 2022), https://www.fisheries.noaa.gov/bulletin/noaa-fisheries-announces-changes-vms-reimbursement-program. Because of "current budgets," units purchased after that date have a maximum reimbursement of $950. *Id.*

NMFS has always been clear that the "purpose" of VMS on for-hire vessels "is to verify whether a vessel is at the dock." 83 Fed. Reg. at 54,071. The trip declaration and the VMS data enable NMFS to "determine when a fishing trip was taken, and the length of that trip" and thereby "validate effort (fishing trips)." 85 Fed. Reg. at 44,009. NMFS explained that VMS "allow[s] NMFS to *independently* determine whether [a] vessel leaves the dock" and thereby helps NMFS to "validate effort and aid with enforcement of the reporting requirements." *Id.* at 44,012 (emphasis added). In NMFS's judgment, the use of a VMS device "best balances" this "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; *see also id.* at 44,016-17 (discussing why alternatives entailed less accurate data or higher costs to industry).

III. The VMS requirement complies with the Fourth Amendment.

The VMS requirement in the final rule does not violate the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." U.S. Const. amend. IV. The "basic purpose of the Amendment 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *United States v. Beverly*, 943 F.3d 225, 232 (5th Cir. 2019) (quoting *Carpenter v. United* States, 138 S. Ct. 2206, 2213 (2018)). Thus, the "ultimate touchstone of the Fourth Amendment is reasonableness." *Heien v. North Carolina*, 574 U.S. 54, 60 (2014) (quotation marks omitted). Plaintiffs posit that a

vessel operator's installation of a VMS unit is tantamount to a warrantless search by a prison guard in a "panopticon," in violation of the Fourth Amendment. Brief 49.

Plaintiffs' arguments are flawed in several respects. *First*, Plaintiffs' facial challenge to the VMS requirement as unconstitutional in all applications does not meet the high burden for mounting such challenges. *See generally United States v. Salerno*, 481 U.S. 739, 745 (1987). *Second*, even assuming that the VMS requirement constitutes a Fourth Amendment "search" in the first place, the VMS requirement is reasonable under the Supreme Court's well-established Fourth Amendment rules for administrative searches in pervasively regulated industries. *See generally New York v. Burger*, 482 U.S. 691, 693 (1987). *Third*, the VMS requirement does not violate the Fourth Amendment because Plaintiffs have not shown that VMS is even a search. The district court rejected Plaintiffs' Fourth Amendment challenge on the second ground without reaching the others, ROA.12506, and this Court should do the same. But the Court may reject Plaintiffs' arguments for any of these reasons.

A. Plaintiffs have not justified a facial challenge.

Plaintiffs' facial attack on the VMS requirement is inconsistent with the general principle that constitutional claims should be litigated as applied to particular facts. In *United States v. Salerno*, the Supreme Court held that a plaintiff bringing a facial challenge to a law generally must prove "that no set of circumstances exists under which the [law] would be valid." 481 U.S. at 745; *accord United States v. McGinnis*, 956 F.3d 747, 752 (5th Cir. 2020). Facial remedies "should be granted sparingly and only

as a last resort." *Serafine v. Branaman*, 810 F.3d 354, 365 (5th Cir. 2016) (quoting *Hersh v. United States*, 553 F.3d 743, 762 (5th Cir. 2008)). The "normal rule" is that constitutional claims should proceed through as-applied litigation with "partial, rather than facial, invalidation" as the remedy. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

"Facial challenges are disfavored for several reasons." *Grange*, 552 U.S. at 450. *First*, "[f]acial challenges often rest on speculation because they do not involve specific applications of a [law], but rather hypothetical applications." *Hersh*, 553 F.3d at 763 (quotation marks omitted). Facial challenges thus "have been held to . . . raise the risk of premature interpretations of [laws.]" *Roy v. City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020) (quotation marks omitted). *Second*, facial challenges run contrary to "fundamental principle[s] of judicial restraint" and constitutional avoidance. *Grange*, 552 U.S. at 450. *Third*, "[i]nvalidating a law that is perfectly constitutional in some applications has obvious harmful effects." *Hersh*, 553 F.3d at 743 (quotation marks omitted).

