No. 22-30105

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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

REPLY BRIEF OF APPELLANTS IN SUPPORT OF AN INJUNCTION PENDING APPEAL

A. Gregory Grimsal
GORDON ARATA MONTGOMERY BARNETT
201 St. Charles Avenue, 40th Floor
New Orleans, Louisiana 70170-4000
Telephone: (504) 582-1111
Facsimile: (504) 582-1121
Email: ggrimsal@gamb.com

John J. Vecchione
Counsel of Record
Sheng Li
Kara Rollins
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
(202) 869-5210 (Telephone)
(202) 869-5238 (Fax)
John.Vecchione@ncla.legal
Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

SUMMARY OF REPLY

Not only would another motion to enjoin the challenged GPS requirement in the district court be futile, but if this Court does not act for the entire pendency of this appeal, **American citizens will be subject to warrantless GPS tracking by their Government without even suspicion of wrongdoing while engaged in non-regulated activity.** Appellees misstated the record below regarding Plaintiffs-Appellants' repeated attempts to ensure the district court ruled before the challenged rule inflicted Fourth Amendment injuries. The Magnuson-Stevens Act ("MSA") does not preclude injunctions of unconstitutional regulations (nor could it), and the balance of factors impels the Final Rule be enjoined. Moreover, Appellees did not challenge that the injunction should be granted for reasons stated in *Ruiz v. Estelle (Ruiz I)*, 650 F.2d 555, 565 (5th Cir. 1981).

RECORD FACTS

Appellees challenge two key facts from Plaintiffs-Appellants' moving brief: (1) that the Class and its representatives use their vessels for non-fishing, private activities (Moving Brief n. 7),[1] and (2) that the district court denied Plaintiffs-Appellants'

[1] Plaintiffs-Appellants assume Appellees make this counter-record assertion regarding the use of the vessels for non-fishing activities because of their interpretation of *United States v. Salerno*, 416 U.S. 739 (1987). There is no set of circumstances under which Appellees may require individuals engaging in unregulated activity to be tracked in all their movements as the Final Rule indisputably does.

request for expedited consideration of the matter. They also intimate that Plaintiffs-Appellants only seek an injunction under Section 705 of the Administrative Procedure Act ("APA"), which is not allowed under the MSA. *See* 16 U.S.C. § 1855(f)(1)(A). But that is not so. The First Amended Complaint ("FAC") unequivocally raised constitutional claims separately from APA claims and asked the court to vindicate Plaintiffs-Appellants' Fourth Amendment rights. ECF No. 54, ¶¶ 72-81 (Count I is: "WARRANTLESS GPS SURVEILLANCE VIA THE VMS IS UNCONSTITUTIONAL."). This motion asks the Court to exercise its inherent power to impose an injunction based on those constitutional arguments, rather than upon Section 705 of the APA. *Cf. BST Holdings, v. OSHA*, 17 F.4th 604 (5th Cir. 2021) (enjoining regulation pending appeal on constitutional and statutory grounds under the Court's inherent power rather than Section 705 of the APA).

Plaintiffs-Appellants repeatedly sought expedited action and preliminary relief to avoid Fourth Amendment injuries and were repeatedly denied relief. Appellees' statements to the contrary are belied by the record. The case was filed timely within 30 days of the regulation on August 20, 2020. ECF No. 1. Plaintiffs-Appellants expeditiously moved for class certification (and attached declarations attesting to routinely using their boats for personal, non-regulated activities)[2] on November 19,

[2] Appellees did not contest these affidavits when they were filed in November 2020. They now bizarrely attempt to waive away these record facts, which were true then and

2020. ECF No. 25. The district court, relying on those declarations, certified the class on June 7, 2021. ECF No. 48. All this time, the Final Rule's GPS-tracking requirement was held in indefinite abeyance so no Fourth Amendment harm was imminent. Plaintiffs-Appellants moved for summary judgment under an agreed-upon schedule on August 11, 2021. ECF No. 73. While that motion was pending and before Appellees cross-moved for summary judgment, Appellee National Marine Fisheries Service ("NMFS") issued a rule on September 14, 2021, announcing the GPS-tracking requirement would go into effect on December 13, 2021, and both parties so informed the district court. ECF Nos. 77, 77-1.

