

No. 22-30105

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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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. LEBOUF, IN HER OFFICIAL CAPACITY AS ASSISTANT ADMINISTRATOR FOR NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

*Defendants-Appellees.*

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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

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APPELLANTS' REPLY BRIEF

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## PRELIMINARY STATEMENT

The district court allowed the GPS-tracking requirement to impose warrantless searches and burdensome costs on small businesses because it mistakenly believed “the Government needs[] the locations actually fished,” ROA 12500, and that “accurate location data ... could not be obtained from current reporting,” ROA.12481. The Government<sup>1</sup> now admits the district court’s mistake because “the purpose of the VMS is to validate trips, *not to determine fishing locations.*” Appellees’ Br. at 41 n.5 (emphasis added). The trip reports to be validated do not “report where [vessels] will generally fish.” *Id.* This admission overturns the central premise undergirding the district court’s decision—*i.e.*, the purported regulatory need for “accurate location data”—and removes all doubt that court committed multiple reversible errors. Even without this admission, the Final Rule’s GPS-tracking requirement violates the Fourth Amendment, the limits of agency power under the MSA, and the Administrative Procedure Act (“APA”).

The Government’s brief repeatedly asserts facts and waivers that the record belies. First, the Government and its *amici* conflate *recreational* charter fishing with *commercial* fishing. Other courts have deemed the latter a closely-regulated industry but

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<sup>1</sup> Rather than refer to the Appellees as “the Appellees,” this brief will refer to them as “the Government.” Appellants will be referred to as “the Class.” The *amici* in support of the Government will be “the Government *amici.*” *See* Fed. R. Civ. P. 28(d)



not, the Government admits, this Court. *See e.g.*, Appellees’ Br. at 1 (“Since the Founding era, Congress has regulated the fishing industry and vessels that fish in federal waters.”), 34-36 (citing Third and Ninth Circuit cases stating *commercial* fishing is closely regulated). No case the Government and its *amici* cite held recreational charter fishing—in which no fish harvested enters commerce—is a closely-regulated industry exempt from the Fourth Amendment’s warrant requirement. This Court should not be the first appellate court to extend the “closely regulated” exemption to recreational fishing.

The Government also mischaracterizes record facts by misconstruing comments objecting that GPS tracking “violat[es] our 4<sup>th</sup> Amendment right to privacy” to mean a concern about data privacy, instead of privacy from GPS surveillance. *See* Appellees’ Br. at 25-26. The Government did not have to “sift pleadings” to understand these Fourth Amendment objections to GPS tracking. *See id.* at 26. The Government’s risible contention that it is incapable of understanding a Fourth Amendment objection to GPS tracking cannot be squared with its expectation for charter captains to divine the Rule’s proposed collection of “socio-economic data” to mean mandatory reporting of non-social business information, such as fuel use and crew size. *See id.* at 25.

It is of no moment that the Government’s *amici* support using a smartphone app to electronically report fish catches, because the Class does not challenge that aspect of the Final Rule. The same *amicus*’s comments tellingly omit mentioning the mandatory installation of a vehicle monitoring system (“VMS”) to conduct GPS tracking. *See, e.g.*, ROA.8480, ROA.8654. None of this rebuts that the overwhelming number of

commentators and charter boat captains opposed this rule and said so. *See generally* ROA.8643-72.

It bears mentioning, given the Government’s “grasstops”<sup>2</sup> *amici*, that the largest charter boat organization in the Gulf, the National Association of Charter Boat Operators (“NACO”) headed by Bob Zales, filed the following objecting comment:

The charter boat sector is unique and does not operate like the commercial or private recreational fisheries. The vast majority of charter boats operate from a specific dock and boat slip, depart and return to the slip on a scheduled basis, and typically fish within a 50-mile radius of their home port. For the purpose of stock assessments, the fact these vessels fish within that 50-mile radius provide ample data to use in stock assessments as more finite fishery data will not enhance any determination of stock status or identifying where the harvest comes from. As such the proposed requirement for a VMS system for the charter boat sector is completely unnecessary and burdensome for the sector.