Here, Plaintiffs seek facial invalidation of the VMS requirements authorized by the final rule. *Cf. City of Los Angeles v. Patel*, 576 U.S. 409, 418-19 (2015) (facial challenges apply to searches "law actually authorizes"). But that remedy is particularly ill-suited to their Fourth Amendment claim. Because the touchstone of the Fourth Amendment is reasonableness, *Heien*, 574 U.S. at 60, questions of constitutionality are closely tied to the particular context. *Maryland v. King*, 569 U.S. 435, 461-62 (2013).

Plaintiffs assert that some class members use their vessels for personal trips that do not involve fishing in federally regulated fisheries. But a hypothetical scenario involving *some* class members' personal use under *some* circumstances cannot sustain a facial challenge. Plaintiffs do not even attempt to establish that the VMS requirement is unconstitutional in all its applications. Rather, Plaintiffs' arguments rely on putative contrasts between members of the class and other vessels subject to VMS requirements. Brief 18-19.

B. The VMS requirement is permissible under *Burger*.

Setting aside the fundamental defect in Plaintiffs' facial challenge, the VMS requirement complies with the Fourth Amendment under rules governing pervasively regulated industries like fishing. This Court can so hold without reaching the underlying question of whether the VMS measures actually constitute a "search" within the meaning of the Fourth Amendment; even assuming the answer is yes, the VMS measures satisfy long-standing precedent.

Because the ultimate touchstone of the Fourth Amendment is reasonableness, *Heien*, 574 U.S. at 60, regulatory schemes that authorize inspections may often be reasonable without a warrant or probable cause. The Supreme Court's "pervasively regulated industries" doctrine, discussed most notably in *New York v. Burger*, 482 U.S. at 693, provides a well-established mechanism for analyzing the reasonableness of administrative inspections in industries like fishing in federal waters. The *Burger* line of cases holds that inspections without precompliance review (like a warrant) may be

reasonable in "industries that have such a history of government oversight that no reasonable expectation of privacy exists." *Zadeh v. Robinson*, 928 F.3d 457, 464 (5th Cir. 2019) (quotation marks omitted).

The *Burger* analysis proceeds in two steps. *First*, the Court determines whether the industry is subject to pervasive regulation. In making this assessment, courts consider factors that may include "the history of warrantless searches in the industry, how extensive the regulatory scheme is, whether other states have similar schemes, and whether the industry would pose a threat to the public welfare if left unregulated." *Zadeh*, 928 F.3d at 464. *Second*, if the industry is pervasively regulated, the Court determines whether the challenged inspection is reasonable in the context of the regulatory regime. To make this judgment, the court considers the governmental interest, the role of warrantless inspections, and the existence of an adequate substitute for a warrant. *Id.* at 464-65. If these criteria are met, inspections do not require precompliance review.

The district court concluded, after a lengthy discussion, that fishing in federal waters is a pervasively regulated industry under *Burger* and that the VMS requirement satisfies the *Burger* criteria for reasonableness. ROA.12487-506. Plaintiffs attack the district court's analysis on several grounds. At the first step, Plaintiffs contend that the Supreme Court has silently (but substantially) limited *Burger* in various ways and that fishing is not pervasively regulated in any event. Brief 22-29. At the second step, Plaintiffs contend that the VMS requirement would not be reasonable even under

Burger. Brief 30-37. To the contrary, fishing is a textbook example of a pervasively regulated industry, and the VMS requirement is a reasonable oversight measure under the *Burger* criteria.