Faced with this new circumstance (of Appellees' making), on October 1, 2021, Plaintiffs-Appellants moved by consent to "condense the briefing schedule and to expedite consideration of the matter," ECF No. 83, so that the district court could rule before any Fourth Amendment injuries occurred. Pursuant to 16 U.S.C. § 1855(f)(4), Plaintiffs-Appellants explicitly "move[d] this court to assign the matter for 'hearing at the earliest possible date and [to] expedite the matter in every possible way.'" *Id.* The district court held a conference on October 1, 2021, in which it expressed a strong preference for delaying the GPS-tracking requirement until after it ruled, but NMFS

---

remain so. No new declarations or evidence need be filed in this Court when no fact in those declarations was ever rebutted below and there has been no change in circumstance.

did not agree. As explained in the moving brief, NMFS only postponed the effective date of the GPS-tracking requirement to March 1, 2022. To increase the likelihood that the district court could rule before March 1, 2022, Plaintiffs-Appellants waived oral argument. Plaintiffs-Appellants thus asked to "expedite the matter in every possible way," but the district court denied that request when it declared "there is no need to set an expedited hearing." ECF 85 n.3.

When the deadline approached without a ruling, Plaintiffs-Appellants asked Appellees to postpone the implementation date further, but Appellees refused. Faced with no other option, Plaintiffs-Appellants moved to stay the Rule so the district court could decide first. ECF No. 90. The memorandum in support of the stay underlines the futility of moving again for a stay in the district court before filing here:

> Finally, Plaintiffs have repeatedly attempted to avoid having to file this motion. They have shortened time to file the original briefing, waived oral argument, attempted expedited consideration, petitioned Defendants for an extension of the rule, conferred with counsel for Defendants on this motion, and now file this motion as a last resort.

Id. at 8. That language demonstrates it is clear and never contradicted that Plaintiffs-Appellants had "attempted expedited consideration" without success. It also underscores the pains Plaintiffs-Appellants took to prevent the regulation from going into effect before they could obtain an injunction. Nonetheless, the district court allowed time to pass, forcing the Class to purchase and install the NMFS-approved devices or else abandon their livelihoods as charter boat operators. Then, just before this Court closed for *Mardi Gras*, the opinion issued. ECF No. 94 (filed on February 28,

2022). That timing made it impossible for Plaintiffs-Appellants to move to stay the regulation before it went into effect. The GPS-tracking requirement began while the courts were closed on March 1, 2022. When they reopened on March 2, 2022, Plaintiffs-Appellants appealed and amended the appeal upon the district court's issuing a final order closing the case. ECF Nos. 95; 97. The clerk's office informed Appellants a signature was needed, and the appeal was perfected on March 14, 2022. Corrected Amended Notice of Appeal, Doc. No. 00516238224.

ARGUMENT

I. THIS MOTION IS PROCEDURALLY SOUND

"[A] motion for a stay pending appeal can first be made in this court if moving in the district court initially would be impracticable." *Planned Parenthood v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). "When the district court's order demonstrates commitment to a particular resolution, application for a stay from that same district court may be futile and hence impracticable." *Chem. Weapons Working Grp. v. Dep't of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996). A motion to stay pending appeal before the district court in this case is futile because the district court just entered its 81-page ruling on the merits. Moreover, Plaintiffs-Appellants seek not a stay of the district court's order, but of the underlying regulation, which the district court ruled upon precisely at a time that guaranteed it would be implemented before the Class could stop it here or before the district court itself.

