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.

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

Civil Action No. 2:20-cv-2312

Honorable Susie Morgan, presiding

APPELLANTS' OPENING BRIEF

A. Gregory Grimsal
GORDON ARATA MONTGOMERY BARNETT MCCOLLAM DUPLANTIS & EAGAN
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)
John.Vecchione@ncla.legal

Counsel for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PERSONS

Mexican Gulf Fishing Company v. U.S. Dep't of Commerce

No. 22-30105

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

1. Mexican Gulf Fishing Company is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
2. Captain Billy Wells is a Plaintiff-Appellee.
3. A&B Charters, Inc. is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
4. Captain Allen Walburn is a Plaintiff-Appellee.
5. Captain Kraig Dafcik is a Plaintiff-Appellee.
6. Captain Joey D. Charters is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
7. Captain Joseph Dobin is a Plaintiff-Appellee.
8. Ventimiglia Charters LLC is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
9. Captain Frank Ventimiglia is a Plaintiff-Appellee.

10. Fishing Charters of Naples is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
11. Captain Jim Rinckey is a Plaintiff-Appellee.
12. Gina Raimondo, in her official capacity as Secretary of Commerce
13. Richard W. Spinrad in his official capacity as Administrator of NOAA.
14. Nicole R. LeBoeuf in her official capacity as Assistant Administrator for NOAA.
15. United States Department of Commerce
16. National Oceanic and Atmospheric Administration
17. National Marine Fisheries Service
18. New Civil Liberties Alliance: John J. Vecchione, Sheng Li, Kara Rollins are counsel for Plaintiffs-Appellants.
19. Gordon, Arata, Montgomery, Barnett, McCollam, Duplantis & Eagan: A. Gregory Grimsal is counsel for Plaintiffs-Appellants.
20. U.S. Department of Justice: Daniel J. Halainen, Nicole Smith, Elizabeth A. Chickering, and Shampa Panda are counsel for Defendants-Appellees.

Dated: May 2, 2022

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

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. This case involves important constitutional questions under the Fourth and Fifth Amendments regarding whether an administrative agency may force regulated businesses to install GPS-tracking equipment at their own expense so that the government may track and record their movements 24-hours day. This case also asks whether an administrative agency may issue costly and burdensome regulations under the Magnuson-Stevens Fishery Conservation and Management Act authorizes without articulating how such regulations improves the conservation and management of fisheries. Moreover, this case poses complex questions regarding an agency's obligations under the notice-and-comment and arbitrary-and -capricious requirements of the Administrative Procedure Act. In addition to these important legal questions, this case involves a voluminous administrative record spanning thousands of pages. Oral argument will help the Court navigate the complicated legal and factual issues presented.

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JURISDICTIONAL STATEMENT

Appellants appeal from the district court's order denying their motion for summary judgment and granting Appellees' motion for summary judgment. ROA.12426 ("Order"). The basis for jurisdiction in the district court was 28 U.S.C. § 1331 and 5 U.S.C. § 701. This court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err when it held that the Fourth Amendment of the United States Constitution allows a federal agency, having no warrant or suspicion of wrongdoing, to permanently and continuously surveil all vessels licensed for chartered recreational fishing in the Gulf of Mexico?

2. Did the district court err when it held that a Fifth Amendment takings claim was not pled in the First Amended Complaint, which precisely described the Government's mandatory installation of an unwanted GPS-device on Appellants' vessels at their own expense and the uncompensated confiscation of Appellants' proprietary information and electronic data?

3. Did the district court err when it held that the Magnuson-Stevens Act authorizes the Government to require charter boat operators to purchase and maintain on their vessels, at their own expense, surveillance equipment without any discernable conservation benefit?

4. Did the district court err when it held that the Final Rule complied with the Administrative Procedure Act?

INTRODUCTION

At the time of the French Revolution, the British philosopher Jeremy Bentham coined the term "Panopticon" to denote a prison wherein all inmates would be subject to 24-hour surveillance by an unseen observer.[1] Even he never suggested such a system for free men as a routine part of engaging in a regulated business. Historically, a government that wished to track its citizens had to devote large resources to having them followed. That is no longer the case: modern surveillance tools enable mass tracking of individuals' every movement at low cost while powerful computer algorithms can process that information to reveal intimate details of each person's life.[2] With technological surveillance and data-processing technology falling dramatically in price and increasing exponentially in power, the only things that stand in the way of this dystopian vision of "Big Brother" are our laws and courts that apply them. This appeal challenges a final rule issued pursuant to the Magnuson-Stevens Act ("MSA") that requires, *inter alia,* 24-hour GPS tracking of certain permitted recreational fishing vessels in the Gulf of Mexico.

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

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

Appellants are charter fisherman who challenge a final rule, (the "Final Rule"), issued pursuant to the MSA that requires 24-hour GPS tracking of their permitted recreational fishing vessels in the Gulf of Mexico. The Government produced no record of routine violations of conservation regulations by charter-fishing permit holders in the Gulf of Mexico to justify its surveillance. Charter boat permit holders harvest *de minimis* amounts of fish from the Gulf, but the Final Rule subjects them to maximalist searches and data collection. Worse, the Final Rule mandates GPS-tracking of Appellants even when they are not hired for charter and are operating their boats for personal or other non-fishing use.

Although Congress gave Appellees no authority to do such, their Final Rule forces innocent Appellants to buy their own surveillance devices. Charter boats, which under the Final Rule, are targeted for 24-hour surveillance, account for less than one percent of Gulf fishing. Indeed, the Appellees present to conservation justification for the Final Rule. As explained herein, the Final Rule disregards constitutional rights and limits on statutory authority, and it violates the Administrative Procedure Act's ("APA") procedural rulemaking requirements.

The Final Rule also constitutes a taking without due process of law or compensation of space on the Appellants' vessels, of their proprietary information, and of their electronic data; this claim was properly pled in the First Amended Complaint ("FAC"). *See* ROA.404.

The Final Rule also presents non-delegation violations and forces Appellants into a market they do not wish to enter. Finally, the Final Rule is arbitrary and capricious under the APA in its collection of data and response to comments regarding such collection.

STATEMENT OF THE CASE

A. CHARTER BOATS AND COMMERCIAL FISHING IN THE GULF OF MEXICO

Commercial fishing vessels catch 93% of the 1.5 billion pounds of fish harvested each year in the Gulf of Mexico, with recreational fishing accounting for the remaining 7%.[3] Most recreational fishing is conducted by individuals who operate their own private boats. For those recreational fishers who rent vessels, there are two types of "for hire" recreational fishing vessels: charter boats and headboats. Charter boats are the only vessels concerned in this appeal. Charter boats "are vessels that take a group of anglers—usually six or fewer—on a fishing trip with a licensed captain and crew."[4] There are approximately 1,300 federally permitted charter boats in the Gulf of Mexico. 85 Fed. Reg. at 44,014. Unlike commercial fishing vessels and headboats, charter boats

[3] In 2019, Gulf of Mexico commercial fishing accounted for 1,402,833,781 pounds, while recreational fishing account for 105,084,987 pounds. *NOAA Fisheries Landing Statistics*, https://www.fisheries.noaa.gov/foss/f?p=215:200:9410340215107::NO::: (search "commercial" or "recreational" and "2020" NMFS Region "Gulf", "All Species", and "Totals by Year").

[4] NOAA Fisheries, *Recreational Fishing Data Glossary* (last visited Apr. 29, 2022) https://www.fisheries.noaa.gov/recreational-fishing-data/recreational-fishing-data-glossary.

are frequently used for personal purposes unrelated to charter fishing. *See* Declarations at ROA.209-226.

Charter boats operating in the Gulf of Mexico are small businesses— "the average charter vessel operating in the Gulf is estimated to receive approximately $88,000 (2018 dollars) in gross revenue and $26,000 in net income (gross revenue minus variable and fixed costs) annually." 86 Fed. Reg. at 12,165. The Plaintiffs-Appellants, using Appellees' figures, summarized charter-boat fishing as a proportion of total recreational fishing in the Gulf for the most popular recreational fishing species. *See* ROA.12160. That chart, reproduced on the next page, was not factually contradicted by either the Appellees or the district court and demonstrates the small percentage of impact such vessels have on the fish stocks of the Gulf of Mexico.

Recreational and Charter Boat Fishing

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

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

only 0.2% of total Gulf fishing.[5] Charter boats are also used for non-fishing activities as non-commercial vessels or for non-fishing recreation such as sightseeing. *See* Declarations at ROA.209-226.

B. THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT AND THE FINAL RULE

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

The MSA provides for the development and implementation of fishery management plans and establishes eight Regional Fishery Management Councils ("Councils") to manage those plans. *Id.* §§ 1801(b)(4), (b)(5). All fishery management plans must be prepared in accordance with "National Standards" defined by statutes at

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

16 U.S.C. § 1851(a). National Standard Seven requires conservation efforts to "minimize costs and avoid unnecessary duplication." *Id.* § 1851(a)(7). If a Council determines certain information is necessary to implement or revise a fishery management plan, it may request the Secretary of Commerce ("Secretary") to implement an information-collection program. 16 U.S.C. § 1881a(a)(1). The Secretary shall promulgate regulations implementing the collection if he determines the "need is justified." *Id.*

The Gulf of Mexico Fishery Management Council ("Gulf Council") manages fishery resources in the Gulf of Mexico. Charter boats are required to have a "for-hire" permit to operate in the Gulf. There are two types of "for hire" permits: one for reef fish and one for coastal migratory pelagic ("CMP" or "pelagic") fish. The majority of Gulf charter-boat operators have both permits. *See* 85 Fed. Reg. at 44,014 ("Among the 1,368 vessels with at least one Gulf charter vessel/headboat permit, 1,260 for-hire vessels had Federal permits for both Gulf reef fish and Gulf CMP species").

On October 26, 2018, NMFS published a notice of proposed rulemaking, pursuant to a request from the Gulf Council, to collect information from "for-hire" charter boats and headboats in the Gulf of Mexico. NOAA, *Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries*, 83 Fed. Reg.

