No. 22-30105

In the 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; WILBUR L. ROSS, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NOAA, A SCIENTIFIC AGENCY WITHIN THE DEPARTMENT OF COMMERCE; NEIL JACOBS, DOCTOR, IN HIS OFFICIAL CAPACITY AS ACTING 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; CHRIS OLIVER, IN HIS OFFICIAL CAPACITY AS ASSISTANT ADMINISTRATOR FOR NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Action No. 2:20-cv-2312
Hon. Suzie Morgan, presiding

BRIEF FOR THE STATES OF LOUISIANA, ALABAMA, MISSISSIPPI AND SOUTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTERESTS OF *AMICI CURIAE*

The States of Louisiana, Alabama, Mississippi and South Carolina have a strong interest in protecting the constitutional rights of their citizens, including their right to be free from Government tracking of their movements without a warrant or exigent circumstances. Amici also have a strong interest in protecting their charter fishermen and other recreational fishermen, and ensuring that they are dealt with fairly. Amici also have an interest in ensuring similar protections afforded pursuant to their State constitutions are respected.

Plaintiffs-Appellants filed this suit to challenge Defendants-Appellees' rule requiring all charter fishermen not only to submit to continuous Government tracking of their location as a condition of fishing in federal waters, but to pay for it, despite the absence of any warrant or particularized suspicion that they are violating any rule or requirement. *Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico*, 85 Fed. Reg. 44,005 (July 21, 2020) (the "Final Rule").

The Final Rule plainly violates the prohibition of warrantless tracking via Government-installed devices recognized by the Supreme

Court in *U.S. v. Jones*, 565 U.S. 400 (2012). Nevertheless, the District Court upheld the rule and its tracking requirement on the grounds that "fishing" is such a highly regulated "industry" that charter fishermen have no reasonable expectation to be free of Government tracking via devices installed on their vessels. This reasoning expands the closely regulated industry doctrine to such a degree that it would apply to *anyone* who fishes, even parents fishing for pleasure with their children, overreaching its legitimate application.

Louisiana, Mississippi, Alabama and South Carolina submit this brief as *amicus curiae* pursuant to Fed. Rule of App. Proc. 29(a)(2) in opposition to the Final Rule and in support of Plaintiffs-Appellants' challenge to it. While preserving the nation's fisheries is a proper Government objective, the means by which Defendants-Appellees seek to do so must be constrained to constitutionally permissible methods. The Final Rule exceeds these bounds.

BACKGROUND

The Final Rule requires any charter boat that is federally licensed to fish for reef fish or highly migratory fish species in federal waters to have a vessel monitoring system ("VMS") on board and active. 85 Fed.

Reg. at 44018, 44020. The VMS is a satellite or cellular GPS tracking device. It transmits the boat's location continuously if using a satellite system; and either transmits or stores and later sends the boat's location every hour if using a cellular system. The transmission frequency is reduced to every four hours if the boat is docked; but the unit can be turned off only if the boat is docked or powered down for more than three days.

Thus, Defendants-Appellees track the location of charter boats – and their operators – *at all times while the boats are in use*. If a charter boat owner or operator does not have a functioning VMS unit or turns it off, even if not fishing, Defendants-Appellees advised that they would not renew the federal charter fishing permit. There is a moratorium on new permits, so losing a permit is catastrophic.

ARGUMENT

The District Court failed to recognize the unreasonableness of the warrantless search embodied by the tracking requirement of the Final Rule and improperly applied the closely regulated industry doctrine to charter fishing to uphold the requirement.

I. THE TRACKING REQUIREMENT IS A SEARCH UNDER THE FOURTH AMENDMENT.

The District Court *assumed* that the tracking requirement is a search under the Fourth Amendment. This is not much of a concession, because the Supreme Court has held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Jones*, 565 U.S. at 404. The Supreme Court emphasized that "[t]he Government physically occupied private property for the purpose of obtaining information." *Id.* Given this physical occupation, the Supreme Court ruled it unnecessary to address the target's expectation of privacy in order to determine that the requirement was a search, because that is the analysis for *non-trespassory* Government activities. *Id.* at 409.

