

The stay is necessary to prevent irreparable injury to Plaintiffs and to give the Court time to properly consider the voluminous submissions before it. *Cf. id.* (noting that a delay of effective date would, among other things, “allow ... additional time for the litigation progress”). Because there is no pressing need for GPS tracking of the class, and the class has a strong interest in avoiding unwarranted intrusions on its constitutional rights, there is no interest outweighing the grant of a stay until such time as this Court rules on the underlying merits.

Plaintiffs also request shortening time for the Defendants to respond to this motion to February 9, 2022, so that, if granted, the stay will be entered in time to protect the Class. As time is of the essence if such shortened time for Response is granted, Plaintiffs waive any Reply Brief unless ordered to address a question by the Court.

FACTS

The facts supporting this motion are clear from the docket and submissions before the Court. In the service of brevity, Plaintiffs simply cite the Docket Entries demonstrating the need for this stay.

1. On June 2, 2021, this Court granted class certification on the Plaintiffs’ original Complaint. DE 48; DE 60 (amending class certification order to, *inter alia*, approve class counsel).
2. Plaintiffs filed the First Amended Class Complaint on June 9, 2021. DE 54. It contained four substantive counts, the first claiming violations of the Fourth, Fifth, and Ninth Amendments, and others under the Magnuson-Stevens Act (“MSA”), the Administrative Procedure Act (“APA”), and the Regulatory Flexibility Act (“FSA”). Count V contained the class allegations.
3. On August 11, 2021, Plaintiffs filed their motion for summary judgment on all counts, including the violation of their Fourth and Fifth Amendment rights threatened by the VMS Requirement.

4. On September 14, 2021, while the parties were briefing the motion and cross-motion for summary judgment, and related submissions, the National Marine Fisheries Service announced that the final rule's VMS Requirement would become effective on December 13, 2021, and the parties so informed the Court. DE 77.
5. In response to this emerging deadline, the parties agreed to shorten the summary judgment briefing schedule, waived oral argument on the motions, and also requested expedited consideration under 16 U.S.C. § 1855(f)(4) of the MSA. On October 4, 2021, the Court shortened the briefing but denied the motion for expedited consideration. DE 85.
6. The Defendants suggested and Plaintiffs agreed that the Plaintiffs would petition the agencies to extend the deadline for the VMS Requirement. Plaintiffs did so, requesting extension to March 22, 2022. On November 11, 2021, the VMS Requirement's effective date was moved, albeit, to March 1, 2022. DE 88. No such suggestion has been made by Defendants in the instant matter.
7. While the Class Plaintiffs currently use an "app" to report their clients' catch, and while they have objected and moved for summary judgment as to certain information required by that app, they did not move for an injunction as to those violations by the agencies.
8. It is February 2, 2022, and the class is faced with purchasing and installing a GPS device that allows Defendants to track them 24 hours a day, which violates their constitutional and statutory rights. They now move for a stay of the VMS Requirement enjoining its enforcement until the Court has time to consider their submissions.

ARGUMENT

As the record reflects, the Court has before it voluminous motions and supporting material as well as complicated and sometimes novel legal issues involving important constitutional rights, administrative power, and statutory authority. DE 73, 73-1, 79, 79-1, 86, 86-1, 87. It is anticipated

that the Defendants will argue that a preliminary injunction under Section 705 of the Administrative Procedure Act (“APA”) is not available because 16 U.S.C. § 1855(f) states “section 705 ... is not applicable.” Plaintiffs, however, are not moving for an injunction or stay under the APA. Rather, they are primarily invoking the Court’s inherent ability to enter an *administrative* stay while it considers motions. Secondly, nothing in the MSA prohibits an injunction under authorities other than the APA, such as the Constitution or Fed. R. Civ. P. 65 and the All Writs Act, 28 U.S.C. § 1651(a), which, again, retains the Court’s ancient authority to impose stays in aid of its function.

I. An Administrative Stay Is Warranted Under the Court’s Own Authority

The chief reason the Court should stay the effective date of the VMS Requirement and enjoin the Defendants from enforcing it is to preserve the status quo so that the Court’s merits determinations and orders will be meaningful. At present, the entire class of charter boat permit holders is under pressure to purchase at least one and sometimes multiple VMS devices that can cost up to thousands of dollars each. They have to be installed and then begin transmitting data to the Defendants by March 1, 2022. This Court since the filing of the motion and cross-motion for summary judgment has experienced Covid-19 related delays, storms, and the general press of litigation accompanying the attempt of courts throughout the country to restart jury trials and the like, particularly for the criminal docket. It has two motions and their accompanying documents running many hundreds of pages under its review.

Under these circumstances, an administrative stay is warranted under applicable precedent. *See In re Abbott*, 800 Fed. Appx. 296 (5th Cir. 2020) (Mem.) (*per curiam*) (unpublished) (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)); *SLV v. Rosen*, 2021 WL 243442 (W.D. Texas 2021) (affirming grant of administrative stay during period court was considering whether it had jurisdiction and noting, even after finding no jurisdiction, administrative stay of agency

actions appropriate) (citing *U.S. v. United Mine Workers of Am.*, 330 U.S. 258 (1947)). The *SLV* court's determination is applicable here:

With respect to issuance of the administrative stay, the Court finds apt guidance from *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). Although that case did not involve uncertainties caused by jurisdiction-stripping provisions of immigration law, it recognized that federal district courts may issue an injunction to preserve the status quo even when subject matter jurisdiction is disputed or unclear. *See* 330 U.S. at 290-93. It further recognized that “in the matter of federal jurisdiction, which is often a close question, the federal court may either have to determine the facts, as in contested citizenship, or the law, as whether the case alleged arises under a law of the United States.” *Id.* at 292 n.57.