54,069 (Oct. 16, 2018) ("NPRM"). The NPRM proposed to amend 50 C.F.R. part 622 to impose the following information collection requirements on charter boats.[6]

First, the proposed electronic-fishing-report requirement would require charter boats to "submit an electronic fishing report for each trip before offloading fish from the vessel, or within 30 minutes after the end of each trip if no fish were landed." *Id.* at 54,076-77. The fishing report must be sent electronically to the Science and Research Director (SRD) of NMFS's Southeast Fisheries Sciences Center. *Id.* The proposed regulatory text stated that the report must contain information regarding "all fish harvested and discarded, and *any other information requested* by the SRD," *id.* (emphasis added) but did not specify what "other information" meant. The NPRM's preamble stated that fishing reports must include information regarding "any species that were caught or harvested, … as well as information about the permit holder, vessel, location fished, fishing effort, discards, and socio-economic data." *Id.* at 54,071.

Second, under the proposed GPS-tracking requirement, charter boats must install onboard an NMFS-approved VMS tracking device that continuously transmits the boat's GPS location to NMFS, regardless of whether the boat is being used for a charter-fishing trip or for personal reasons. *Id.* at 54,076-78.

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[6] While these information-collection requirements also apply to headboats in the Gulf of Mexico, they are not part of this appeal.

Third, the proposed trip-declaration requires "an owner or operator of a federally permitted charter vessel or headboat to submit a trip notification to NMFS before departing for any trip," indicating "whether the vessel is departing on a for-hire trip or another type of trip" and, if it was a for-hire trip, "the expected trip completion date, time, and landing location." *Id.*

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

The Final Rule's electronic-fishing-report requirement is codified at 50 C.F.R. § 622.26(b)(1) for reef-fish permitted charter boats and at § 622.374(b)(1)(i) for pelagic-fish permitted boats. "The owner or operator of a charter vessel … must submit an electronic fishing report of all fish harvested and discarded, and any other information requested by the SRD for each trip … via NMFS approved hardware." 50 C.F.R. § 622.26(b)(1); *see also* 622.374 (b)(1)(i). As with the NPRM, the regulatory text did not define what "other information" means. The Final Rule's preamble stated that "NMFS will require the reporting of five economic values per trip: The charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." 85 Fed. Reg. 44,011. None of these business data elements were discussed in the NPRM.

The Final Rule's GPS-tracking requirement is codified at 50 C.F.R. § 622.26(b)(5) for reef-fish permitted charter boats and at § 622.374(b)(5)(ii)-(v) for pelagic-fish permitted boats. Each charter boat must be "equipped with NMFS-approved hardware and software with a minimum capability of archiving GPS locations … The vessel location tracking device … must be permanently affixed to the vessel and have uninterrupted operation." 50 C.F.R. § 622.26(b)(5); *see also* § 622.374(b)(5)(ii). The "permanently affixed" tracking device must "archive[] the vessel's accurate position at least once per hour, 24 hours a day, every day of the year." *Id.* § 622.26(b)(5)(ii)(B); *see also* § 622.374(b)(5)(iv)(B). Charter-boat operators must continuously transmit the stored GPS data to NMFS and the U.S. Coast Guard. 85 Fed. Reg. at 44,007.[7] Charter-boat operators "are responsible for purchasing the VMS units," Order at ROA.12440, which the Final Rule estimated would cost upwards of $3000 plus a monthly service fee of $40 to $75. 85 Fed. Reg. at 44,013. The Final Rule has two exceptions for the GPS monitoring: (1) an in-port exemption that allows the GPS data to be transmitted every four hours (instead of hourly) when the vessel is docked; and (2) a power-down exemption that allows for location data transmission requirements to be suspended

[7] The GPS device may be either cellular- or satellite-based. "Cellular-based systems collect and store data while a vessel is not within range of a cellular signal and then transmit the data when the vessel is within cellular range." 85 Fed. Reg. at 44,007. Satellite-based systems transmit data as they are collected. *Id.*

when the vessel is out of the water for more than 72 hours. *Id.* at 44,020. The operator must still report the precise location where the boat is docked or powered down, and thus NMFS will still know a vessel's exact hourly location whether it is in port or powered down.

The Final Rule's trip declaration requirement is codified at 50 C.F.R. § 622.26(b)(6) for reef-fish permitted charter boats and at § 622.374(b)(6) for pelagic-fish permitted boats. Prior to taking a trip, the charter boat operator "must notify NMFS and report the type of trip, the U.S. Coast Guard vessel documentation number or state vessel registration number, and whether the vessel will be operating as a charter vessel … . If the vessel will be operating as a charter vessel or headboat during the trip, the owner or operator must also report the expected trip completion date, time, and landing location." *Id.* § 622.26(b)(6); *see also* § 622.374(b)(6).

NMFS received 109 comments during the comment period, including numerous objections. *See generally* ROA.8643-8785 (collecting NPRM comments). The Final Rule attempted to address some but not all comments. Several commenters objected that 24-hour GPS surveillance was an unconstitutional invasion of privacy. *See, e.g.,* Brady Comment at ROA.8710 ("To require detailed GPS data for vessels utilized by the for hire community … is also a violation of our 4th Amendment rights."); Pierdinock Comment at ROA.8697 (same); Mercurio Comment at ROA.8757-58 (same). As the district court recognized, "NMFS did not directly address the Fourth Amendment, but [instead] it did respond to the concern over 'how NMFS will protect data that are being

reported, and prevent misuse by staff or public distribution.'" Order at ROA.12441 (quoting 85 Fed. Reg. at 44,010).

Many commenters objected that 24-hour GPS surveillance was unnecessary and unduly burdensome. *See, e.g.,* Buesing Comment at ROA.8647 ("Putting gps and reporting restrictions on charter boat operators will not give usable information that cannot be gained from current reporting"); Comments at 8699-8700, 8706, 8708 ("We are strongly opposed to any type of GPS monitoring system which tracks a vessel each hour which only adds additional costs and safety concerns when operating."); Hatch at ROA.8701 ("Tracking does not provide any additional data that would be provided by filling out a vessel trip report."). Several commenters explicitly complained that it was unnecessary and inappropriate to subject charter boats to the same tracking requirements as commercial fishing vessels. *See, e.g.*, Luciano Comment ("I can see how this works on commercial offshore vessels where their trips are usually 3-5 days—however, we do mostly 4.5 hour trips."); Comments at ROA.8700, 8706, 8708, 8711 ("Common sense should be used here and not treat … charter boats similar to large commercial fishing vessels[.]"); Pollard Comment at ROA.8715 ("Your proposal would treat [charter boats] like larger commercial fishing enterprises with greater compliance resources"). The Final Rule stated that GPS tracking of all charter boats "best balances the need to collect and report timely information with the need to minimize the cost and time burden to the industry." 85 Fed. Reg. at 44,012. But the response contained no analysis about how NMFS determined that cost-benefit balance or what factors it

weighed. Nor did the response explain why preexisting trip-reporting procedures were inadequate.

The Final Rule further stated that some commenters objected to "reporting of economic information" in electronic fishing reports. 85 Fed. Reg. at 44,011. According to the Final Rule, these commenters claimed that "[r]equiring operators to submit their financial information leads to a lack of buy-in and trust among participants" and that commenters preferred "other methods to collect this information such as surveying websites, directly surveying permit holders, or simply asking the question on a random basis rather than for every trip." *Id.* However, none of the 109 comments to the NPRM made this objection.[8] The Final Rule nonetheless responded that "NMFS will require the reporting of five economic values per trip: The charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." 85 Fed. Reg. at 44,011. This was the first time a document published in the Federal Register indicated any of these business data elements would be part of the electronic fishing report. The Gulf Council had discussed these business data elements only in small events with limited attendance. *See* ROA.8006 (summary of webinar).

[8] One commenter objected to collection of "information about expenses and profits." *See* Miller Comment at ROA.8772. But he did not discuss "trust" or "buy in." Nor did he indicate a preference for using survey data to collect financial information.

The Final Rule's electronic-fishing-report and trip-declaration requirements became effective on January 5, 2021. *Id.* at 44,005. Since that date, charter-boat operators have been making electronic fishing reports and trip declarations using a smartphone app they were required to download.[9] The app further requires them to report certain business data: charter fee, fuel usages, fuel price, number of passengers, and crew size. At that time, the GPS-tracking requirement was "delayed indefinitely." *Id.*

C. PROCEDURAL HISTORY

On August 20, 2020, Appellants filed a class-action suit challenging the Final Rule as unconstitutional and unlawful. Complaint at ROA.21. Appellants did not and do not challenge the transmission of fish-related information in electronic fishing reports. Rather, they challenged requirements to transmit "other information" not specified in the regulatory text, including business data articulated for the first time in the Final Rule's preamble. *See* 85 Fed. Reg. at 44,011. Appellants also challenged the GPS-tracking requirement in its entirety. The Court certified the class under Federal Rule of Civil Procedure 23(b)(2) on June 2, 2021. *See* ROA.336 and ROA.475.

[9] Defendants implemented one portion of the Final Rule by requiring permitted charter-boat operators to download the smartphone app. The GPS-tracking portion was not implemented until March 1, 2022.

Appellants filed an amended complaint on June 9, 2021. FAC at ROA.404. On August 11, 2021, Appellants moved for summary judgment and the Defendants-Appellees cross-moved for summary judgment on September 24, 2021. ROA.12149, 12215. On February 28, 2022, the district court denied Appellants' motion for summary judgment, denied their request for stay of the regulation, and granted Defendants-Appellees' cross-motion for summary judgment. Order at ROA.12426. The GPS-tracking requirement came into effect the next day. Plaintiffs-Appellants immediately appealed. ROA.12507; *see also* ROA.12509-12. This appeal is properly before the Court under 28 U.S.C. § 1291.