Here, Defendants-Appellees would not install the tracking devices themselves, but instead require Plaintiffs-Appellants to do so. This is of no consequence to whether there is a Government occupation because Plaintiffs-Appellants are merely instrumentalities through whom Defendants-Appellees obtain placement of the device sending tracking data to them. This is similar to holding someone's hand and smashing it

into another's face–the tort was committed by the hand-holder, not the hand-owner.

II. THE TRACKING REQUIREMENT IS AN UNREASONABLE SEARCH AND THEREFORE IMPERMISSIBLE WITHOUT A WARRANT.

A search may still be constitutional if it is reasonable. *Grady v. North Carolina*, 575 U.S. 306, 310 (2015). "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id*. The tracking requirement fails this examination.

A. The Nature of the Search Demonstrates the Unreasonableness of the Tracking Requirement.

At the outset, the Supreme Court made clear in *Jones* that Government placing (or here, requiring) tracking devices on private vehicles without a warrant is improper.

This particular tracking requirement is also overbroad because it is not limited to charter fishing activities, much less to fishing in federal waters. To the contrary, the Final Rule expressly extends the requirement to uses of the boat that *are not fishing*: it applies "anytime the vessel departs from a dock… regardless of the duration or purpose,

including non-fishing activities." 85 Fed. Reg. at 44088. Charter boats are generally smaller vessels that are also useful for in-shore fishing outside of federal waters. They are also useful for private fishing, transportation, travel, or pleasure, and charter fishing boat owners often use them for such purposes, which have nothing to do with charter fishing. Also, the tracking requirement applies *year-round,* even though some key reef fish seasons (*e.g.*, red snapper and amberjack) last only a few months; and even though many charter fishermen operate only during prime charter seasons when paying customers want their services. By requiring tracking at all times, the Final Rule overreaches its purpose of tracking charter fishing efforts.

The burden of the tracking requirement is significant. Defendants-Appellees estimated the monthly subscription fee for cellular tracking units at $10 to $40 per month (satellite units cost far more). Since the average annual charter boat net income is only $26,000, the subscription fees alone would consume up to 1.85% of fishermen's net income. This is not a trivial expense, as the District Court asserted.

Defendants-Appellees currently have a grant program to reimburse up to $950 of the cost of the purchasing a tracking unit. However, this is

subject to reduction or termination and Defendants-Appellees already reduced it from $3,100 to the current $950 "[d]ue to current budgets." NOAA Fisheries Bulletin FB22-019 (April 4, 2022), https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/311ef0e, last accessed May 1, 2022. This is neither reassuring that the grants will continue, nor likely that they will cover costs of the units. And when a unit must be repaired or replaced, it's fully at the fisherman's expense. This is yet more expense to the fishermen, another 3.6% or more of their $26,000 average annual net income.

The tracking requirement is potentially ruinous to charter fishermen because there is no alternative to the requirement when the tracking unit is broken. If this happens, Defendants-Appellees blithely suggest "contact[ing] the hardware vendor to see if the situation can be repaired." 85 Fed. Reg. at 44013 (response to Comment 21). If not, however, "the vessel cannot leave the dock." *Id*. There is no procedure in the Final Rule to enable fishermen to continue working when the required equipment breaks, through no fault of their own.

It is common knowledge that repairing electronic devices can be difficult if not impossible and can take a very long time. And post-COVID

supply-chain problems have greatly exacerbated both repair and replacement timelines. With some federal charter seasons and the peak charter season lasting only months, having to wait for repair or replacement may force fishermen to miss most or all of their customers for the year; and would obviously greatly reduce their income.