Defendants' contention that "[i]t does not follow from the refusal to grant a preliminary injunction … that the district court would refuse injunctive relief pending an appeal" Appellees Br. at 11, citing *Bayless v. Martine*, 430 F.2d 873, 879 (5th Cir. 1970), is irrelevant, because the district court did not deny a preliminary injunction. Rather, it made a final ruling on the merits based on the complete record after full briefing, and the 81-page opinion leaves no doubt where the district court stands.[3] *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (permitting F.R.A.P. 8 application in the court of appeals when "the district court's resolve is demonstrated"). Unlike in *Ruiz I,* there is no new evidence for the lower court to review, but even there, this Court allowed the Rule 8 motion and provided injunctive relief. 650 F.2d 555, 567 (noting the trial's length and breadth of evidence the district court heard before granting relief).

Urgency provides an independent basis to satisfy Rule 8's impracticability requirement. *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 44 (1st Cir. 2021) ("We therefore agree with plaintiff that the tight timeframe present here renders prior recourse to the district court sufficiently impracticable"); *Gonzalez ex rel. Gonzalez v. Reno*, 2000 WL 381901, at *4 (11th Cir. Apr. 19, 2000) ("[W]e are satisfied that Plaintiff has sufficiently shown that it would have been impracticable

[3] It should also be noted that the district court has fairly and accurately described the burden preliminary motions made on an already overburdened courthouse when counsel raised the subject in conferences, expressing a preference for an agreement to postpone the GPS-tracking requirement's effective date.

to move first in the district court[]" due to "the time-sensitive nature of the proceedings"). In *Commonwealth v. Beshear*, 981 F.3d 505, 578 (6th Cir. 2020), for instance, the district court enjoined Kentucky's COVID-19-related prohibition against in-person instruction at religious schools, and Kentucky appealed. The Sixth Circuit concluded that "[m]oving first in the district court would … have been impracticable" because "[i]n-person instruction … [was] expected to resume at religious schools in the Commonwealth this coming Monday." *Id.* at 508. Here, there is even greater urgency because, with every passing hour, many hundreds of American citizens in the Class suffer irreparable Fourth Amendment injuries.

Matters would not be so urgent had the district court ruled with enough time to permit appeal or a stay motion before the Final Rule's effective date (or if Appellees had been willing to delay implementation). However, the district court declined to do so at every opportunity: it first rejected Plaintiffs-Appellants' motion to expedite consideration under the MSA and then rejected Plaintiffs-Appellants' request to stay the GPS-tracking requirement as moot. ECF Nos. 85, 94. The district court instead ruled just hours before GPS tracking was scheduled to begin, making it impossible for Plaintiffs-Appellants to seek injunctive relief pending appeal before the onset of irreparable Fourth Amendment harm. ECF No. 94. In short, except for shortening briefing schedules, the district court ignored the urgency of the impending Fourth Amendment violations and allowed them to transpire, thus deliberately cementing a

status quo in Appellees' favor. "[U]nder the circumstances, it would serve little purpose to require another application to the district court." *McClendon*, 79 F.3d at 1020.

Defendants' reliance on *Whole Woman's Health v. Paxton*, 972 F.3d 649, 654 (5th Cir. 2020), *see* Appellees Br. at 11, is misplaced because that case lacks the hallmarks of urgency and futility present here. Regarding urgency, *Paxton* "emphasize[ed] that the [movant's] appeal has been pending before this court for nearly 1,000 days. Never during this time period has the [movant] moved in the district court for a stay." *Id.* at 653. In contrast, Plaintiffs-Appellants appealed immediately after the district court's ruling and moved for a stay to prevent ongoing irreparable harm. Regarding futility, the movant in *Paxton* sought a stay based on a new Supreme Court case but "d[id] not even attempt to explain why it would be 'pointless' to move first in the district court" based on that case. *Id.* at 644-45. It instead assumed the district court would refuse to consider the new authority, thus "apply[ing] a presumption of bad faith on the part of the district court." *Id.* at 645. In contrast, Plaintiffs-Appellants express no bad-faith presumption that the district court would ignore new authorities or evidence, as there is no new material for the district court to consider.