SUMMARY OF ARGUMENT

The routine GPS tracking of charter boat Gulf and Reef Fish permit holders in the Gulf of Mexico is both unnecessary and violates the Fourth Amendment of the United States Constitution. The district court's Order erred when it found that charter boat fishing was a "closely regulated industry" and also erred in finding no Fourth Amendment violation of the Final Rule even if it were. The district court also committed reversible error when it found that Appellants' Fifth Amendment claims were not properly pled. The MSA, contrary to the district court's Order, does not allow Appellees to require GPS tracking 24 hours a day, especially when doing serves no discernable conservation purpose. Further, the Final Rule cannot withstand APA review because (1) there was improper notice of the data the agency planned to collect, (2) the Final Rule is unconstitutional, and (3) the Final Rule is arbitrary and capricious.

STANDARD OF REVIEW

This Court reviews a district court's summary judgment decision *de novo*. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record *de novo* when the district court reviewed an agency's decision by way of a motion for summary judgment). "When reviewing agency action under the APA, this court must set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; or (C) in excess of statutory jurisdiction, authority, or limitations." *Markle Ints., LLC v. United States Fish & Wildlife Serv.*, 827 F.3d 452, 460 (5th Cir. 2016), *vacated and remanded sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) (cleaned up).

The Court "must disregard any *post hoc* rationalizations of the [agency's] action and evaluate it solely on the basis of the agency's stated rationale at the time of its decision." *Luminant Generation Co., L.L.C. v. E.P.A.*, 675 F.3d 917, 925 (5th Cir. 2012). Additionally, "courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making." *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) (citing 5 U.S.C. § 706 (2)(B)). "Accordingly, when reviewing constitutional claims under the APA, courts apply a de novo standard of review." *Exxon Mobil Corp. v. Mnuchin*, 430 F. Supp. 3d 220, 228–29 (N.D. Tex. 2019).

ARGUMENT

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

The imposition of permanent 24-hours-a-day electronic GPS tracking on charter boats is a novel and dangerous government intrusion into Americans' private lives. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," providing that "no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "The 'basic purpose of this Amendment[]' … 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter*, 138 S. Ct. at 2213 (quoting *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967)). The Supreme Court has noted, "[f]ew protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." *Byrd v. United States*, 138 S.Ct. 1518, 1526 (2018) (citations omitted). Indeed, "[t]he Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence." *Id.*

Neither the district court nor the Government denied the Final Rule empowers an administrative agency to electronically record Americans' movements, even when they are not engaging in regulated activities, if they work in a regulated industry. Here, the district court committed reversible error when it found that charter fishing is a

"closely-regulated" industry and thus, that warrantless searches are allowed under the Fourth Amendment. The seminal Fourth Amendment case of *Katz v. United States*, 389 U.S. 347 (1967) turned on applying old Constitutional protections to new technologies. "Instead of being an inkblot, the *Katz* test ensures that the original Fourth Amendment does not become outdated as a result of technological change." Orin S. Kerr, *Katz as Originalism*, 71 Duke L. J. 1047, 1050 (2022). If the district court's decision is not reversed, there will be less Fourth Amendment protection for recreational fishermen than former (unregulated) felons enjoy. There have been originalist and textualist criticisms of *Katz*, but no current view of the Fourth Amendment permits what the Government attempts here.

A. The GPS-Tracking Requirement Is a Search Under Both the Property-Based and Privacy-Based Approaches to the Fourth Amendment

Broadly speaking, the Supreme Court recognizes two approaches to analyzing whether government action constitutes a Fourth Amendment "search" that must be accompanied by a warrant. The property-based approach asks whether the government intruded upon a person's property to conduct a search, *see Jones*, 565 U.S. at 404, and the privacy-based approach asks whether the government invades a person's reasonable expectation of privacy, *Carpenter*, 138 S. Ct. at 2213. *See also* Kerr, *supra*, 71 Duke L. J. at 1085-1088 (suggesting a harmony between both approaches under textual interpretation of the Fourth Amendment). Forced installation of GPS-tracking devices on charter boats constitutes a search under both approaches.

1. A Property-Based Analysis Requires Striking the Final Rule

The permanent installation of GPS tracking devices on charter boats constitutes a property-based warrantless search. Appellants' charter boats are "effects" protected by the Fourth Amendment. *Jones*, 565 U.S. at 404 ("It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment.").

Under *Jones*'s property-based approach, "a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information." *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019) ("*Taylor I*") (citing *Jones*, 565 U.S. at 404). The property owner's expectation of privacy is not relevant. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). It does not matter that the trespass is *de minimis* or if the information obtained lies in plain view—chalking a vehicle's tire to verify the duration it was parked in a public space is a property-based search. *Taylor I*, 922 F.3d at 332. The GPS-tracking requirement results in far greater invasion of private property than chalking and also obtains far more detailed information—24-hour location data.

2. The Final Rule Also Violates Privacy-Based Fourth Amendment Analysis

Perpetual twenty-four-hour GPS tracking violates Plaintiffs' reasonable expectations of privacy and constitutes a warrantless and unconstitutional search under the privacy-based approach to the Fourth Amendment articulated in *Katz*, 389 U.S. at 360 (Harlan J., concurring). As early as 1987, this Court recognized that long-term and "indiscriminate … surveillance [even of areas in plain view] raises the spectre of the

Orwellian state." *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987). The Supreme Court adopted that logic in *Carpenter*, 138 S. Ct. at 2218, when it recognized "the line between short-term tracking of public movements … and prolonged tracking that can reveal intimate details through habits and patterns. The latter form of surveillance invades the reasonable expectation of privacy that individuals have in the whole of their movements and therefore requires a warrant." *Leaders of a Beautiful Struggle, et al. v. Baltimore Police Dept., et al.*, 2 F.4th 330, 341 (4th Cir. 2021) (*en banc*) (citing *id.*).

In *Leaders of a Beautiful Struggle*, the Fourth Circuit, sitting *en banc*, concluded Baltimore's aerial surveillance program violated the reasonable expectation of privacy because "the program enables … retrospective location tracking in multi-hour blocks, often over consecutive days, with a month and a half of daytimes for analysts to work with. That is enough to yield 'a wealth of detail,' greater than the sum of the individual trips." *Id.* at 342.

Under the Final Rule, permanent GPS tracking of all trips reveals an even greater "wealth of detail," and thus violates the reasonable expectation of privacy—particularly because there is no exception for non-fishing use of vessels and tracking may only be turned off when the boat is powered down and out of water for more than three days.

Appellants should have more of a privacy interest in their own vessels than a driver of a rental car has when not named on the rental agreement. *See Byrd*, 138 S. Ct.

at 1531 (driver of rental car had a reasonable expectation of privacy as long as there was lawful possession of the vehicle).

The district court did not dispute that GPS tracking constitutes warrantless searches under both the property- and privacy-based approaches. Order at ROA.12488. It assumed that "the tracking requirement constitutes a search," but held "the search is reasonable under the closely regulated industry exception." *Id.* But the closely-regulated-industry doctrine does not excuse warrantless property-based searches as a categorical matter. Nor does it excuse privacy-based searches of the charter fishing industry here.

B. The Closely-Regulated-Industry Exception Is a Privacy-Based Doctrine that Does Not Apply to Property-Based Searches

As the district court noted, the closely-regulated-industry exception is a privacy-based doctrine that recognizes "some industries have such a history of government oversight that no *reasonable expectation of privacy* exists" and therefore "a warrantless search is permissible if certain criteria are met." Order at ROA.12488-89 (quoting *Zedeh v. Robinson*, 928 F.3d 457, 464 (5th Cir. 2019)) (cleaned up). But the court erred because, as Appellants explained in their summary judgment brief, any Fourth Amendment exception based on "hav[ing] a significantly reduced expectation of privacy in the location of their vessels … is irrelevant because *Jones*'s property-based definition of Fourth Amendment search does not depend on a person's reasonable expectation of privacy." ROA.12312.

The Supreme Court held in *Jones* that "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." 565 U.S. at 409. Further, in *Jardines*, the Court confirmed that expectations of privacy are irrelevant in the context of a property-based violation. 569 U.S. at 11. There, the Court explained that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*." Indeed, "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Id.* at 11.

This too is an easy case. The Government is tracking Appellants by requiring them to install an unwanted GPS device on their private vessels. There is no need to consider expectations of privacy to find a Fourth Amendment violation. *Jardines*, 569 U.S. at 11. The closely-regulated-industry doctrine is based on diminished expectations of privacy of actors in certain industries, *Zedeh*, 928 F.3d at 464, and cannot negate the warrant requirement for property-based searches. The district court's misapplication of that exception establishes Plaintiffs' substantial likelihood of success on the merits, obviating a privacy-based analysis at all.

C. The 'Closely Regulated Industry' Exception Does Not Apply to Privacy-Based Searches in this Case

The closely-regulated-industry exception cannot excuse the Final Rule's warrantless privacy-based searches. *First*, recreational charter fishing does not "pose[] a

clear and significant risk to the public welfare," which the Supreme Court held in *City of Los Angeles v. Patel*, 576 U.S. 409, 424 (2015), was required for the exception. *Second*, the Final Rule fails the criteria for warrantless search of a closely regulated industry as articulated in *New York v. Burger*, 482 U.S. 691, 702-03 (1987). Finally, in no case is there any reason to track Appellants during their personal and other non-charter-fishing trips.

1. Recreational Charter Fishing Is Not 'Closely Regulated'

In *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74 (1970), the Supreme Court upheld the warrantless search of a liquor dealer on the ground that the dealer belonged to a closely regulated industry with diminished expectations of privacy. Since then, the Court has extended this doctrine to only three other industries: firearms sales, mining, and automobile junkyards. *See United States v. Biswell*, 406 U.S. 311 (1972)(finding that compliance checks did not intrude on defendant's reasonable expectation of privacy because he engaged in the firearms business); *Donovan v. Dewey*, 452 U.S. 594 (1981)(finding warrantless inspections were constitutional under the Federal Mine Safety and Health Act); *Burger*, 482 U.S. 691 (finding that vehicle dismantlers were part of a closely regulated industry).