B. The Purpose of the Search Demonstrates the Unreasonableness of the Tracking Requirement.

Less intrusive means to obtain data on charter fishing efforts are not only available but *required* in the same rule as the tracking requirement. The Final Rule requires electronic fishing reports that include "information about the permit holder, vessel, location fished, fishing effort, discards, and socio-economic data." 85 Fed. Reg. at 44005. Thus, Defendants-Appellees already require reporting where the charter boat fished, which is the same data the tracking unit would convey.

Duplication of data is hardly a compelling purpose. To the contrary, the Supreme Court rejected validation of data as a basis for upholding a warrantless search requirement. In *City of Los Angeles v. Patel*, 576 U.S. 409, 427 (2015), the Supreme Court noted that it had already rejected the argument that a search requirement is needed to avoid "giving operators a chance to falsify their records"–in other words, to validate the data. Yet

this is the same need cited by Defendants-Appellees and the District Court, that the tracking is needed to validate the reported trip-location data:

> By tracking vessels, NMFS can validate a trip as taken and the location of the trips, as well as ensure vessel owners and operators are reporting as required. * * *
>
> The vessel location tracking system is an additional mechanism that verifies vessel activity without a report having to be completed by the vessel operators. The vessel location tracking system will allow NMFS to independently determine whether the vessel leaves the dock. This will allow NMFS to independently determine whether the vessel leaves the dock. This will help validate effort and aid with enforcement of the reporting requirements.

85 Fed. Reg at. 44,010 and 44,012 (responses to Comments 11 and 22). With no evidence or even allegation that charter fishermen have falsified or would falsify their reports, Defendants-Appellees cannot justify their warrantless tracking requirement on the very basis already rejected by the Supreme Court – validation of data.

C. The Intrusion of the Search on Privacy Expectations Demonstrates the Unreasonableness of the Tracking Requirement.

"Individuals have a reasonable expectation of privacy in the whole of their physical movements" and "[m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's

whereabouts." *Carpenter v. U.S.*, 138 S.Ct. 2206, 2217 (2018). While tracking a fishing boat every hour, or even every four hours, is not as complete as tracking a cell phone, this is a difference only of degree – and a small degree at that. A boat can only move so far in an hour. Knowing where a boat is every hour is tantamount to knowing where it is all the time. The precision of the tracking was Defendants-Appellees' rationale for why it is necessary. 85 Fed. Reg. at 44010 and 44012 (responses to Comments 11 and 22). Indeed, if the tracking *didn't* show a boat's location sufficiently to know where it was, then the requirement would be useless, and improper for that reason as well.

As Plaintiffs-Appellants explain, the tracking required by Defendants-Appellees is prolonged (indeed, perpetual), precise, and comprehensive, and reveals "intimate details through habits and patterns" and provides a "wealth of detail" regarding the fisherman's location and activities. And unlike the 127 days of tracking held to be impermissible in *Carpenter*, tracking under the Final Rule would be *perpetual*. Fishermen have a reasonable expectation not to be tracked in such a manner.

D. The Search Embodied in the Tracking Requirement Is Unreasonable Under the Relevant Factors and Impermissible.

The tracking requirement is an unreasonable search because it fails each of the factors identified by the Supreme Court for this analysis. It is therefore impermissible, in the absence of a warrant or some specific exception. *Carpenter*, 138 S.Ct. at 2221.

"The Court usually requires 'some quantum of individualized suspicion' before a search or seizure may take place." *Id*. The "exigencies of the situation [may] make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment," such as "the need to pursue a fleeing suspect, protection individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." *Id*. at 2222. Here, there *are* no such exigencies, as the rule applies in blanket fashion to all charter boats, all of the time.

Paroled criminals or those on bail can be tracked using ankle bracelets. But that is after they have been convicted of a crime, or least charged. Here, there is no charge of any crime or even an accusation, much less probable cause. Yet the Final Rule would authorize the

Government to track the fisherman wherever they go, whenever they go, regardless of their reason for going there. Adding injury to injury, the Government requires them to pay for the invasion of their privacy.