ROA.8746-48 (Dec. 24, 2018 Comment from Capt. Bob Zales). Captain Zales emphasized that charter fishing differs from commercial fishing as charter boats always leave from and return to the same port—a statement the Government nor *amici* challenge. Hence, visual inspections of docks can determine whether vessels are docked or at sea, without the need for GPS tracking. The entire regulation was created with

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<sup>2</sup> As opposed to “grass roots” market participants. *See generally* Daniel J. Schwartz, The Potential Effect of Non-Deferential Review on Interest Group Participation and Voter Turnout. 77 NYULR 1845, 1866 (2002).

commercial interests' support to burden a completely different type of fishing. He further stated:

A VMS is a completely unnecessary requirement for the for hire charter fishing sector. The vast majority of for hire charter trips take[] fish in an area of less than a 50 mile circumference from their port or origin. The key argument in support of VMS is it will help provide more data to produce better stock assessments. This is a bogus and unfounded argument. All VMS does is provide the time of departure, where the vessel sails and stops and when it returns. It provides no other data that can't be provided by a smart device.

*Id.*; *see also* ROA.8742-43 (Dec. 22, 2018 Comment from Capt. Bob Zales on behalf of Panama City Boatmen Association) (to the same effect).

While the Government argues GPS tracking serves merely a data-collection objective, record evidence suggests it will be used for law enforcement. Government repeatedly explained during the rulemaking process that one rationale for trip declarations, which GPS tracking validates, is to enable law enforcement agents to intercept charter boats. ROA.8894; *see also* ROA.8899 (stating that agents "will be provided the opportunity to inspect and verify landings after the reports are submitted."). Moreover, the Gulf Council's Law Enforcement Committee "felt, if location information is to be required, real-time GPS capabilities ... would be the most useful for law enforcement, although the location data could allow officers to verify fishing activities occurring in federal or state waters, which would be very useful based on regulations." ROA.5649-50, ROA.6021. The GPS-tracking requirement's dual law-

enforcement purpose heightens commenters' Fourth and Fifth Amendment concerns that the Government ignored.

Despite terming the Class's opposition to its regulations a "kitchen-sink challenge," the Government asserts the Class did not preserve arguments made not only here but below. Appellees' Br. at 2. The Government states the Class did not raise the National Standards below nor in its opening brief and they are waived. Not so. *See* Opening Br. at 7, 44, 46. (explaining that GPS tracking violates cost-justification requirement under National Standards 7 and 8). The Opening Brief explicitly noted that the court below had not acted on the National Standards when raised. *Id.* at 46. Plaintiffs' summary-judgment brief explicitly relied upon the National Standards as well. ROA.12161, 12167, 12169, 12186-88, 12189 (discussing violation of National Standards). The Government's contrary assertions—and waiver claims—are ill-taken.

Class members challenged the entire VMS regulation as unlawful (as opposed to reporting fish caught using a smartphone app), even when they are using their permits. But they particularly noted these agencies have no power to regulate them when not using their permits. The Final Rule violates the Constitution and the law regardless, but neither the district court nor the Government cites any case allowing a regulatory agency to monitor a person's whereabouts when not engaged in regulated activity.

## ARGUMENT

### I. THE GPS-TRACKING REQUIREMENT AUTHORIZES WARRANTLESS SEARCHES IN VIOLATION OF THE FOURTH AMENDMENT

The Government’s admission that “the purpose of the VMS is ... not to determine fishing locations,” Appellees’ Br. 41 n.5, establishes that the district court committed reversible error by holding that warrantless searches were justified under the closely-regulated exemption because the “Government needs ... the locations actually fished,” and “[t]he tracking requirement provides the only accurate data of the vessels’ locations.” ROA.12501. Beyond this error, the closely-regulated exemption does not apply because recreational charter fishing is not closely regulated. The exemption is further unavailable because it categorically does not apply to property-based searches encompassed by the GPS-tracking requirement.

#### A. This Facial Fourth Amendment Challenge Is Appropriate

The Government erroneously asserts that this facial challenge to the constitutionality of GPS-tracking regulation is disfavored. Appellees’ Br. at 31-32. The APA indisputably authorizes facial challenges to the constitutionality of agency regulations. *See* 5 U.S.C. § 706(2)(B) (providing for judicial review of agency action that is “contrary to constitutional right, power, privilege or immunity”). And the Supreme Court made clear in *City of Los Angeles v. Patel*, “that facial challenges under the Fourth Amendment are not categorically barred or especially disfavored.” 576 U.S. 409, 415 (2015).