Notably, the three dissenting justices warned in *Burger* that a lax test for closely regulated industry means "few businesses will escape such a finding" and the "warrant requirement [would become] the exception not the rule." *Id.* at 721 (Brennan, J., dissenting). That warning proved prescient as lower courts promiscuously expanded the exception to circumvent warrants in an endless list of industries, ranging from childcare

to pet sales. *See Lesser v. Espy*, 34 F.3d 1301, 1307 (7th Cir. 1994); *Rush v. Obledo*, 756 F.2d 713, 720–21 (9th Cir. 2009).

The Supreme Court corrected course in *Patel*, which held the exception does not apply to hotels. 576 U.S. 424. *Patel* reminded lower courts that the closely-regulated-industry doctrine "has always been a narrow exception" that must not "swallow the rule" of the warrant requirement. *Id.* To this end, *Patel* announced that hotels do not fall within the exception because "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare." *Id.* at 424. An attenuated connection to public welfare is not enough, and the industry instead must be "intrinsically dangerous." *Id.* at 424 n. 5.

In this case, the district court erred when it found that charter fishing, which falls within recreational fishing, is a closely regulated industry. Instead, the district court skimmed past *Patel*'s intrinsic-public-danger criterion and relied solely on the history of *commercial* fishing regulations to apply that doctrine to *recreational* charter fishing. *See* Order at ROA.12490-94. But commercial fishing and recreational fishing are drastically different.[10]

[10] Saying that commercial fishing and charter fishing, which is included within recreational fishing, are the same is like saying that the show the *Deadliest Catch*, about commercial fishing in Alaska, is the same as *Bill Dance Outdoors*.

The analysis below conflated commercial fishing, which accounts for upwards of 93% of fish caught, with recreational fishing that poses little conservation risk.[11] The MSA recognized that "recreational fishing and commercial fishing are different activities" and mandates different regulatory "approaches should be adapted to the characteristics of each sector." 16 U.S.C. § 1801(a).

But here, the district court determined when applying the closely-regulated-industry doctrine, "the proper classification of the industry is fishing industry as a whole, not merely the charter fishing industry." Order at ROA.12497 n. 416. Yet, the authorities cited say the opposite.

The closely-regulated-industry analysis in *U.S. v. Raub*, 637 F.2d 1205, 1209 (9th Cir. 1980), Order at ROA.12497 n. 416, is based on "[c]ommercial fishing ha[ving] a long history of being closely regulated," stretching back to 1793, which cannot be said of recreational fishing. *Raub* concluded "that there is no reasonable expectation of privacy regarding identification stops of *commercial* fishermen[.]" *Id.* at 1210 (emphasis added). The lack of a history of warrantless inspection as to *recreational* fishermen means the closely regulated industry exception does not apply. *Zadeh*, 928 F.3d at 462 (no "closely regulated" exception where medical industry did not have a long history of warrantless searches); *see also Morgan v. Chapman*, 969 F.3d 238, 242-243 (5th Cir. 2020)

[11] Appellants relied on statistics available on Appellees' website to estimate that "charter-boat fishing comprises approximately only 0.2% of total Gulf fishing." ROA.12160.

(same). If the district court's view is approved, the Government will be able to electronically track any recreational fisherman without a warrant. That means everyone who takes a boat into the Gulf of Mexico to fish. Such a vast reduction in Fourth Amendment protections was not contemplated by the MSA which is primarily concerned with commercial fishing. The district court's assertion that "it is not required [to] address[] the public welfare factor" from *Patel*, *see* Order at ROA.12496, directly contradicts this Court's instruction for "courts [to] consider … whether the industry would pose a threat to the public welfare if left unregulated." *Zadeh*, 928 F.3d at 465. The fact that *Zadeh* "did not [specifically] address the danger to the public welfare," Order at ROA.12495, is of no moment because *Zadeh* ruled that "the medical industry … is not a closely regulated industry" for an independent reason and so did not need to analyze dangerousness. 928 F.3d at 466. Intrinsic danger is a necessary but not sufficient condition. So, while a court may *reject* the closely-regulated-industry exception without addressing dangerousness, it cannot *apply* the exception without doing so.

The district court's contention that "other courts post-*Patel* have not required there to be a risk to the public welfare when extending closely regulated status" is error and not supported by the cases it cites. Order at ROA.12495. The Sixth Circuit rejected the closely-regulated-industry exception based solely on its conclusion that the industry "does not pose a clear and significant risk to the public welfare." *Taylor v. City of Saginaw*, 11 F.4th 483, 488 (6th Cir. 2021) ("*Taylor II*") (cleaned up). Other cases cited by the district court reinforce the need to demonstrate public danger. The district court's first

case involved inspections of massage parlors "to better control illicit operations and protect and promote the *public health, safety and welfare*," which the Ninth Circuit held were needed to "curtail[] prostitution and human trafficking." *Kilgore v. City of South El Monte*, 3 F.4th 1186, 1188, 1192 (9th Cir. 2021) (emphasis added), cited at Order at ROA.12495. The next case, *United States v. Hamad*, 809 F.3d 898, 907 (7th Cir. 2016), cited at Order at ROA.12495, concerned cigarette sales, which likewise poses obvious public dangers. *Free Speech Coalition v. Attorney General*, 825 F.3d 149 (3d Cir. 2016), cited at Order at ROA.12496, is wholly inapposite because, like *Zadeh*, it relied on independent reasons to conclude the "exception to the warrant requirement for closely regulated industries is inapplicable" as to the pornography industry and thus had no need to address dangerousness."

The only post-*Patel* authority cited by the district court that categorized an industry as closely regulated without addressing public danger is unpublished and unpersuasive dicta from an out-of-circuit district court. *Goethel v. Pritzker*, 2016 WL 4076831, at *9 (D.N.H. July 29, 2016), cited at Order at ROA.12496. The claims in *Goethel* were dismissed on statute-of-limitations grounds, *id.* at *4, and thus the closely-regulated-industry discussion is dicta; besides, *Goethel* was a commercial fisherman. What's more, *Goethel*'s treatment of *Patel* is error. The *Goethel* court relied on criteria listed in *Rivera-Corraliza v. Morales*, 794 F.3d 208, 217 (1st Cir. 2015), which did not address dangerousness, to analyze whether an industry is closely regulated under *Patel*, because it mistakenly believed *Morales*'s "criteria post-dates *Patel*." 2016 WL 4076831,

at *9 n. 14. But *Morales* was a qualified-immunity case that deliberately applied pre-*Patel* law because "the key question for qualified-immunity purposes is whether the law was clearly established when the complained-of actions occurred" and "*Patel* was not around when the events here went down." 794 F.3d at 217 n. 12. *Goethel* thus failed to address *Patel*'s public-danger criterion because it mistakenly relied on *Morales*'s recitation of pre-*Patel* law, and this Court should not import that careless mistake into Fifth Circuit law.

The district court's contention in the alternative that "there is a risk to public welfare" in charter fishing is mistaken. *See* Order at ROA.12496. According to the court, "the fishing industry, if left unregulated, would overfish and deplete the United States's fishery resources, which would endanger the public welfare by harming the nation's food supply[.]" *Id.* at ROA.12497. But virtually all industries regulated because of externalities could endanger the public welfare in some way. Such reasoning improperly dilutes *Patel*'s dangerousness criterion to mean "regulated for public welfare," because if "general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Patel*, 576 U.S. at 425. An attenuated connection to public danger is not enough, otherwise a narrow exception would swallow the rule. The Supreme Court therefore emphasized that while "[h]otels—like practically all commercial premises or services—can be put to use for nefarious ends," they still do not qualify because the industry must be "intrinsically dangerous." *Id.* at 424 n.5. Simply put, recreational charter fishing is not intrinsically dangerous to the public, so it is not a closely regulated industry.

2. The GPS-Tracking Requirement Fails the *Burger* Test for Warrantless Search of a Closely Regulated Industry

Even if charter fishing *were* intrinsically dangerous, the closely-regulated-industry exception to warrantless searches still would not apply because the GPS-tracking requirement flunks the three *Burger* requirements for that exception, 482 U.S. at 702–03. Specifically, (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary' to further [the] regulatory scheme"; and (3) the government must "provid[e] a constitutionally adequate substitute for a warrant." *Id.*

Because only "intrinsically dangerous" industries may qualify as closely regulated, the substantial government interest vitiating warrants under *Burger* must relate to that danger. *Cf., e.g., Kilgore*, 3 F.4th at 1192 ("curtailing prostitution and human trafficking is a substantial government interest"); *Calzone v. Olson*, 931 F.3d 722, 725 (8th Cir. 2019) ("Missouri has a substantial interest in ensuring the safety of the motorists on its highways"); *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transportation*, 840 F.3d 879, 895 (7th Cir. 2016) ("The public safety concerns inherent in commercial trucking give the government a substantial interest."). The GPS-tracking requirement here is unrelated to the safe operation of charter vessels.

Next, warrantless 24-hour GPS surveillance of charter boats is far from "necessary." Plaintiffs routinely use their vessels for personal trips unrelated to fishing.[12] Despite recognizing this fact is relevant to the "necessity of the tracking requirement," Order at ROA.12498 n. 418, the district court failed to address why Defendants need to track Plaintiffs' *personal* trips. Tracking personal trips is neither necessary nor related to conservation.

GPS tracking of charter-fishing trips is also unnecessary because Appellees' own statistics indicate charter fishing accounts for merely 0.2 percent of Gulf of Mexico fishing, ROA.12158-60, and warrantless GPS tracking of such a miniscule segment is not "necessary" to achieve the MSA's conservation purpose. The district court noted that "Congress found regulation of the entire fishing industry is required to combat overfishing." Order at ROA.12501 n.437 (citing 16 U.S.C. § 1801(a)). But it does not follow that it is necessary to subject charter vessels to the *same* warrantless inspection regulations as commercial vessels. To the contrary, the statute cited by the district court says the exact opposite: "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)).

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[12] While "the Government disputes the fact that charter vessels are frequently used for personal reasons," Order at ROA.12498, it presented no evidence to rebut Plaintiffs' multiple affidavits that they use charter vessels for personal trips. *See* Declarations at ROA.209-226. There is no true dispute at summary judgment if in the face of sworn affidavits the other side simply says, "we disagree."