1. Fishing is a pervasively regulated industry.

Fishing is a pervasively regulated industry under *Burger*, as the consistent "pervasiveness and regularity" of regulation over time makes clear. 482 U.S. at 701. Regulation of the fishing industry "is virtually as old as fishing itself," and in the United States, "the fishing industry has been the subject of pervasive governmental regulation almost since the founding of the Republic." *Lovgren v. Byrne*, 787 F.2d 857, 865 & n.8 (3d Cir. 1986); *see also Douglas v. Seacoast Prods.*, 431 U.S. 265, 273 (1977) ("comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation"); *United States v. Raub*, 637 F.2d 1205, 1209 & n.5 (9th Cir. 1980) (history of one fishery). As early as 1793, Congress authorized searches of licensed vessels. Enrollment and Licensing Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315 ("it shall be lawful for any officer of the revenue, to go on board of any ship or vessel . . . to inspect, search, and examine"). And this approach to the fishing industry has continued into modern times. *See, e.g.*, Act of May 20, 1964, Pub. L. No. 88-308, § 3(d)(2), 78 Stat. 194, 195 (repealed 1977) (authorizing law enforcement officers to "search any vessel" "with or without a warrant").

The fishing industry remains subject to comprehensive federal regulations, including requirements for vessels participating in federally regulated fisheries to

obtain permits, report about catch and landings, and open their records to NMFS inspection. 50 C.F.R. Part 622. The MSA also authorizes NMFS to conduct searches of regulated fishing vessels "with or without a warrant or other process." 16 U.S.C. § 1861(b)(1)(A)(ii), (vi). And as discussed (pp. 12-18), Congress authorized NMFS to require fishing vessels to use equipment to facilitate enforcement of this regulatory regime. *Id.* § 1853(b)(4). NMFS thus has required VMS devices in many of its fisheries (p. 8), and VMS is well-established in the fishing industry. *See generally* NOAA Fisheries, *Regional Vessel Monitoring Information* (Aug. 20, 2021), https://www.fisheries.noaa.gov/national/enforcement/regional-vessel-monitoring-information. This pervasive level of regulation should be no surprise to charter vessel owners and operators, like Plaintiffs, who seek federal permits in order to fish these particular species in these particular (federal) waters.

Consistent with this history, courts have had little difficulty concluding that fishing is a pervasively regulated industry under *Burger*. *See* ROA.12492-93. And courts specifically have upheld warrantless searches in the fishing industry. *See, e.g.*, *Lovgren*, 787 F.2d at 863-67 (upholding warrantless inspection of dock areas); *Balelo v. Baldridge*, 724 F.2d 753, 764-67 (9th Cir. 1984) (en banc) (upholding regulation requiring observers on purse seiners); *United States v. Kaiyo Maru No. 53*, 699 F.2d 989, 994-97 (9th Cir. 1983) (upholding warrantless boarding of vessel). This Court has not yet addressed this issue but has observed that "the 'reasonable' expectation of privacy is often less aboard a vessel than on land" because "[t]hose who venture on the seas

are presumed to do so cognizant of the raft of regulations designed to promote their safe passage." *United States v. Ortega*, 644 F.2d 512, 514 (5th Cir. 1981); *accord United States v. Whitmire*, 595 F.2d 1303, 1312 (5th Cir. 1979) ("it is difficult to see that a crew member might legitimately claim privacy on the open deck of a fishing smack or in the hold of a cargo vessel available for hire"); *see also*, *e.g.*, *United States v. Reeh*, 780 F.2d 1541, 1546 (11th Cir. 1986) (noting that "American officials may constitutionally board an American ship at any time" and that "seafarers can have only a limited expectation of privacy on their vessels").

Plaintiffs do not seriously dispute the history of comprehensive regulation in the fishing industry or state outright that they believe the courts have uniformly erred in concluding that fishing is a pervasively regulated industry. Instead, Plaintiffs seek to distinguish their challenge from every other fishing case by drawing new and artificial lines around their vessels. But Plaintiffs' arguments have no basis in law.

First, Plaintiffs argue that *Burger* does not apply to "property-based" searches, Brief 22-23, but this argument is confused. In determining whether a Fourth Amendment search has occurred, the Supreme Court historically has looked to reasonable expectations of privacy. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan., J., concurring); *accord, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). More recently, in *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), the Supreme Court recognized that physical intrusions on property can establish a Fourth Amendment search. These cases address the

threshold question whether there has been a Fourth Amendment search in the first instance. *Jardines*, for example, applied "the traditional property-based understanding of the Fourth Amendment" to answer the threshold question whether the police's entry onto a defendant's porch constituted a search. 569 U.S. at 5, 11.