None of the Government’s concerns against facial challenges is present. *First*, this challenge does not rely on speculation based on hypothetical scenarios, *see* Appellees’ Br. at 31, because every member of the Class is currently being subject to constant GPS tracking by the Government. *Second*, the challenge does not run contrary to judicial restraint, *see id.*, because federal judges have an Article III duty to protect constitutional rights against government intrusion. *Third*, this case does not risk “invalidating a law that is perfectly constitutional in some application,” *id.* (cleaned up), because the Class’s constitutional challenge is limited to only portions of the Final Rule that violate the Fourth Amendment. For instance, the Class does not challenge the electronic-reporting requirement.

As the Court said in *Patel*, 576 U.S. at 415, “when addressing a facial challenge to a [regulation] authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes[.]” Here, the Final Rule authorizes “permanently affix[ing]” government-approved GPS devices on private vehicles so the Government can track their precise locations “24 hours a day, every day of the year.” 50 C.F.R. §§ 622.26(b)(5), 622.374(b)(5). The Supreme Court has held this exact behavior unconstitutional when done to a single criminal suspect. *United States v. Jones*,

565 U.S. 400, 404 (2012).<sup>3</sup> A facial challenge against a regulation that purports to authorize unconstitutional surveillance against thousands of legitimate businesspersons—without suspicion of wrongdoing—is entirely appropriate and indeed is necessary to preserve individual liberty. *See Patel*, 576 U.S. at 415.

**B. The Government’s Coercion Cannot Be the Basis for ‘Consent’ to Waiving Fourth Amendment Rights**

The Government argues that analogy to *Jones* is inappropriate because “Plaintiffs consent to [being subject to GPS-tracking] by agreeing to the terms of their permits.” Appellees’ Br. at 45. Not so. The existence of this lawsuit demonstrates Class members do not “consent” to waiving their Fourth Amendment rights. Rather, Class members are being coerced by the threat of losing permits needed to continue their livelihood.

Although a “search conducted pursuant to a valid consent is constitutionally permissible,” *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), consent must be “in fact voluntarily given, and not the result of duress or coercion, express or implied.” *Id.* at 248; *see also Johnson v. United States*, 333 U.S. 10, 13 (1948) (consent to search is invalid when “granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right”). The Government cannot conduct trespassory searches of a charter boat directly, so “it cannot do so indirectly by

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<sup>3</sup> Continuous GPS tracking also “invaded [charter-boat operators’] reasonable expectation of privacy in the whole of [their] physical movements.” *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018).

conditioning the receipt of [a] government benefit”—here permits each charter captain needs to earn a living—“on the applicant’s forced waiver of his Fourth Amendment right.” *Lebron v. Sec’y, Fla. Dep’t of Child. & Fams.*, 710 F.3d 1202, 1217 (11th Cir. 2013).<sup>4</sup>

The Government’s related argument that “*Jones* involved a personal vehicle, whereas a VMS unit is installed on a vessel requiring a federal permit due to its commercial use in federal waters” also fails. *See* Appellees’ Br. at 46. Charter boats are personal vehicles that are entitled to no less Fourth Amendment protection as “effects” than the automobile in *Jones*, 565 U.S. at 404 (“It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the Amendment.”). A state-issued driver’s permit was needed to operate the personal vehicle in *Jones*, but that permit did not license the State to ignore the Fourth Amendment by installing a tracking device on that vehicle. Similarly, the federal government cannot place conditions on federal fishing permits to circumvent constitutional rights.

### **C. Privacy-Based Exemptions Do Not Apply to the Property-Based Searches in this Case**

“[T]he theory behind the closely regulated industry exception is that persons engaging in such industries, and persons present in those workplaces, have a *diminished*

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<sup>4</sup> Nor can the Government argue that no taking took place because Class members “voluntarily” installed VMS devices on their boats as a condition of obtaining fishing permits. *See Nollan v. California Coastal Comm’n*, 483 U.S. 825, 832 (1987) (holding that permit condition that amounted to “permanent physical occupation” was a taking).



*expectation of privacy.*” *Zadeh v. Robinson*, 928 F.3d 457, 466 (5th Cir. 2019) (emphasis added). As the Class argued below, privacy-based Fourth Amendment doctrines are “simply irrelevant because *Jones*’s property-based definition of Fourth Amendment search does not depend on a person’s reasonable expectation of privacy.” ROA.12312; *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (“[W]e need not decide whether the officers’ investigation of Jardines’ home violated his expectation of privacy under *Katz*.”).