III. THE "CLOSELY REGULATED INDUSTRY" EXCEPTION TO THE WARRANT REQUIREMENT IS INAPPLICABLE TO CHARTER FISHING.

The District Court upheld the Final Rule on the grounds that "fishing" is a "closely regulated industry" under the doctrine of that name. This doctrine short-circuits examination of the reasonableness of the search, reasoning that there can be no reasonable expectation of privacy for those engaged in an industry where there is pervasive governmental oversight. *Marshall v. Boone*, 436 U.S. 307, 313 (1978).

The closely regulated industry doctrine has a strong air of bootstrapping. Its essence is that the Government has so comprehensively ignored the right to be free of warrantless searches in a particular industry that the right is nullified and those participating in it cannot complain about it now – precisely *because* the Government has done so for so long. Congress itself cannot disregard the Constitution directly, so the courts should be loath to *infer* a right for the Executive Branch to do so from regulatory provisions.

The Supreme Court has found only liquor sales, firearms dealing, mining, and automobile junkyards to be so "closely regulated" that the doctrine would apply – indeed, "the closely regulated industry ... is the exception." *Patel*, 576 at 425. By contrast, "nothing inherent in the operation of hotels [the industry at issue in *Patel*] poses a clear and significant risk to the public welfare" and while there are regulations applicable to hotels, they "can hardly be said to have created a 'comprehensive' scheme that puts hotel owners on notice that their 'property will be subject to periodic inspections undertaken for specific purposes.'" *Id*. The district court's expansion of this doctrine to encompass "fishing" is legal error.

A. The Industry Relevant to the Final Rule Is "Charter Fishing," Not "Fishing" Generally.

The "industry" at issue must first be determined before it can even be determined whether it is "closely regulated." Here, the District Court generically identified the industry as "fishing," but identified only restrictions specific to *commercial* fishing to justify the tracking requirement with respect to *charter* fishing.

Congress defined charter fishing in the Magnuson-Stevens Act ("MSA") as *recreational* fishing, in *distinction from* commercial fishing.

"Charter fishing" is "fishing from a vessel carrying a passenger for hire... who is engaged in recreational fishing," where "recreational fishing" is "fishing for sport or pleasure." 16 U.S.C. 1802(3, 37). "Commercial fishing" is "fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade." 16 U.S.C. 1802(4).

Congress did not stop there. The MSA expressly recognizes that recreational and commercial fishing are different, and requires management adapted to each:

> While both provide significant cultural and economic benefits to the Nation, recreational fishing and commercial fishing are different activities. Therefore, science-based conservation and management approaches should be adapted to the characteristics of each sector.

16 U.S.C. 1801(a)(13).

The Government's regulations implementing MSA also distinguish commercial from recreational fishing, and apply different managerial structures and requirements. Commercial fishermen are subject to much more comprehensive regulation, including preexisting tracking requirements that apply only to commercial fishing.

The statutory distinction between commercial and recreational fishing, including charter fishing, makes sense. Commercial fishing is a *business*. While charter fishing is also a business, that business is essentially *transportation* – taking people to the fish so *they* can fish for sport or pleasure. Charter fishermen typically *don't* fish as part of their business operations–usually it is their clients who fish–so it is wrong even to categorize charter fishing as a "fishing industry." By contrast, commercial fishing is the actual harvesting of the fish. These sectors are fundamentally different in purpose and operation and in regulation.

Commercial and charter fishing operations are also different in size and scale. Commercial fishing operations are generally (and increasingly) more substantial businesses than charter fishing operations, typically generating more revenue, employing more personnel, and taking far more fish. Charter operations are typically small businesses with small payrolls (often just single individuals or families) and small income (averaging only $26,000 per year). Subjecting charter fishermen to the same burdens as commercial fishermen is fundamentally unfair and arbitrary due to this resource disparity.