Plaintiffs suggest (for the first time on appeal) that the recognition of this property-based approach in *Jones* and *Jardines* unsettled the Supreme Court's decision in *Burger* and the closely-regulated-industry line of cases. Brief 23. But *Burger*—which itself involved physical entry onto private property—addresses the question whether a search is reasonable, not whether there has been a search. 482 U.S. at 693. These are two fundamentally different issues. A physical intrusion on property without a warrant may nonetheless by reasonable under the Fourth Amendment; *Jones* itself clearly separated these two issues. 565 U.S. at 413. Plaintiffs offer no authority for their argument that *Jones* and *Jardines* limited the *Burger* doctrine, despite the decade that has passed since those cases were decided. Altering *Burger* is the province of the Supreme Court alone. *See Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484-85 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls" and "leav[e] to this Court the prerogative of overruling its own decisions.").

Second, Plaintiffs argue that the fishing-industry cases are no longer good law in light of *City of Los Angeles v. Patel*, 576 U.S. 409, 428 (2015). Brief 24-29. Plaintiffs

misread *Patel*. In that case, the Supreme Court upheld the Ninth Circuit's decision that a municipal ordinance permitting law enforcement inspections of hotel guest registries violated the Fourth Amendment. *Id.* In reaching this conclusion, the Supreme Court applied its precedent to the facts at hand. *Id.* at 424-28. Plaintiffs nonetheless suggest that *Patel* worked a significant change in the doctrine—perhaps overruling many cases—by adopting a new, mandatory "public welfare" test for determining whether an industry is pervasively regulated.

In *Patel*, the Supreme Court discussed public welfare as a means of differentiating hotels from pervasively regulated industries, but the Court did not adopt a new requirement or alter the basic *Burger* analysis. 576 U.S. at 424 (citing *Burger*). Rather, public welfare is among several factors that courts may consider when "categoriz[ing] industries under *Burger*," alongside the history and extent of regulation. *See, e.g.*, *Zadeh*, 928 F.3d at 464. Courts applying the pervasively-regulated-industry exception after *Patel* have not adopted Plaintiffs' narrow and rigid view. *See, e.g.*, *Killgore v. City of S. El Monte*, 3 F.4th 1186, 1191-92 (9th Cir. 2021) (concluding massage industry pervasively regulated without addressing public welfare); *Free Speech Coalition v. Att'y Gen. U.S.*, 825 F.3d 149, 166-70 (3d Cir. 2016) (discussing *Patel* at length without reference to public welfare). In any event, Congress concluded that overfishing affects the public welfare when enacting the MSA. 16 U.S.C. § 1801(a)(3)-(6); *see also* ROA.12496-97. An industry need not be "ultra-hazardous" to implicate

public welfare. *Liberty Coins v. Goodman*, 880 F.3d 274, 284-85 (6th Cir. 2018) (precious metals dealing is pervasively regulated).

Third, Plaintiffs urge the Court to treat charter fishing differently from other fishing subject to the MSA. Brief 24-29. Plaintiffs offer no reason why the Court should carve out an exception for charter fishing other than that it would favor their position. In the MSA, Congress expressed concerns about overfishing generally. 16 U.S.C. § 1801(a)(9), (a)(13), (b)(3). And courts have never approached *Burger* with Plaintiffs' self-serving level of granularity. Plaintiffs' suggestion that charter fishing should be treated differently because it is recreational, or that a contrary conclusion would open all recreational fishing to searches, is baseless. Charter fishing is distinct from recreational fishing. *See, e.g.*, 16 U.S.C. § 1853(a)(13)-(14) (addressing "commercial, recreational, and charter fishing sectors"); 50 C.F.R. § 622.2. Charter fishing vessels are businesses and part of the fishing industry; Plaintiffs' vessels are subject to the VMS requirement because they chose to obtain NMFS permits. Plaintiffs' hyperbolic suggestion that "everyone who takes a boat into the Gulf of Mexico" could be required to use a VMS system, Brief 27, is not rooted in reality or the doctrine's limitation to "closely regulated" industries.