Necessity is further undermined by the fact that, when charter-boat operators take fishing trips, they already report their general fishing locations and the types and numbers of fish caught through same-day electronic reporting. Operators are also already "calling out" when they leave, telling Appellees where they will generally fish and when they will return. The Final Rule says GPS tracking is needed so "NMFS can validate a trip was taken and the location of trips," 85 Fed Reg. at 44,010. But warrantless searches are unnecessary where "there is no basis to believe … spot checks" are "unworkable." *Patel*, 576 U.S. at 427. Defendants concede they could validate reports through spot checks and present no reason why spot checking is unworkable, except by claiming additional staff is needed. ROA.12257, 12263.

The district court relied on *Balelo v. Baldrige*, 724 F.2d 753, 766 (9th Cir. 1984), to conclude Defendants' alleged need for additional staff and funds to pay them makes spot checks unworkable. Order at ROA.12500-501. But *Balelo* is inapposite. For one, the unworkable alternatives in that case were "aerial surveillance and the like," which presented technical challenges and fell outside the agency's expertise. *Id.* at 766. Even so, the agency still had to present evidence to "demonstrate[] that the suggested techniques … are prohibitive in terms of cost and are ineffective in terms of data collection." *Id.* at 766. Here, spot checks are simple and fall well within Defendants' expertise of inspecting fishing vessels for unauthorized catches. There is no technological challenge to solve, as Defendants admit all they need is more staff. If staffing and funding needs justify warrantless searches, *Burger*'s necessity requirement

becomes a nullity. A desire to avoid work and cut costs does not license agencies to ignore the Constitution. Indeed, it would not have been costless to spot-check hotels for records violations in *Patel*, 576 U.S. at 427.

Additionally, *Balelo*'s holding was based on the need to directly collect conservation-related data. Here, the agency already receives data from trip reports electronically every day, and merely wants to validate that data. The question therefore is not whether charter boats' GPS data are necessary for conservation, but rather whether the warrantless *validation* of preexisting location reports and "call outs" is necessary. The Final Rule merely makes the conclusory claim such validation would "aid with enforcement of the reporting requirements." 85 Fed. Reg. 44,013. The Supreme Court "has previously rejected this exact argument, which could be made regarding any recordkeeping requirement." *Patel*, 576 U.S. at 427. *Burger*'s necessity prong requires a more compelling need. In *Owner-Operator*, 840 F.3d at 895, for instance, the need to install electronic devices in vehicles to validate records was supported by extensive records demonstrating "falsification and errors in the traditional paper records are a widespread problem." In contrast, nothing in the record suggests charter-boat operators submit false or incomplete reports—or even have incentive to do so.[13]

[13] Though Defendants-Appellees did not dispute that charter boat operators submit accurate reports, the district court refused to accept this fact, because "Plaintiffs cite no evidence for their argument that charter vessels have no known propensity for breaking the law." Order at ROA.12497 n. 416. It is unclear how Plaintiffs-Appellants could prove they are not lawbreakers. *Cf. Smith v. United States*,

Nor can a need for warrantless GPS tracking be found in charter boats' mobility, *see* Order at ROA.12499. The district court collected many cases involving the Coast Guard's inspection of vessels on the high seas. *Id.* n. 386 (citing cases). But NMFS does not wield the Coast Guard's expansive customs enforcement authority under 14 U.S.C. § 522. And even the Coast Guard's inspection authority to conduct warrantless inspection of personal crafts like those at issue here must be supported by suspicion of wrongdoing. *U.S. v. Whitmire*, 595 F.2d 1303, 1315-16 (5th Cir. 1979) ("We do not presently face these situations. We need only decide whether the fourth amendment allows the boarding of a pleasure craft, sighted initially in intercoastal waters, as to which officers have a reasonable suspicion of a customs violation a boarding that occurred after an unsatisfactory document check on shore."). The concurring opinion in *Whitmire* was even more explicit:

> My brethren assume at the outset that the fourth amendment protects seafarers as well as those who fly planes or operate vehicles or live on land.
>
> I would again emphasize what they only suggest before they turn to search the horizon for exceptions: those aboard vessels are protected by the fourth amendment, and no vessel may be stopped or boarded or searched

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568 U.S. 106, 113 (2013) ("It would be nearly impossible for [a party] to prove the negative that an act … never happened."). American law presumes free men to be innocent until proven guilty but in any event, judicial review must be based on the administrative record, which is devoid of any suggestion that Plaintiffs' reports are in any manner false or incomplete. The burden must rest on the regulator to demonstrate a problem before intruding on constitutional rights, not on the regulated to disprove it.

> except in compliance with its requirements. Without a warrant, law enforcement officers may not even stop, and, a fortiori, may not board or search a vessel unless the action is reasonable by fourth amendment standards.

Id. at 1317 (Rubin, J., concurring) (emphasis added).

Recognizing the need for Fourth Amendment protection to match technological and social change, the *en banc* Fifth Circuit rejected the notion that "the Coast Guard's power to search nautical vessels is today as unrestricted as when [Justice] Marshall" sat on the Supreme Court. *United States v. Williams*, 617 F.2d 1063, 1086 (5th Cir. 1980) (*en banc*). Rather, it concluded any "search of those 'private' areas of the hold of either an American or foreign vessel … when there is no reason to suspect [wrongdoing], is today unreasonably intrusive." *Id.* (emphasis added). That was 1980. Today, Supreme Court precedent accounting for modern technology recognizes that a physical trespass to collect long-term GPS records constitutes an unreasonable invasion of privacy, *see Carpenter*, 138 U.S. at 2218, and *Jones*, 565 U.S. at 404, and thus must be supported by at least reasonable suspicion under even the Coast Guard's expansive inspection powers. *See Cunningham*, 1996 WL 665747, at *3 n.1 ("[W]arrantless searches that extend beyond the scope of document and safety inspections require reasonable suspicion of criminal activity or probable cause, depending on the intrusiveness of the search.").

In both *Whitmire* and *Williams*, when the Court noted the exigent needs for warrantless inspection when intercepting drug smugglers at sea, it still held there must be "reasonable suspicion" of wrongdoing to board the vessel and search it. None of

those needs exist here. Charter boats are not coming from international waters, and Appellees know precisely which ports they leave from and return to, thus making spot checks at port easy. Yet, with less need, Appellees claim more power than the Coast Guard: the ability to conduct 24/7 warrantless searches at sea with zero suspicion. The district court's approval of such unrestrained power strips Appellants of Fourth Amendment rights simply because they fish that even drug runners from Bimini enjoy. that even drug runners from Bimini enjoy simply because they fish.

The GPS-tracking requirement is also devoid of "a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702–03. This third criterion requires warrantless searches to be "carefully limited in time, place, and scope.'" *Id.* at 703 (quoting *Biswell*, 406 U.S. at 315). In *Zadeh*, 928 F.3d at 467, this Court held warrantless inspections of medical facilities failed to provide constitutionally adequate limits where "only licensees are subject to the subpoena; only medical records must be produced; and it is the [agency] or its representatives who will be asking for the records." The Final Rule is even worse as it allows Defendants to collect all GPS-location records, from all licensees, and at all times, including when they are engaging in purely personal use of their vessels and not engaged in conduct that Appellees regulate.

The district court concluded "constitutionally adequate" limits exist because the agency exercised no discretion as to when and whom to track. Order at ROA.12503-04. But the lack of discretion is simply the byproduct of the limitless and automated GPS surveillance of all licensees: "since the data collection is automated … there

actually is no exercise of discretion; the search is the same as stated in the regulation each time," which is to say 24-hours a day, 365 days a year. The automatic nature of GPS tracking means searches are not only warrantless but also suspicionless, and likely to capture even *unregulated* activities such as personal trips.

Consider again Bentham's Panopticon, wherein all inmates are subject to constant surveillance by an unseen observer. *See* Bentham, *Panopticon, or the Inspection House* (1791). The fact that the observer need not decide when and whom to watch does not somehow make the Panopticon "constitutionally adequate." Quite the opposite, the automatic nature of continuous GPS tracking means searches are not only warrantless but also suspicionless. "The Magnuson Act provides [only] for warrantless searches of vessels *reasonably believed* to be in violation of provisions of the Act." *Gulf of Maine Trawlers v. United States*, 674 F. Supp. 927, 932–33 (D. Me. 1987) (emphasis added); *see also* 16 U.S.C. § 1861(b)(1) (authorizing searches where a Coast Guard or authorized law enforcement officer "has reasonable cause to believe" a law is being broken).

II. APPELLANTS' FIFTH AMENDMENT CLAIMS WERE PROPERLY PLED

The district court concluded Appellants' statement that "'[t]he Fifth Amendment protects … property from deprivation by the Government without due process of law,'" combined with their "use of the word 'seizure' in their complaints [to allege a Fifth Amendment property-right violation] … is insufficient to place the Government on notice that Plaintiffs are bringing a [Fifth Amendment] takings claim." Order at ROA.12486 (quoting FAC at ROA.411 ¶ 25). In doing so, the district court also

misapplied the notice pleading standard under Federal Rule of Civil Procedure 8. As this Court has explained, "the *Twombly/Iqbal* 'plausibility' standard does not require magic words[.]" *Agredano v. State Farm Lloyds*, 975 F.3d 504, 506 (5th Cir. 2020) (citing *Ashcraft v. Iqbal*, 556 U.S. 663 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "So long as a pleading alleges facts upon which relief can be granted … it states a claim *even if it fails to categorize correctly the legal theory giving rise to the claim*." *Jacked Up, LLC v. Sara Lee Corp.*, 854 F.3d 797, 810 (5th Cir. 2017) (citation and internal quotation marks omitted) (emphasis added).