The Government’s assertion that “Plaintiffs offer no authority for their argument that *Jones* and *Jardines* limited the [closely-regulated] doctrine,” Appellees’ Br. at 37, misses the mark. The Supreme Court has *never* applied the “closely-regulated” doctrine to property-based searches recognized in *Jones* and *Jardines*. The Government bears the burden of proving this privacy-based exemption somehow expanded to justify warrantless property-based searches in which the expectation of privacy is irrelevant. *See United States v. Riley*, 968 F.2d 422, 424–25 (5th Cir. 1992) (“Because a warrantless search is presumed to be unreasonable, the Government has the burden of proving that the warrantless search was conducted pursuant to an exception.”). It cites no authority to support shifting this burden.

#### **D. Recreational Charter Fishing Is Not Closely Regulated**

Even if the closely-regulated exemption could somehow excuse warrantless property-based searches, it would still not apply because recreational charter fishing is not closely regulated.

**i. Commercial Fishing and Recreational Fishing Are Separate Industries**

The Government's aggressive attempt to categorize all fishing as a single, closely-regulated industry is misplaced and would force all fishermen in the Gulf to forfeit their Fourth Amendment rights, including a family taking out its own boat. *See* Appellees' Br. at 34-36. The MSA itself categorizes fishing into distinct commercial and recreational industries. "[C]ommercial fishing" is "fishing in which the fish harvested, either in whole or in part, are intended to enter commerce," while "recreational fishing" means "fishing for sport or pleasure." 16 U.S.C. § 1802(4, 37). The statute explicitly recognizes that "recreational fishing and commercial fishing are different activities" and commands that different regulatory "approaches should be adapted to the characteristics of each sector." 16 U.S.C. § 1801(a)(13).

While commercial fishing has been subject to federal regulation since the nation's founding, federal regulation of recreational fishing in the high seas did not begin until after Congress enacted the MSA in 1976. Indeed, regulation of recreational fishing was such an afterthought in the MSA that Congress did not even define that term as a regulated activity until the Sustainable Fisheries Act of 1996, Pub. L. 104-297 (October 11, 1996). This omission is unsurprising, as the federal Government has regulated commercial—not recreational—fishing since the founding. *See e.g.* Davis R. Robinson, *The Convergence Law and Diplomacy in United States-Canada Relations: The Precedent of the Gulf of Maine Case*, 26 Can.-U.S. L.J. 37, 42 (2000) (discussing Revolutionary War disputes

over fishing and their settlement by the Treaty of Paris). In short, no “long tradition of close government supervision” justifies applying the closely-regulated exemption to recreational fishing. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978).

**ii. Authorities Concerning Close Regulation of Commercial Fishing Do Not Apply to Recreational Charter Fishing**

The Government argues that charter fishing is closely regulated by relying exclusively on case law pertaining to *commercial* fishing. *See* Appellees’ Br. at 34-36. The Government’s assertion that “[c]harter fishing is distinct from recreational fishing,” Appellees’ Br. at 39, is directly contradicted by the MSA. It defines “Charter fishing” as “fishing from a vessel carrying a passenger for hire ... who is engaged in recreational fishing.” 16 U.S.C. § 1802(3).

Charter operators do not engage in commercial fishing because the fish harvested in charter trips are not “intended to enter commerce.” *Id.* § 1802(4). As the Class’s *amici* point out, charter operators’ only commercial activity involves the *transportation* of recreational fishermen, not the harvesting of fish for commercial purposes. State AGs Br. at 15 (“While charter fishing is also a business, that business is essentially *transportation*”); Buckeye Br. at 10 (“a recreational fishing charter captain is like a sea-going Uber driver.”).

**iii. Charter Fishing Is Not a Closely Regulated Subset of Recreational Fishing**

Cases concerning commercial fishing are inapplicable because charter fishing is a type of recreational fishing. The question therefore is whether charter fishing is

nonetheless a closely-regulated subpart of the otherwise lightly-regulated recreational-fishing industry. The Government's assertion that courts do not approach the closely-regulated exemption with this "level of granularity," is directly contradicted by this Circuit's decision in *Zadeh*, 928 F.3d at 466. This Court held there that "the medical industry as a whole is not a closely regulated industry" and asked whether "it is possible that a subset, such as those who prescribe controlled substances, would [qualify]." *Id.* Here, for charter boats, the answer must be no.