2. The VMS requirement satisfies *Burger*.

Because fishing is a pervasively regulated industry, the Court applies the *Burger* criteria to determine whether the VMS requirement is reasonable. There are three criteria: "(1) a substantial government interest, (2) a regulatory scheme that requires

warrantless searches to further the government interest, and (3) 'a constitutionally adequate substitute for a warrant.'" *Zadeh*, 928 F.3d at 464-65 (quoting *Burger*, 482 U.S. at 702-03)). The VMS requirement satisfies all three.

First, NMFS has a substantial interest in the conservation and management of the Nation's fisheries. *See, e.g.*, 16 U.S.C. § 1801(b)(1), (3). Congress also found that the "collection of reliable data" is "essential" to the "effective conservation [and] management" required by the MSA. *Id.* § 1801(a)(8); *see also id.* § 1853(a)(5). NMFS thus has a substantial interest in improving the accuracy of information on fishing effort as necessary to conserve this "important national asset," *Kaiyo Maru*, 699 F.2d at 995, and guard against overfishing. *See also, e.g.*, *Lovgren*, 787 F.2d at 866. Rather than try to deny this obvious government interest, Plaintiffs revive their baseless public-welfare argument. Brief 30. Plaintiffs' view of *Patel* is incorrect, and in any event, Congress articulated a clear public-welfare interest in preventing overfishing.

Second, the VMS requirement is necessary to further the government's conservation and management interest. 85 Fed. Reg. at 44,012, 44,016. VMS "verifies vessel activity without a report having to be completed by the vessel operators" and thus allows for independent validation by NMFS. *Id.* Validation, in turn, is "a crucial component of understanding what the total landings are." ROA.5844. In reviewing the alternatives, NMFS concluded that the necessary level of trip validation could not be achieved without a permanently affixed GPS unit. ROA.5942. VMS is thus the "mechanism that verifies vessel activity" that "best

balances the need to collect and report timely information with the need to minimize the cost and time burden to the industry." *Id.* at 44,012.

Plaintiffs offer an array of objections. Plaintiffs argue that permanently affixing VMS with uninterrupted operation is not necessary, observing that VMS would communicate location data even when a vessel is taken on a private trip. Brief 31. The final rule provides appropriate but limited exemptions to power down the VMS unit when, for example, the vessel is removed from the water for repairs. 85 Fed. Reg. at 44,012. But allowing permittees to power down at will defeats the purpose of independent verification. *Id.* A vessel operator that is not submitting a required trip declaration or fishing report could simply switch off the VMS unit to evade NMFS's notice; the VMS unit enables NMFS to "ensure vessel owners and operators are reporting as required." *Id.* at 44,010; *see also* ROA.6347-48 (council discussion). Plaintiffs next argue, again, that the Court should order a sui generis rule for charter vessels because they are not commercial vessels, ipso facto. Brief 31.

Plaintiffs' main argument on necessity is that VMS is unnecessary because vessels submit information on fishing effort in their logbooks and NMFS can use alternative verification methods, like spot checks. Brief 32. But spot checks and similar alternatives are not a substitute for trip validation data, which enables more accurate calculation of fishing effort through its broader scope.[5] ROA.11758

[5] Plaintiffs' arguments here also suggest a fundamental misunderstanding of trip declarations and VMS. Vessels' trip declarations do not report "where they will

(discussing issues with scaling existing survey), ROA.12094 (discussing "critical" role of validation); *see also Balelo*, 724 F.2d at 766 (explaining that reasonableness does not require inferior alternatives). Plaintiffs also suggest that the record does not support a need for verification, citing the presumption of innocence, Brief 33 n.13, but the point of trip validation is to provide an independent means of determining whether vessels have left the dock. Along these same lines, Plaintiffs suggest that the Court should apply greater scrutiny to VMS because it uses GPS, Brief 35, but acknowledging technological change does not itself justify a more restrictive approach. Indeed, the case Plaintiffs cite on this issue expressly acknowledges the "undoubted constitutionality of . . . administrative inspections in the absence of criminal activity" on nautical vessels, despite technological change. *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (en banc).