The FAC described the Final Rule's violation of Appellants' property rights in their charter boats under the Fifth Amendment in detail. FAC at ROA.404-27 ¶¶ 1, 9, 11, 12, 14, 16, 18, 29, 54, 55, 58, 82, 84, 87, 98, 113. It is of no moment that Appellants did not use the magic word "takings." *Agredano*, 975 F.3d at 506. The FAC made a Fifth Amendment deprivation-of-property claim based on the argument that "Defendants lack the authority … to insert a device on Plaintiffs' vessels at [Plaintiffs' own] expense." *Id.* ¶ 84. That placement comprises a takings claim under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982), which held that "a permanent physical occupation of property" by the government constitutes a *per se* taking regardless of "whether the action achieves an important public benefit or has only minimal economic impact on the owner." Even though the cable equipment in *Loretto* took up little space and had "minimal economic impact," it was still a taking. *Id.* at 434-35. This was because "[t]o the extent that the government permanently occupies physical property,

it effectively destroys" "the rights to possess, use and dispose of it." *Id.* at 435. The Supreme Court recently reaffirmed this principle and clarified that even temporary physical intrusions are *per se* takings—the length of physical occupation only determines the amount of just compensation—not whether a taking occurred. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2066, 2072 (2021).

Here, Charter-boat operators must "permanently affix" NMFS-approved VMS devices on their vessels. 50 C.F.R. §§ 622.26(b)(5); 622.374(b)(5)(ii). Such permanent physical occupation is an obvious Fifth Amendment taking under *Loretto*. Appellants specifically emphasized the "permanently affix" language in the FAC for that very reason. FAC at ROA.418 ¶ 55. The FAC further alleged that "Defendants lack the authority … to [permanently] insert a device on Plaintiffs' vessels at their expense," *id.* at ROA.423 ¶ 84, and explicitly complained of unconstitutional "deprivation of property" under the Fifth Amendment. *Id.* at ROA.428.

Complaints must allege adequate facts and a legal violation. Here the FAC alleges the Government occupied their property and made them pay for the occupying device. That suffices. There was no need, as the district court believed, for the complaint to articulate Appellants' precise legal theory, or indeed even the correct legal theory. *Jacked Up*, 854 F.3d at 810. Accordingly, Appellants were entitled to present a *Loretto* takings claim in their summary judgment brief, which the district court improperly ignored. This Court should therefore remand for adjudication of those claims in the district court.

III. THE GPS-TRACKING REQUIREMENT IS NOT AUTHORIZED UNDER THE MSA

A. The MSA Language Does Not Authorize Mandatory Purchase of Unwanted VMS Devices

Nothing in the MSA authorizes the Government to track and record every movement of charter boats, let alone force boat owners to pay the cost of being tracked. The district court incorrectly found the power to *purchase* unwanted GPS-tracking devices in § 1853(b)(4) because that provision merely authorizes NMFS to "require the *use* of specific types of … devices which may be required to facilitate enforcement of the provisions of [the MSA]." (emphasis added).

If a regulated person uses certain equipment to fish, like nets, § 1853(b)(4) authorizes NMFS to require "use of specific types" of net. But NMFS cannot require him to purchase a category of equipment for which he has no use, such as forcing a lobster fisherman to purchase a harpoon gun. A contrary interpretation to permit mandatory purchase of unwanted and unnecessary equipment would render the MSA unconstitutional as exceeding Congress's Commerce Clause powers. "The Framers gave Congress the power to regulate commerce, not to compel it[.]" *NFIB v. Sebelius*, 567 U.S. 519, 555 (2012). So, the Commerce Clause does not authorize Congress to "compel individuals not engaged in commerce to purchase an unwanted product." *Id.*

The district court nonetheless held that the Government may compel each charter-boat operator to purchase and install an unwanted GPS-tracking device because those operators "are voluntary participants in the charter vessel permit program." Order

at ROA.12468. This reasoning, however, would improperly circumvent the Constitution's prohibition against compelled commerce. Congress may regulate virtually every industry. If Congress can require fishermen to purchase a GPS-tracking device as a condition of participating in the fishing industry, then it can likewise mandate purchases of all other licensed or regulated industries. The limits on Commerce Clause powers recognized in *NFIB* would be meaningless. This Court should reject the district court's expansive interpretation of § 1853(b)(4).

B. The MSA's 'Necessary and Appropriate' Language Does Not Authorize, but Prohibits, GPS-Tracking of Charter Boats at Owners' Expense

Even if NMFS could compel the purchase of unwanted devices under § 1853(b)(4), that provision still would not authorize the purchase of GPS-tracking equipment in this case. That is because any mandatory purchase under § 1853(b)(4) is limited to "devices which may be required to facilitate enforcement of the *provisions* of [the MSA]," and no provision of the MSA requires 24-hour GPS tracking of charter-boat operators. (emphasis added).

The court noted that the MSA requires FMPs to contain "conservation and management measures …which are…*necessary and appropriate* for the conservation and management of the fishery" and that MSA further allows the Government to "prescribe such measures, requirements, or conditions and restrictions as are determined to be *necessary and appropriate* for the conservation and management of the fishery." Order at ROA.12460 (quoting 16 U.S.C. § 1853(a)(1)(A), (b)(14)) (emphasis in original).

According to the district court, "the 'necessary and appropriate' language in the MSA, combined with the explicit authorization to require fishermen to use certain equipment, authorizes [NMFS] to require regulated fishermen to bear the cost of the tracking requirement." *Id.* at 37.

However, as this Court held in *Gulf Fishermens Ass'n v. NMFS*, 968 F.3d 454, 465 (5th Cir. 2020), the MSA's "necessary and appropriate" language "cannot expand the scope of the provisions the agency is tasked with carry[ing] out" under the MSA (alteration in original). To the contrary, that language *limits* NMFS's authority. *See The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147 (D.D.C. 2005) ("[NMFS's] discretion is tempered by substantive elements of the [MSA] that require all regulations to be 'necessary and appropriate[.]'"); *see also Hawaii Longline Ass'n v. NMFS*, 281 F. Supp. 2d 1, 3 (D.D.C. 2003) ("[MSA's] substantive requirements demand that an FMP be 'necessary and appropriate for the conservation and management of the fishery[.]'") (quoting 16 U.S.C. § 1853(a)(1)(A)); *accord Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1139-40 (W.D. Wash. 2000). Thus, the "necessary and appropriate" language does not expand NMFS's authority under § 1853(b)(4) to force charter-boat operators to purchase any equipment that the agency deems necessary and appropriate. Rather it authorizes only requiring equipment that is both "necessary and appropriate" to enforcing actual and identifiable provisions of the MSA. The Final Rule, however, does not identify *any* provision of the MSA that GPS tracking would allegedly help enforce. While it concluded that 24-hour GPS tracking would "help … enforcement of the

[electronic] reporting requirement," 85 Fed. Reg. at 44,012, electronic reporting is not a provision of the MSA that could justify forced purchase of GPS-tracking equipment under § 1853(b)(4).

The district court further erred by concluding "the required purchase and use of tracking equipment facilitates enforcement of the MSA," Order at ROA.12461, without considering whether such mandatory purchase is "necessary and appropriate." If facilitating enforcement were enough, NMFS could, say, mandate equipping all fishing vessels with audio-recording devices to eavesdrop on onboard conspiracies to overfish. MSA's "necessary and appropriate" limitation prevents such abuses of power.

Courts must independently review whether a regulation is necessary and appropriate and may not simply defer to an agency's assertion. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 615 (5th Cir. 2021) (rejecting agency's assertion that vaccine mandate was "necessary"). Here, 24-hour GPS tracking of Appellants at their own expense cannot possibly be *necessary* because Appellees admit such tracking provides duplicative location data the Government already receives through electronic reports. Validation of those reports through GPS tracking is also not necessary, because there is no evidence in the Final Rule that the electronic reports are inaccurate in any way.

The GPS-tracking requirement is also not *appropriate*. In *Michigan v. EPA*, 576 U.S. 743 (2015), the Supreme Court held that a requirement under the Clean Air Act for regulations to be "appropriate" required the agency to ensure a reasonable relationship between costs imposed on the industry as against air quality benefits before

promulgating such a regulation. *Id.* at 752 ("One would not say that it is even rational, never mind 'appropriate,' to impose [exorbitant] economic costs in return for [marginal] health or environmental benefits."). This Court likewise concluded in *Nat'l Grain & Feed Ass'n v. OSHA.*, 866 F.2d 717, 733 (5th Cir. 1988), that "necessary or appropriate" language "encompasses a specie of cost-benefit justification." *See also Alabama Power Co. v. OSHA.*, 89 F.3d 740, 746 (11th Cir. 1996) (interpreting the same "necessary or appropriate" language). *Nat'l Grain* and *Alabama Power* had language that allowed regulation to be "necessary **or** appropriate" that is *either* of those two alternatives. The MSA requires that all regulations be *both*. The MSA's "necessary and appropriate" language thus also places a cost-benefit balancing requirement on NMFS's ability to mandate purchases of unwanted self-tracking equipment. Indeed, the grounds for requiring cost-benefit balancing are even stronger in this case than in *Michigan* or *Nat'l Grain*, because the MSA's National Standards explicitly require conservation measures to be cost-justified. In particular, Standard Seven states that "[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication," while Standard Eight says "[c]onservation and management measures shall … to the extent practicable, minimize adverse economic impacts on [fishing] communities." 16 U.S.C. § 1851(a)(7), (a)(8).

The Final Rule, however, did not undertake any cost-benefit analysis. It did not even identify any cognizable benefit to subjecting charter-boat operators to 24-hour GPS tracking at their own expense. The Final Rule's assertion that tracking would "aid

with enforcement of the reporting requirements," 85 Fed. Reg. at 44,012, is inadequate, because the MSA does not authorize regulations that are "necessary and appropriate to enforce NMFS's reporting requirements." Rather, regulations must be "necessary and appropriate *for the conservation and management of the fishery*." 16 U.S.C. § 1853 (a)(1)(A) (emphasis added). The Final Rule did not mention any conservation or management benefits, let alone balance those benefits against privacy and pecuniary costs to ensure the rule was necessary and appropriate. Nor did the Government identify any conservation or management benefits in its briefs to the district court. It instead asserted GPS tracking would obviate the need to "increase staffing." ROA.12263. While the MSA defines "conservation and management" capaciously, *see* 16 U.S.C. § 1802 (5), reducing NMFS's workload is not included. Because 24-hour GPS-tracking of charter-boat operators at their own expense does not provide any discernible conservation and management benefits, it is not a "necessary and appropriate" measure under the MSA.