The Government has not met its burden of proving a long history of close regulation sufficient to create an exception to the Fourth Amendment's warrant requirement. Nor could it, because federal regulation of charter fishing in the Gulf did not begin until the 1990s. *See* Sustainable Fisheries Act of 1996, Pub. L. 104-297 (October 11, 1996) (defining for the first time "charter fishing" as a regulated activity under MSA). That is a far cry from Colonial Era regulations typically needed to justify the closely-regulated exemption. *Zadeh*, 928 F.3d at 466 (noting that "when the Court held that the liquor industry was closely regulated, it mentioned that English commissioners could inspect brewing houses on demand in the 1660s, and that Massachusetts passed a similar law in 1692") (citing *Colonnade Catering v. United States*, 397 U.S. 72, 75 (1970)).

Next, the Government cannot establish that charter fishing presents "a clear and significant risk to the public welfare," which is a criterion for the closely-regulated exemption elucidated by the Supreme Court in *Patel*, 576 U.S. at 424. The Government's

assertion that *Patel* did “not adopt a new requirement or alter the basic [closely-regulated] analysis,” Appellees’ Br. at 38, is again contradicted by this Court’s decision in *Zadeh*, 928 F.3d at 465. In that case, this Court cited *Patel*, 576 U.S. at 424, to add “whether the industry would pose a threat to the public welfare if left unregulated” as a new consideration in analyzing whether an industry is closely regulated. *Id.*

The Government cites cases that it asserts analyze the closely-regulated exemption without considering danger to public welfare. Appellees’ Br. at 38 (citing *Killgore v. City of S. El Monte*, 3 F.4th 1186, 1191-92 (9th Cir. 2021) and *Free Speech Coalition v. Att’y Gen. U.S.*, 825 F.3d 149, 166-70 (3d Cir. 2016)). These two out-of-circuit decisions do not trump this Court’s precedent in *Zadeh*, 928 F.3d at 465. And the Opening Brief already explained that *Killgore*’s finding of a closely-regulated industry concerned public welfare, because the inspection scheme at issue was designed to “protect and promote the public health, safety and welfare.” Opening Br. at 28 (quoting *Killgore*, 3 F.4th 1186, 1192). The same Opening Brief also explained that *Free Speech Coalition* held the “exception to the warrant requirement for closely regulated industries is inapplicable” for independent reasons; it thus had no need to address danger to public welfare. *Id.* (citing *Free Speech Coalition*, 825 F.3d at 165). The Government offers no response to these unassailable points. Nor does the Government address the reasoning in *Taylor v. City of Saginaw*, which rejected the closely-regulated exemption based only on concluding that the industry “does not pose a clear and significant risk to the public

welfare.” 11 F.4th 483, 488 (6th Cir. 2021) (cleaned up). The conclusion that danger to public welfare is a criterion for the closely-regulated exemption is inescapable after *Patel*.

The Government’s assertion that “overfishing affects the public welfare,” Appellees’ Br. at 38, proves nothing. Every industry affects the public welfare, but they are not all closely regulated. See *Barlow’s*, 436 U.S. at 313 (“The clear import of our cases is that the closely regulated industry ... is the exception. The Secretary would make it the rule.”). *Patel* clarified that a closely-regulated industry must be “intrinsically dangerous,” *i.e.*, it must pose an inherent threat to the public’s physical safety. 576 U.S. at 424 n.5. There is nothing intrinsically dangerous about charter fishing. So, it is not a closely-regulated industry in which the Government may conduct warrantless searches.

#### **E. The GPS-Tracking Requirement Fails the *Burger* Test**

Even if warrantless inspections under the closely-regulated doctrine were possible, the GPS-tracking requirement would still fail at least two preconditions for such warrantless inspections. See *New York v. Burger*, 482 U.S. 691, 702 (1987). *First*, the Government conceded that accurate locations of charter boats are not “necessary to further [the MSA’s] regulatory scheme.” *Id.*; Appellees’ Br. at 41 n.5. *Second*, 24-hour GPS tracking is not “carefully limited in time, place, and scope.” *Burger*, 482 U.S. at 703.