Third, the VMS requirement provides a constitutionally adequate substitute for a warrant by "perform[ing] the two basic functions of a warrant," which are to provide notice and to limit the scope of the search. *Burger*, 482 U.S. at 703. The VMS requirement serves the notice function because it applies equally (and only) to for-hire vessels holding relevant permits. Permit holders like Plaintiffs have notice that officers may "access, directly or indirectly, for enforcement purposes any data or information required to be provided," "with or without a warrant or other process."

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generally fish," Brief 32, and the purpose of VMS is to validate trips, not to determine fishing locations.

16 U.S.C. § 1861(b)(1)(A)(vi). And they consent to VMS devices by virtue of agreeing to the terms and conditions of their fishing permits. That is enough. *See, e.g.*, *Burger*, 482 U.S. at 710-11; *Balelo*, 724 F.2d at 766.

There also is no appreciable risk of an abuse of discretion, as the collection of data is automated and predictable, on terms published in the regulations and using VMS devices that permittees procure. 85 Fed. Reg. at 44,020. Plaintiffs suggest that VMS nevertheless is insufficiently "limited in time, place, and scope," because the VMS communicates location data during private recreational trips. Brief 36 (quoting *Burger*, 482 U.S. at 703). But again, the point of VMS is to allow NMFS to verify that the vessel has left the dock; allowing the vessel operator the discretion to power off the unit would defeat the point. And VMS is limited in the nature of the data it communicates: vessel location once every hour, nothing more.

In sum, NMFS has a clear interest in improving the accuracy of data on fishing effort needed for conservation and management, VMS provides the only cost effective way to achieve NMFS's interest by providing independent validation, and the uniform and predictable application of VMS requirements for permittees provides an adequate substitute for a warrant. The VMS requirement is exactly the sort of rule that *Burger* is designed to address.

C. Plaintiffs' Fourth Amendment claim fails for further reasons.

Although the Court should affirm the district court under *Burger*, the Court may also reject Plaintiffs' challenge in light of more fundamental flaws.

First, Plaintiffs have not shown that the VMS requirement violates a reasonable expectation of privacy under the Fourth Amendment, such that a search has occurred. *Katz*, 389 U.S. at 362 (Harlan, J., concurring); *accord United States v. Beaudion*, 979 F.3d 1092, 1097, 1099 (5th Cir. 2020). Plaintiffs are subject to the VMS requirement only because they have obtained and continue to benefit from federal permits issued under the MSA. The VMS unit, in turn, provides NMFS only with data about the location of the vessel, not the owners and operators of the vessel. *See, e.g.*, 85 Fed. Reg. at 44,007. The VMS unit records no identifying information about the crew or passengers, nor do the other electronic reporting requirements. Plaintiffs have not established a reasonable expectation of privacy in the location of their federally-permitted vessels when they take paying passengers to fish for federally-managed species in federal waters.

Plaintiffs characterize VMS as surveillance and claim that the collection of location data violates a reasonable privacy interest in their own vessels. Brief 20-22. Yet Plaintiffs rely on cases addressing programs that involved "prolonged tracking" that "can reveal intimate details" about a person "through habits and patterns." *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 341 (5th Cir. 2021) (en banc) (aerial photography of city); *see also United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (surveillance of backyard of home). The data VMS units collect—the intermittent location of charter vessels—is different in kind. Plaintiffs take their vessels into open waters and provide access to members of the public for commercial

purposes. *See, e.g.*, *United States v. Turner*, 839 F.3d 429, 435 (5th Cir. 2016) (no reasonable expectation of privacy in gift card information used for commercial purposes). And Plaintiffs already are required to declare and report trips. 85 Fed. Reg. at 44,005-06.