C. The District Court's Expansive Interpretation of 'Necessary and Appropriate' Violates the Nondelegation Doctrine

The district court's interpretation of "necessary and appropriate" as expanding rather than limiting NMFS's power must also be rejected under the constitutional avoidance canon because it would violate the nondelegation doctrine.

"Article I, § 1 of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 472 (2001) (cleaned up). Where Congress

delegates regulatory power to an agency, it must supply "an intelligible principle to guide the [agency's] use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). While the Supreme Court has yet to articulate the precise parameters of the intelligible-principle test, *see id.* at 2131 (Alito, J., concurring); *id.* at 2138 (Gorsuch, J., dissenting), granting an agency power to take any "necessary and appropriate" measures without limitations or standards for judicial review crosses the line into unconstitutional delegation of legislative power, *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980).

In this matter, the district court held that the "necessary and appropriate" language complies with the nondelegation doctrine because the statute's National Standards provide intelligible principles. Order at ROA.12465. But those very National Standards require cost-benefit balancing, which the district court expressly declined to do, Order at 40, and with which the Final Rule could not pass muster. Specifically, National Standards 7 and 8 respectively require conservation and management measures to "minimize cost" and "minimize adverse economic impacts on [fishing] communities." 16 U.S.C. § 1851(a)(7), (a)(8). Thus, the district court's decision not to require the agency to follow these National Standards means no intelligible principle guides the delegation of legislative power.

IV. THE DISTRICT COURT'S DECISION ALLOWED VIOLATIONS OF THE APA.

The Final Rule runs afoul of the Administrative Procedure Act ("APA"), which provides for a set of default rules that governs federal rulemaking. A reviewing court

must "hold unlawful and set aside" regulations that violate the APA's requirements. 5 U.S.C. § 706 (2). The Final Rule's requirement for electronic fishing reports to include unspecified "other information," in particular business information *(e.g.*, charter fees, crew size, etc.), was not a logical outgrowth of the NPRM and therefore violates the APA's notice-and-comment requirement. The Final Rule's GPS-tracking requirement is likewise arbitrary and capricious because NMFS either ignored or failed to provide a reasoned response to significant objections to that requirement.

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

"Under the APA, an agency must publish notice of the legal authority for a proposed rule and of the rule's substance or subject matter, 5 U.S.C. § 553(b)(2), (3), and must also provide an opportunity for interested persons to participate in the rulemaking, § 553(c)." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 447 (5th Cir. 2021). Notice is sufficient if the final rule is a "logical outgrowth" of the proposed rule, which means, the notice must "adequately frame the subjects for discussion" such that "the affected party 'should have anticipated' the agency's final course in light of the initial notice." *Id.* (citing *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019)).

If a final rule contains a requirement not in the notice, the question becomes whether interested parties "should have anticipated" the new requirement, and "thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Texas Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 381 (5th Cir. 2021). If so,

"the rule is deemed to constitute a logical outgrowth of the proposed rule," and thus satisfies the notice requirement. *Id.*

"By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts because the final rule was surprisingly distant from the proposed rule." *CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009) (cleaned up).

Here, the District Court erred by finding that the Final Rule met the logical outgrowth test. The Notice stated that the report must contain information regarding "all fish harvested and discarded, and any other information requested by the SRD." 83 Fed. Reg. at 54,076-77. The Notice did not, however, indicate what "other information" meant. There is obviously no way for the public to divine what unspecified "other information" NMFS could request and thus there was no meaningful opportunity to comment. The only clue in the preamble about what "other information" meant was the statement in the preamble that fishing reports must include unspecified "socio-economic data." 83 Fed. Reg. at 54,071.

The Final Rule's relevant regulatory text is identical to the proposed text, including "other information" in the reporting requirement but not specifying what the information would be. 85 Fed. Reg. at 44,017, 44,019; Order at ROA.12447. A significant change to the Final Rule from the Notice, however, was the addition in the preamble that "NMFS will require the reporting of five economic values per trip: The

charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip." 85 Fed. Reg. at 44,005, 44,011. The district court concluded that reference to "socio-economic data" in preamble to the NPRM put commenters on notice that the Final Rule would require reporting of the charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip. Order at ROA.12451-52.

The district court considered the definition from the Oxford English Dictionary, which defines "socio-economic" as "social *and* economic, that derives from or is concerned with the interaction of social and economic factors." *Id.* (emphasis added). The district court then jumped to the conclusion that "[b]y definition, 'socio-economic' includes [all] economic factors," including those required by the Final Rule. *Id.* at ROA.12452. No so. The "socio-" prefix narrows the term to include only a subset of economic factors that, as the district court itself recognized, related to "a person's socioeconomic background or status," such as "income, occupation, and standard of living." *Id.* However, the price of charter services and fuel are economic factors that do not relate to anyone's social background or status, and thus are not *socio*-economic factors. The same is true of fuel consumption and the number of customers and crew.

To the extent the NPRM's reference to "socio-economic factors" provided any notice what "other information" must be reported, it notified the public that such economic data that does not relate to a person's social status will *not* be required. Otherwise, why else add the "socio-" prefix? While "it certainly was not necessary that

[NMFS] spell out with particularity the proposed meaning" of socio-economic, *United Steelworkers of Am., AFL-CIO-CLC v. Schuylkill Metals Corp.*, 828 F.2d 314, 318 (5th Cir. 1987), it cannot include within the ambit of that term purely economic factors, such as price, that the prefix "socio-" is designed to limit. If the agency wanted to require under the Final Rule that fishermen submit the five economic values, then it should have simply said so in the NPRM itself. But it did not.

The term "socio-economic factors" is also a broad term that encompasses age, marital status, income, race, religion, sexual preference, health status, and political affiliation to name a few. Under the district court's logic, an agency's final rule could mandate reporting of any of the above-listed information so long as the proposed rule contained a single sentence referring to "socio-economic factors."

The District Court's expansive interpretation of the term allows for many interpretations and makes it impossible for a person to "have anticipated" what the agency meant and to file responsive comments. *Texas Ass'n of Mfrs.*, 989 F.3d at 381. Instead, "interested parties would have had to divine the agency's unspoken thoughts," *CSX Transp.*, 584 F.3d at 1080, or else have had access to non-public information. For this reason, the Final Rule fails the logical outgrowth test.

Further, the authorities relied on by the District Court to support its conclusion are inapposite. In *United Steelworkers*, 828 F.2d 314, cited at Order at ROA.12448-49, an agency proposed to require employers to support employees who lose their jobs or are transferred due to lead exposure by "maintain[ing] the rate of pay, seniority and other

rights[,]" and requested public feedback on the "extent" and "appropriate scope" of benefits. *Id.* at 318. The Final Rule required that "the employer shall maintain the earnings, seniority rights and other employment rights." *Id.* at 316. This Court held that "earnings," which included premium payments such as overtime, were a logical outgrowth of the narrower "rate of pay" language. *Id.* at 318. *United Steelworkers* thus stands for the proposition that a final rule is a logical outgrowth of a marginally less burdensome proposed rule where the proposal explicitly contemplates increasing the burden. It says nothing about the situation here, where an agency uses a vague term—"socio-economic factor"—to describe a proposed regulatory requirement and expects the public to divine its meaning and provide responsive comments.

The district court also cited *American Coke and Coal Chemical Institute v. EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006), for the proposition that "the agency's development document accompanying the notice of proposed rulemaking could help 'put parties on notice' of change the agency might make in the final rule." But the court did not identify any such development document that accompanied the NPRM (and were made available to the public) that explain what "socio-economic" meant.

The district court also relied on Mr. Adam Miller's comment to the NPRM objecting to "all the information about expenses and profits" to conclude that collection of business data could have been anticipated. Order at ROA.12453 (quoting Miller

Comment at ROA.8772).[14] However, "comments by members of the public would not in themselves constitute adequate notice" because "notice necessarily must come—if at all—from the Agency." *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991). Here, Mr. Miller did not foresee mandatory reporting of charter fees, fuel use, fuel prices, passenger number and crew size because of the agency's reference to "socio-economic factors" in the NPRM. Rather, Mr. Miller attended the Gulf Council's Data Collection Technical Committee's September 2016 webinar, which specifically discussed electronic reporting of those data elements. *See* ROA.8006 (listing attendees). During the webinar, the agency disclosed its intent to collect business data at issue to select individuals and groups before promulgating the NPRM. But such webinars and similar events are insufficient to provide public notice under the APA. Neither are committee reports never entered in the Federal Register that the district court relied on to conclude notice was adequate. *See* Order at ROA.12450. Instead, the APA requires publication of an

[14] The district court identified two other commenters that it deemed to display awareness of the collection of business data. Mr. Marit Buesing's detailed summary of the proposed reporting requirement noted it included "how many passengers," but not other business data elements at issue. Order at 12453 (quoting Buesing Comment at ROA.8647). And the Ocean Conservancy urged the agency to allow fishermen to "retrieve … economic data," without specifying what that economic data includes. *Id.* The district court also highlighted two comments to NOAA's notice of availability, not the NPRM. One from the Ocean Conservancy and the other from a charter boat captain who voiced similar objections to Mr. Miller. *Id.* at ROA.12453-54. However, "ambiguous comments and weak signals from the agency gave [the public] no such opportunity to anticipate and criticize the rules or to offer alternatives. Under these circumstances, the … [Final Rule] exceed[s] the limits of a 'logical outgrowth.'" *Int'l Union, United Mine Workers of Am. MSHA*, 407 F.3d 1250, 1261 (D.C. Cir. 2005) (citing *Shell Oil*, 950 F.2d at 751).

NPRM in the Federal Register so that *all* members of the public—instead of just a handful of event attendees—would have notice of what an agency is proposing and thus have a meaningful opportunity to comment. *See* 5 U.S.C. § 533(b).