The district court held that *Burger*’s necessity requirement was met because “[t]he tracking requirement provides the only accurate data of the vessels’ [fishing] locations.” ROA.12501. It explained that less-invasive spot checks and “no fish” reports “are hardly a substitute for the collection of locations fished.” *Id.* As the Government

concedes, however, “the purpose of [GPS tracking] is ... not to determine fishing location.” Appellees’ Br. 41 at n.5. This clarification proves that the entire premise of the district court’s necessity decision, *i.e.*, that accurate location data is needed to further the MSA’s regulatory scheme, was flat wrong. That mistake constitutes reversible error.

The Government clarifies that GPS tracking is used to validate charter operators’ trip-declaration reports by “provid[ing] an independent means of determining whether vessels have left the dock.” *Id.* at 42. But such validation is easily accomplished by a visual inspection of the dock without needing to track the boat’s movements at sea. The Government asserts without elaboration or support that GPS tracking enables “more accurate calculation of fishing effort through its broader scope.” *Id.* at 41. The Government still does not answer what marginal increase in accuracy would result from highly invasive GPS tracking over spot checks. Nor does it answer why such marginal improvements in accuracy are “necessary” under *Burger* absent evidence of inaccurate or fraudulent reports. Such threadbare assertions cannot satisfy the Government’s burden to establish an exemption to the Fourth Amendment’s warrant requirement.

The GPS-tracking requirement also fails *Burger*’s exception for warrantless inspections to be “carefully limited in time, place, and scope.” 482 U.S. at 703. The Government argues that broadcasting “vessel location once every hour” is carefully limited. Appellees’ Br. at 43. Not so. The hourly GPS coordinate of a charter boat at sea allows anyone to plot the vessel’s approximate location throughout its entire journey and thus fails to be limited in time. Further, the Government does not identify any

limitations in “place” or “scope.” The Government tracks charter boats wherever they go, even when there is no suspicion of unlawful activity, regardless of whether boats are engaged in charter fishing or non-fishing personal trips. And if the vessel is powered down, the Government still knows its exact location because the charter operator must report where the powered-down boat is stored. In short, continuous GPS tracking provides no constitutionally adequate safeguards and thus must be rejected.

## **II. *CHEVRON* DEFERENCE DOES NOT PREVENT THE GPS-TRACKING REQUIREMENT FROM EXCEEDING THE MSA’S AUTHORIZATION**

### **A. The Government’s Reliance on *Chevron* Is Misplaced, as *Chevron* Deference Violates the Due Process of Law**

The Government invokes *Chevron* deference to argue that “[b]ecause the MSA’s broad grant of authority does not foreclose the agency’s reading and that reading is reasonable, it must be upheld” Appellees’ Br. at 16. “[T]he *Chevron* doctrine has been questioned on substantial grounds, including that it represents an abdication of the judiciary’s duty under Article III ‘to say what the law is,’ and thus turns over judicial power to politically unaccountable employees of the Executive Department.” *Chamber of Commerce v. DOL*, 855 F.3d 360, 380 n.14 (5th Cir. 2018) (collecting cases). Even more problematically, deference deprives the Class of its due process right to an impartial tribunal because “when judges defer to the executive’s view of the law, they display systematic bias toward one of the parties.” *Tetra Tech EC, Inc. v. Wisconsin Dep’t of Revenue*, 914 N.W.2d 21, 49 (Wisc. 2018) (quoting Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016) (overruling state-law deference precedent)); *see*



also *King v. Mississippi Mil. Dep't*, 245 So. 3d 404, 408 (Miss. 2018) (“[C]ourts [must] fulfill their duty to exercise their independent judgment about what the law *is*.”) (quoting *Gutierrez–Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring)).

To mitigate *Chevron*’s constitutional defects, the Supreme Court limited deference to an agency’s statutory interpretation to only instances where “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority.” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Am. Hosp. Ass’n v. Becerra*, 2022 WL 2135490 (U.S. June 15, 2022) (reversing *Chevron*-based interpretation of statute). The Court must also exhaust all the “traditional tools” of statutory interpretation before deferring to an agency’s interpretation. *See Kisor v. Wilke*, 139 S. Ct. 2400, 2415 (2019) (citing *Chevron v. NRDC*, 467 U.S. 837, 843 n. 9 (1984)). Nothing in the statute intimates that the agencies have authority to track permit holders “24 hours a day, every day of the year.” 50 C.F.R. §§ 622.26(b)(5), 622.374(b)(5). The agencies cannot bootstrap such power from vague language in the MSA. Here, the Government does not identify any delegation of authority to use the term “necessary and appropriate for the conservation and management” under 16 U.S.C. § 1853(a)(1) or the National Standards under § 1851(a) to conjure such power without clear congressional authorization.