Second, Plaintiffs also have not shown that the VMS requirement is a physical intrusion by the government of a constitutionally protected area in which Plaintiffs have property interests. *Jones*, 565 U.S. at 407; *accord Beaudion*, 979 F.3d at 1097. Plaintiffs rely on broad trespass principles to establish a search cognizable under the Fourth Amendment, but they have not identified any physical intrusion by NMFS—because there is none. Brief 20. NMFS does not physically intrude on Plaintiffs' vessels; rather, Plaintiffs choose to acquire and install VMS units on their vessels because they seek to continue benefiting from the permits that allow them to take paying passengers to fish for federally managed species. Thus, unlike Plaintiffs' "chalking" case, there is no "intentional physical contact" by the government. *Taylor v. City of Saginaw*, 922 F.3d 328, 332-33 (6th Cir. 2019). Plaintiffs agree to permits with terms and conditions that include VMS and then install these units to comply.

Plaintiffs analogize this case to *Jones*, where the police installed a GPS tracker on a vehicle without the owner's knowledge in order to surreptitiously monitor his movements. 565 U.S. at 404 & n.2. Here, in contrast, NMFS does not install the devices, and the vessel owners and operators are aware of the VMS; indeed, Plaintiffs consent to these conditions by agreeing to the terms of their permits. In addition,

Jones involved a personal vehicle, whereas a VMS unit is installed on a vessel requiring a federal permit due to its commercial use in federal waters. Plaintiffs therefore have not established that VMS is an unreasonable search under the property-based approach.

IV. Plaintiffs' Just Compensation Clause claim is improper.

Lastly, Plaintiffs challenge the district court's rejection of their belated efforts to insert a claim under the Just Compensation Clause into this litigation. Plaintiffs raised that claim for the first time at summary judgment, and the district court construed that effort as a request for leave to amend. The district court's denial of leave to amend is reviewed for an abuse of discretion, *Scott v. U.S. Nat'l Bank Ass'n*, 16 F.4th 1204, 1208 (5th Cir. 2021), which Plaintiffs have not established. In any event, the district court did not have jurisdiction over this claim.

A. Plaintiffs did not plead a claim under the Just Compensation Clause.

Under the Just Compensation Clause of the Fifth Amendment, private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Just Compensation Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987). A "physical" taking "generally occurs when the government directly appropriates private property or engages in the functional equivalent of a practical ouster of [the owner's]

possession." *Washoe Cnty. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (quotation marks omitted). Plaintiffs assert that installing a VMS unit is a physical occupation that effects a taking without just compensation. Brief 39.

In their August 2020 complaint, Plaintiffs alleged that the VMS requirement "violates the due process clause of the Fifth Amendment" through the "seizure" of data "created by a device bought and paid for by Plaintiffs" without "any cause at all, never mind probable." ROA.40. A due process claim is not a takings claim. *See generally Lingle v. Chevron U.S.A.*, 544 U.S. 528, 540-45 (2005). The only appearance of the word "taking" was in the complaint's background section, which describes the Fifth Amendment as "protect[ing] life, liberty, and property from taking by the Government without due process of law." ROA.29. In their June 2021 amended complaint, Plaintiffs did not add a takings claim or allege new facts to support such a claim. In fact, Plaintiffs removed the sole instance of the word "taking" in the background section and instead alleged that "[t]he Fifth Amendment protects life, liberty, and property from *deprivation* by the Government without due process of law." ROA.412 (emphasis added).

The district court concluded that Plaintiffs had not alleged a takings claim. ROA.12486. Federal Rule of Civil Procedure 8(a)(2) requires Plaintiffs to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs' statement of the claim "needs to be sufficient to 'give the defendant fair notice of what the [plaintiff's] claim is and the grounds upon which it rests.'" *Shepherd*

v. City of Shreveport, 920 F.3d 278, 287 (5th Cir. 2019) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiffs alleged a claim for deprivation of data without due process, not a claim for physical occupation of property. ROA.12485. Yet when Plaintiffs moved for summary judgment, they presented this new takings claim. ROA.12485-86.