Here, the NPRM stated in the preamble that electronic fishing reports would include "socio-economic data," with no further elaboration. 83 Fed. Reg. at 54,071. If this were enough, as the district court concluded, an agency could use impossibly vague language (such as "socio-economic") to describe proposed rules and claim what it ultimately promulgates is a logical outgrowth. This Court should reject such a hindsight approach that would render the APA's notice-and-comment requirement worthless.

B. The GPS-Tracking Requirement Is Arbitrary and Capricious Because It Did Not Provide Reasoned Responses to Commenters' Fourth Amendment Objections

The district court committed reversible error when it concluded that commenters did not raise a Fourth Amendment objection based on GPS tracking that merited a response from the agency.

Arbitrary-and-capricious review requires that an agency "has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). To avoid being arbitrary or capricious, agencies must provide reasoned explanations for each of their decisions. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). An agency violates the arbitrary-and-capricious standard "if it fails to respond to 'significant points' and consider 'all relevant factors' raised by the public comments." *Carlson v. Postal Regul. Comm'n*, 938

F.3d 337, 344, (D.C. Cir. 2019) (quoting *HBO, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977)). "Comments are 'significant,' and thus require response, only if they raise points "which, if true … and which, if adopted, would require a change in an agency's proposed rule." *Huawei*, 2 F.4th at 449 (quoting *City of Portland v. EPA*, 507 F.3d 706, 714–15 (D.C. Cir. 2007)).

During the comment period, several boat captains raised Fourth Amendment objections: "To require detailed GPS data for vessels utilized by the for hire community … is also a violation of our 4th Amendment rights." *See, e.g.,* Brady Comment at ROA.8710 ("To require detailed GPS data for vessels utilized by the for hire community … is also a violation of our 4th Amendment rights."); Pierdinock Comment at ROA.8697 (same); Mercurio Comment at ROA.8757-58 (same). The Final Rule failed to even acknowledge—let alone address—commenters' Fourth Amendment concerns. The Final Rule lists 26 categories of comments. 85 Fed Reg. 44,009-13. But none pertains to the Fourth Amendment or privacy. Indeed, neither "Fourth Amendment" nor "privacy" appears in the Final Rule.

As the district court recognized, the Government did not address these Fourth Amendment objections and instead "respond[ed] to the concern over 'how NMFS will protect data that are being reported, and prevent misuse by staff or public distribution.'" Order at ROA.12441 (quoting 85 fed. Reg. at 44,010); *see also* Order at ROA.12470. The court allowed the Government to ignore commenters' Fourth Amendment objections because it mistakenly believed commenters meant to raise only a data security objection

when they said "4th Amendment rights." *Id.* The court misconstrued commenters' complaint that "Providing all confidential transiting details is a violation of our 4th Amendment right to privacy" to not raise a Fourth Amendment objection at all. *Id.* (citing comments). According to the court, "[t]he only basis for their privacy objection that the commenters raised was that their 'transiting details' are confidential according to NOAA," and the Final Rule addressed data security. *Id.* at ROA.12471. It did not matter to the district court that those commenters explicitly said "4th Amendment" because "NMFS … was not required to dig for another basis of generalized Fourth Amendment concerns." *Id.*

But no digging was required because the commenters explicitly provided their Fourth Amendment concerns: "To require detailed GPS data for vessels utilized by the for hire community … is also a violation of our 4th Amendment rights." *See, e.g.,* Brady Comment at ROA.8710 ("To require detailed GPS data for vessels utilized by the for hire community … is also a violation of our 4th Amendment rights."); Pierdinock Comment at ROA.8697 (same); Mercurio Comment at ROA.8757-58 (same). Again, the NFMS punted on discussing the Fourth Amendment concerns that the Government should not be collecting this information and focused instead on data security.

It is troubling that the district court concluded a vague term such as "socio-economic factors" puts citizens on notice that fuel prices would be required under the Final Rule, but that citizens' specifically objecting that "to require detailed GPS data …

is also a violation of our 4th Amendment rights" failed to put *the Government* on notice of a Fourth Amendment objection based on GPS tracking. Blatant double standards in favor of administrative agencies against American citizens have no place in our laws.

The district court's conclusion that commenters did not raise a Fourth Amendment objection based on GPS tracking when they explicitly said "to require detailed GPS data … is also a violation of our 4th Amendment rights" is reversible error. The Government was required to address the Fourth Amendment objection to the GPS-tracking requirement's constitutionality but failed to do so. These failures render the Final Rule arbitrary and capricious.

C. The Final Rule Failed to Justify the Cost and Burden Placed by the GPS-Tracking Requirement in Terms of Conservation Benefits

"Normally, an agency rule would be arbitrary and capricious if the agency has … failed to consider an important aspect of the problem[.] … The reviewing court should not attempt itself to make up for such deficiencies[.]" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983). Here, the MSA specifically requires conservation regulations to "minimize costs and avoid unnecessary duplication" and to "minimize adverse economic impacts on [fishing] communities." 16 U.S.C. § 1851(a)(7), (8). It also limits regulations to those that are "necessary and

appropriate for the conservation and management of the fishery." *Ocean Conservancy*, 394 F. Supp. 2d at 156 (quoting 18 U.S.C. § 1853(a)).

NMFS is thus required to ensure cost and burden imposed by the GPS-tracking requirement is justified by its conservation benefits. *See Michigan*, 576 U.S. at 752. NMFS is further required to address this cost-benefit question in response to commenters who objected to GPS tracking of charter boats as unnecessary and unduly burdensome. *Carlson*, 938 F.3d at 344. Many objected to the financial cost of purchasing and servicing VMS devices and being forced to halt their business when such devices malfunction.[15] Several stated that preexisting reporting of charter boats' general locations before and after each trip meets NMFS's needs.[16] Others pointed out there is little need for tracking

[15] *See*, *e.g.*, Pollard Comment at ROA.8715 ("GPS monitoring systems will only add additional costs[.]"); Branca Comment at ROA.8752 (It's extremely alarming that there is no mention of a price … or monthly fee for the GPS-tracking device that would be required to have my boat tracked on my dime.").

[16] *See*, *e.g.*, Buesing Comment at ROA.8647 at 20 ("Putting gps and reporting restrictions on charter boat operators will not give usable information that cannot be gained from current reporting"); Hatch Comment at ROA.8701 ("Tracking does not provide any additional data that would be provided by filling out a vessel trip report.").

charter boats with GPS precision given their limited impact on fisheries in comparison to commercial vessels.[17]

The district court concluded that the Final Rule adequately addressed the GPS-tracking requirement's necessity, burdens, and costs by quoting the following:

> The Gulf Council determined, and NMFS, agrees, that requiring each Gulf for-hire vessel be equipped, at a minimum, with archivable vessel location tracking (cellular VMS) *best balances* the need to collect and report timely information with the need to minimize the cost and time burden to the industry. 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 help validate effort and aid with enforcement of the reporting requirements.

Order at ROA.12476 (quoting 85 Fed. Reg. at 44,012) (emphasis added). The above statement, however, stumbles from the start because the "need to collect and report timely information" is not an end unto itself under the MSA, but rather a tool to serve the statute's ultimate purpose of conserving and managing fisheries. 16 U.S.C. § 1851(a)(2) ("Conservation and management measures shall be based upon the best scientific information available."). Thus, the Final Rule was required to explain how costs and burdens of the GPS-tracking requirement were justified in terms of the MSA's

[17] *See*, *e.g.*, Luciano Comment at ROA.8692 ("I can see how this works on commercial offshore vessels where their trips are usually 3-5 days—however, we do mostly 4.5-hour trips."); Comments at ROA.8700, 8706, 8708, 8711 ("Common sense should be used here and not treat … charter boats similar to large commercial fishing vessels[.]").

conservation and management benefits (as opposed to information collection). It utterly fails in this task.

The Final Rule's assertion that GPS tracking "is an additional mechanism that verifies vessel activity" and "will allow NMFS to independently determine whether the vessel leaves the dock," 85 Fed. Reg. at 44,012, merely restates the function of a GPS-tracking device and falls short of cost-benefit balancing. The Final Rule's claim that GPS-tracking will "aid with enforcement of the reporting requirements" likewise fails. Cost-benefit balancing requires the agency to explain *why* aiding enforcement of the reporting requirement justifies the cost and burden of 24-hour GPS tracking in terms of conservation and management benefits. Such an explanation must account for commenters' objections that charter boats being tracked accounts for a miniscule amount of overall Gulf fishing and that there is no record evidence of inaccurate reporting by charter boats. The Final Rule's failure to address these questions, and indeed failure to have any discussion of conservation and management benefit, renders its claimed "best balance[]" of cost and benefit arbitrary and capricious. *See Encino*, 136 S. Ct. at 2125 (rulemaking is arbitrary and capricious unless "agency's explanation is clear enough that its path may reasonably be discerned") (internal quotation marks omitted). The district court's reliance on that assertion is reversible error. *See* Order at 51.

The district court also devoted several pages of its opinion to discuss the Final Rule's analysis of costs on the charter-fishing industry. *See* Order at ROA.12476. But

cost-benefit balancing, which the Final Rule purported to have performed, 85 Fed. Reg. at 44,012, has two sides. The first is cost and the second—which the district court improperly ignored—is benefit. National Standard 8 does not, for example, command NMFS to "minimize costs" in a vacuum—if it did, the agency's budget would be zero. 16 U.S.C. § 1851 (a)(7). Rather, costs must be minimized in relation to a measure's conservation and management benefits. No amount of attention to the GPS-tracking requirement's costs can rescue the Final Rule from being arbitrary and capricious because it failed to balance those costs against any conservation and management benefits.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully ask this Court to reverse the district court's opinion and, the record being stipulated, render judgment setting aside the Final Rule.

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Respectfully submitted,

A. Gregory Grimsal
GORDON ARATA MONTGOMERY BARNETT MCCOLLAM DUPLANTIS & EAGAN
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)
John.Vecchione@ncla.legal

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on May 2, 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

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief 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 brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and this Court's grant of extended pages because if contains 14,729 words according to the count of Microsoft Word.

I further certify that the facts supporting consideration of this motion are true and complete.

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