In the circumstances before it, the Supreme Court found that “the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction.” *Id.* at 290. Relying on *Shipp [v. United States]* 203 U.S. 563 (1906)], the Court “provided protection for judicial authority” in such uncertain situations concerning jurisdiction. *Id.* As part of its larger discussion, the Supreme Court recognized that it was the court's duty alone to determine whether it had jurisdiction and “[o]n that question, at least, it was its duty to permit argument, and to take the time required for such consideration as it might need.” *Id.* at 291. (quoting *Shipp*, 203 U.S. at 573). Two other legal principles from *Shipp* deserve notation: (1) “[u]ntil [the court's] judgment declining jurisdiction should be announced, it had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition” and (2) “[t]he fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it.” *Id.* at 291-92 (quoting *Shipp*, 203 U.S. at 573).

Id. * 6; *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); *Martin et. al. v. Frail*, 2011 WL 13175089 *7 n. 91 (W.D. Tex. July 5, 2011) (administrative stay so district court could consider summary judgment).

Simply to provide time to consider the voluminous submissions and provide a considered opinion, the Court should stay the VMS Requirement under its inherent authority to rule on motions and to preserve the status quo while it does so.

II. A Preliminary Injunction Is also Warranted in This Matter

The First Amended Complaint and Summary Judgment motion make clear that important

constitutional rights are at stake. Preliminary injunctions are often granted against agency actions in the Fifth Circuit while courts consider regulations. The court in *Associated Builders & Contractors of Se. Texas v. Rung*, 2016 WL 8188655 (E.D. Tex.), noted:

To preserve the status quo, federal courts in the Fifth Circuit have regularly enjoined federal agencies from implementing and enforcing new regulations pending litigation challenging them. *See, e.g., Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015) (enjoining executive order inconsistent with immigration statutes); *Nat'l Fed'n of Indep. Bus. v. Perez*, Case No. 5:16-cv-00066-C (N.D. Tex. June 27, 2016), *appeal pending* (5th Cir.) (preliminarily enjoining the DOL's "persuader" rule as violative of Congressional intent under the Labor Management Reporting and Disclosure Act ("LMRDA")).

Id. *5.

The familiar standard for preliminary injunctions is: "(1) a substantial likelihood of success on the merits of their case; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any damage that the injunctive order might cause the Defendants; and (4) that the order will not be adverse to the public interest." *Id.* (citations omitted).

Plaintiffs easily meet these standards. To start, Plaintiffs have substantial success on the merits for reasons stated in their summary judgment submissions. DE 73-1, 86-1. In particular, the Supreme Court's criticism of government efforts at 24-hour warrantless surveillance tips this factor towards Plaintiffs. *See Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018) (striking down warrantless electronic tracking of vehicle).

Next, the deprivation of a constitutional right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, absent a preliminary injunction, Plaintiffs are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citation omitted).

The balance of equities clearly favors Plaintiffs because the constitutional injury to Plaintiffs is worse than anything the Defendants will experience. They still receive all the fish-

catch information and more through the “app,” and the public interest is unharmed from a delay in a rule that has never been implemented, and there is no emergency need. Defendants already voluntarily delayed the VMS requirement for over a year after promulgating the August 2020 Final Rule. DE 77. And their purported reason for imposing a March 1, 2022 deadline is having VMS devices in place to track spring breakers. DE 88-1. This is hardly the type of concern requiring this court to rush or cause the Defendants damage.

III. The All Writs Act Provides Further Support for a Stay of the VMS Requirement

The final power the Court may invoke to preserve the status quo while it considers the outstanding motion is the All Writs Act, 28 U.S.C. § 1651(a), which states: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” It is unequivocal that this includes injunctions. *United States v. W. Pa. Sand & Gravel Ass’n*, 114 F. Supp. 158, 159 (1953). It includes injunctions against agencies to preserve the status quo and forestall arguments about mootness and other consequences of administrative *fait accompli*. See *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (“Likewise, decisions of this Court have recognized a limited judicial power [under § 1651] to preserve the court’s jurisdiction or *maintain the status quo by injunction pending review of an agency’s action through the prescribed statutory channels.*” (Emphasis added)). The D.C. Circuit recently issued an All Writs Act “administrative injunction” to stay the release of President Trump’s Jan. 6 records to “protect the court’s jurisdiction to address appellant’s claims of executive privilege,” *i.e.*, to give the court time to consider arguments and reach a decision on the merits. *Trump v. Thompson*, No. 21-5254, 2021 WL 5239098, at *1 (D.C. Cir. Nov. 11, 2021).

Courts in the Fifth Circuit have also used the All Writs Act in this way. *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. 1981) (enjoining related state cases and noting Anti-Injunction Act did not prevent such a stay); *In re Vioxx Prod. Liab. Litig.*, 869 F. Supp. 2d 719 (E.D. La. 2012)

(same); *Newby v. Enron Corp.*, 2002 WL 1001056 (S.D. Tex. May 1, 2002) (same). Defendants alone control the timing of the regulation that would force Plaintiffs to purchase and install GPS tracking devices that broadcast their whereabouts. Any claim that this Court has no power to stay the regulation while it considers the merits of the motions would be ill-made and should be ill-taken.

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. Counsel has kept this important motion, vital to the entire class, under ten pages in recognition of the imposition caused by requesting that Defendants respond within seven days.

CONCLUSION

Plaintiffs ask this Court to exercise its inherent discretion to administratively stay the regulation and enjoin its enforcement only for so long as the Court considers the merits.

A form of Order is attached.

Dated: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 2nd day of February 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all attorneys of record.

/s/ John J. Vecchione
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