II. THE MSA DOES NOT STRIP THIS COURT OF ITS ARTICLE III POWERS TO ENJOIN UNCONSTITUTIONAL ACTIONS WHILE IT CONSIDERS THE CASE

Appellees assert that Congress has prohibited enjoining unconstitutional action whenever the MSA is invoked. *See* Appellee's Br. at 7-9. But the MSA prohibits only injunctions under Section 705 of the APA. *See* 16 U.S.C. § 1855(f)(1)(A) ("section 705

of [the APA] is not applicable"). It says nothing, however, about injunctions issued under the Court's inherent Article III powers. *See, e.g., In re Abbott*, 800 Fed. App'x. 296 (5th Cir. 2020) (per curiam) (granting administrative stay under Court's inherent authority to control its docket to give time to consider motions) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *see also Texas All. for Retired Americans v. Hughes*, 2020 WL 5814260 (5th Cir. Sep. 28, 2020) (administrative stay of TRO granted while it considered appeal briefs); *Mi Familia Vota v. Abbott*, 2020 WL 6334374 (5th Cir.) (same).

A few hypotheticals vividly illustrate the absurdity of Appellees' claim "that § 1855(f)(1)(A) prohibits [all] preliminary injunctive relief," Appellees Br. at 8. Under their reading, no preliminary injunction would be available even for a blatantly unconstitutional rule such as one that targets only Asian-American permitted recreational fishermen for GPS surveillance. Nor would they allow the Court to stay a rule that forbade criticism of the President as a condition of maintaining a recreational fishing permit. The MSA should not be construed to create a clash between this Court's inherent Article III power and Congress's Article I legislative power.

Cases Appellees cite do not support their contention that § 1855(f)(1)(A) prohibits the Court from issuing injunctions for purely constitutional claims. *Delta Com. Fisheries Ass'n v. Gulf of Mex. Fishery Mgmt. Council*, 364 F.3d 269 (5th Cir. 2004), made no constitutional challenge and alleged no constitutional injury. The closure of a fishery in *Kramer v. Mosbacher*, 878 F.2d 134 (4th Cir. 1989), likewise implicated no constitutional issues but the court held plaintiffs had not met the statute of limitations, so its

discussion of injunction was *dicta*. *Accord Turtle Island Restoration Network v. Dep't of Commerce*, 438 F.3d 937, 945, 948-949 (9th Cir. 2006) (plaintiffs exceeded the statute of limitations and no constitutional violation alleged, but noting that injunction still available if plaintiff moved under laws other than the MSA); *and see Goethel v. U.S. Dep't of Commerce*, 854 F.3d 106 (1st Cir. 2017) (decided on statute of limitations grounds).

III. APPELLEES HAVE NOT DISPUTED THAT AN INJUNCTION PENDING APPEAL IS ALSO WARRANTED UNDER *RUIZ*

Appellees did not seriously contest that this case presents substantial and serious legal questions on the merits including whether charter boat fishing is a "closely regulated industry" and whether the Fourth Amendment is violated by twenty-four-hour GPS tracking even when not engaging in regulated activity. *Ruiz I*, 650 F.2d at 565; *Ruiz v. Estelle (Ruiz II)*, 666 F.2d 854, 856–57 (5th Cir. 1982). An injunction against the Final Rule should issue on those grounds as well as on the factors shown in Plaintiffs-Appellants' moving brief.

CONCLUSION

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

Dated: April 8, 2022

Respectfully submitted,

A. Gregory Grimsal
GORDON ARATA MONTGOMERY BARNETT
201 St. Charles Avenue, 40th Floor
New Orleans, Louisiana 70170-4000
Telephone: (504) 582-1111
Facsimile: (504) 582-1121
Email: ggrimsal@gamb.com

/s/ John J. Vecchione
John J. Vecchione
Counsel of Record
Sheng Li
Kara Rollins
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
(202) 869-5210 (Telephone)
(202) 869-5238 (Fax)
John.Vecchione@ncla.legal
Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

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

I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because if contains 2496 words according to the count of Microsoft Word.

/s/ John J. Vecchione
John J. Vecchione
Counsel of Record for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on April 8, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/EFC system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ John J. Vecchione
John J. Vecchione
Counsel of Record for Plaintiffs-Appellants