The district court construed this new claim as a request for leave to amend and denied it. ROA.12486-87. That decision fell well within "the sound discretion of the district court." *Heinze v. Tesco Corp.*, 971 F.3d 475, 485 (5th Cir. 2020) (quotation marks omitted). Amending complaints during summary judgment briefing is disfavored, *Jackson v. Gautreaux*, 3 F.4th 182, 189 (5th Cir. 2021), and the district court concluded that Plaintiffs' delay in presenting the claim justified denying leave to amend. ROA.12487; *see also Residents of Gordon Plaza v. Cantrell*, 25 F.4th 288, 302-03 (5th Cir. 2022) (discussing factors justifying denial, including delay). As the court explained, Plaintiffs filed their suit in August 2020; the court set a deadline to amend by June 2021; and Plaintiffs amended without adding a takings claim. ROA.12487. The court declined to permit amendment "eighteen months after suit was filed and seven months after the deadline to file such a motion." *Id.*

Plaintiffs challenge only the district court's conclusion that the amended complaint did not present an adequate Rule 8 statement of a takings claim. Brief 37-39. In support, Plaintiffs cite paragraphs of the amended complaint that reference the Fifth Amendment and its due-process clause, ROA.405, 412, 427-28; discuss

Plaintiffs' interests in their location data, ROA.406-10, 418-19, 423-24, 427-28; describe VMS as "intrusive," ROA.418; object to the reporting requirement, ROA.425; and allege their due-process claim challenging the "seizure" of "data" in violation of "the due process clause," ROA.423. These paragraphs all plainly concern data collection and due process, not takings and physical occupations. These are different claims, not different legal theories. Plaintiffs' merits arguments in their brief about a takings claim bear no relation to their complaint. *See* Brief 38-39. The district court's analysis was correct: Plaintiffs did not allege a takings claim.

B. The district court lacked jurisdiction over a claim under the Just Compensation Clause.

Plaintiffs' attempts to inject a takings claim into this litigation are futile in any event. *Johnson v. Teva Pharm. USA*, 758 F.3d 605, 610 (5th Cir. 2014). Federal courts have "no subject matter jurisdiction over claims against the United States unless the government waives its sovereign immunity and consents to suit." *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011). Two statutes, the Tucker Act and the Little Tucker Act, waive the United States' immunity from claims under the Just Compensation Clause of the Fifth Amendment. *See generally Sammons v. United States*, 860 F.3d 296, 300 (5th Cir. 2017). The Tucker Act provides that the "United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution" and not sounding in tort. 28 U.S.C. § 1491(a)(1). And the Little Tucker Act provides that "district courts shall have original jurisdiction,

concurrent with the United States Court of Federal Claims," over "[a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon the Constitution" and not sounding in tort. *Id.* § 1346(a)(2).

These statutes collectively establish a comprehensive scheme for seeking just compensation from the United States for alleged government takings. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998); *Wilkerson v. United States*, 67 F.3d 112, 118-19 (5th Cir. 1995). Under this scheme, the Court of Federal Claims "has exclusive jurisdiction over claims against the United States for more than $10,000." *Sammons*, 860 F.3d at 299. Consequently, the district court would have jurisdiction over Plaintiffs' claims only if Plaintiffs sought compensation not in excess of $10,000. Plaintiffs made no such allegations in district court and therefore did not establish the district court's jurisdiction under the Little Tucker Act, despite bearing the burden to do so. *See, e.g.*, *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 487 (5th Cir. 2014) (plaintiff bears burden of establishing district court's jurisdiction). Indeed, Plaintiffs made no reference to the Little Tucker Act and included no allegations as to just compensation, which is why the district court concluded that they failed to allege a takings claim in the first place. The Court of Federal Claims thus has exclusive jurisdiction. *See Sammons*, 860 F.3d at 299; *Wilkerson*, 67 F.3d at 119-20.

Plaintiffs' pursuit of equitable relief does not save their claim from the exclusive jurisdiction of the Court of Federal Claims. "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law,

when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *accord Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2176-77 (2019) ("As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed."). Plaintiffs' pursuit of a takings claim in the district court is thus futile.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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June 1, 2022
90-8-8-08398

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2022, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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CERTIFICATE OF COMPLIANCE

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