The impropriety of treating all fishing as a single closely regulated industry is apparent from the fact that the District Court's reasoning would strip *everyone* who fishes of their privacy rights. Even a father and son or daughter fishing from a pier surrenders their rights merely by doing so since the closely regulated industry exception would apply equally to them merely because they participate in "fishing." The disconnect is that recreational fishing–which includes charter fishing–is *not* an industry, because it is for sport or pleasure.

Thus, the relevant industry here (if any) is *charter* fishing, not "fishing" *per se*. Commercial and recreational fishing cannot be lumped together as a single "industry" of "fishing." Regulations applicable only to one do not apply to the other and cannot be cited to subject one sector to requirements applicable to the other. Regulations imposed on commercial fishing therefore carry little or no significance as to how closely regulated charter fishing is. This is similar to this Court's observation in *Zadeh v. Robinson*, 928 F.3d 457, 466 (5th Cir. 2019), that while the medical profession is not closely regulated for purposes of the doctrine, a subset such as those who prescribe controlled substances

might be. Even if commercial fishing is closely regulated as a subset of fishing, all fishing is not.

B. There Is No Basis to Find Charter Fishermen Have a Diminished Expectation of Privacy Rights.

In the end, the closely regulated business "is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy." *Zadeh*, 928 F.3d at 465, *citing New York v. Burger*, 482 U.S. 691, 701 (1987). "[T]he theory behind the closely regulated industry exception is that persons engaging in such industries, and persons present in those workplaces, have a diminished expectation of privacy." *Id*. at 466.

There is no historical precedent that even suggests charter fishermen have, or should have, diminished privacy expectations. The District Court cited only commercial industry precedent, which is irrelevant. There are *regulations* applicable to charter fishing, but none prior to this tracking requirement impinged on privacy rights. Because the essence of the closely regulated industry doctrine is that those participating in the industry should anticipate such impingement and there is nothing to show that charter fishermen should, that doctrine cannot be applied to validate the tracking requirement.

IV. THE CLOSELY REGULATED INDUSTRY DOCTRINE WOULD NOT SUPPORT THE TRACKING REQUIREMENT BECAUSE IT IS UNNECESSARY TO DETERMINE CHARTER FISHING EFFORTS AND THERE IS NO ADEQUATE SUBSTITUTE FOR A WARRANT.

Even when the closely held exception applies, "warrantless inspections in closely regulated industries must still satisfy 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 464-465, citing *Burger*, 482 U.S. at 702–03. The tracking requirement is duplicative of other, less-intrusive fishing effort reporting requirements and is thus unnecessary to further the Government's interest. And while tracking enables independent Government validation of such reporting, this is not a valid reason to disregard the constitutional warrant requirement.

The District Court incorrectly reasoned that the Final Rule was a "constitutionally adequate substitute for a warrant" merely because charter fishermen *know* about the requirement. This is *not* a "substitute" for a warrant. A warrant requires judicial determination that there is "probable cause" to believe a violation may be underway or imminent, or has occurred. U.S. Const. Amend. IV; *U.S. v. Grubbs*, 547 U.S. 90, 96

(2006). Foreknowledge that the Government may violate the Fourth Amendment is not a substitute for the Government's compliance with the Fourth Amendment.

Thus, even if the closely held industry exception *could* apply here, it would not apply because two of the three requisite criteria are lacking.

CONCLUSION

The District Court repeatedly stated that charter fishermen should just find another line of work if they don't want to be tracked. But constitutional rights cannot be conditioned upon choosing not to engage in an activity–unless some exception applies. As none does, charter fishermen cannot be required to leave their jobs to avoid Government violation of their rights.

A rule must be set aside if it is contrary to a constitutional right. 5 U.S.C. 706(2)(B). That is the case as to the tracking requirement of the Final Rule–it violates charter fishermen's Fourth Amendment rights, and therefore cannot stand.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the May 9, 2022, the foregoing brief was filed electronically with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which will send notification of such filing to all participating attorneys.

/s/ *Elizabeth B. Murrill*
Elizabeth B. Murrill

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 3,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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Dated: May 9, 2022