**B. The GPS-Tracking Requirement Is Not Necessary and Appropriate and Violates the National Standards**

All regulations promulgated by NMFS must be “necessary and appropriate for the conservation and management of the fishery.” 16 U.S.C. § 1853(a)(1), (b)(14). The Government’s argument that 16 U.S.C. § 1853(b)(4)’s authorization “to require devices used for enforcement” proves the necessity of GPS tracking is circular. *See* Appellees’ Br. at 17. The Government cannot rely on the existence of an authorization to prove that it satisfied Congress’s limit on that authorization. Otherwise, *any* device required by the Government under § 1853(b)(4) would be *ipso facto* necessary for conservation and management. Nor is the Government’s judgment regarding the necessity of GPS tracking entitled to judicial deference.

As already noted, the Government conceded that the district court was wrong about GPS tracking being needed to enforce the MSA by determining fishing locations. *Compare* Appellees’ Br. at 41 n.5 *with* ROA.12461. The only function of GPS tracking is to “provide an independent means of determining whether vessels have left the dock.” Appellees’ Br. at 42. But charter operators already report when they leave dock. Thus, charter operators are being subjected to 24-hour GPS tracking at their own expense just so the Government has a redundant means of determining whether their boats are docked. Whatever “necessary” means, it cannot mean redundant.

The Government provides no explanation why it needs to impose an invasive and costly redundancy other than an unsupported belief that charter operators are

violating their obligation to report when they leave dock. Appellees' Br. at 18 (“assurances that ... permittees always follow the law is either utopia or naïve”). But the record is devoid of *any* evidence of misreporting. The GPS-tracking requirement is a solution to a nonexistent misreporting problem, and therefore cannot be “necessary.”

GPS tracking fails the MSA's requirement for regulations to be “appropriate to conservation and management of the fishery.” 16 U.S.C. §§ 1853(a)(1), (b)(14). The Government urges this Court to ignore the Supreme Court's interpretation of “appropriate” as requiring cost-benefit balancing because “unlike in *Michigan v. EPA*, 576 U.S. 743 (2015), NMFS has not interpreted the MSA to preclude the consideration of costs.” Appellees' Br. at 18. But the EPA's decision to ignore costs was not the reason for the Supreme Court's interpretation in that case. Rather, the Court applied the ordinary meaning of “appropriate” to hold that the agency must “ensure that the costs are not disproportionate to the benefits,” and *then* held that the EPA's decision to ignore costs violated that requirement. *Michigan*, 576 U.S. at 758. Thus, NMFS's consideration of financial costs cannot alter the meaning of “appropriate” under §§ 1853(a)(1), (b)(14) as requiring it to likewise “ensure cost-effectiveness.” *Id.* National Standards that require conservation measures to, “where practicable, minimize costs” and “minimize adverse economic impacts on [fishing] communities” reinforce that interpretation. 16 U.S.C. § 1851(a)(7), (a)(8). The National Standards' instructions to minimize costs and adverse economic impacts, where practicable, requires an

assessment of the conservation benefits costly measures serve. In other words, cost-benefit balancing is needed.

While NMFS considered some non-constitutional costs of GPS tracking, it utterly failed to “ensure that the costs are not disproportionate to the benefits,” *Michigan*, 576 U.S. at 758, because it ignored the benefits side of the ledger. The only proffered benefit of GPS tracking is to validate dock-leaving reports, which, according to the Government, “enables more accurate calculation of fishing effort.” Appellees’ Br. at 41. But the Government provides no basis to believe dock-leaving reports are inaccurate in any way, so any increased accuracy resulting from GPS tracking is negligible at best.

On the cost side, GPS tracking is highly invasive and financially burdensome on charter boat operators: it eats away five percent of the average charter business’s annual income. 85 Fed. Reg. 44,005, 44,015 (July 21, 2020) (“these [startup] costs are equivalent to ... 3.1 percent of average annual charter vessel net income” and “reoccurring charges will be equivalent to ... 1.8 percent of average annual charter vessel net income.”). On the benefit side, there is negligible or non-existent improvement in the accuracy of dock-leaving reports already being submitted, and the Government provides no explanation how greater accuracy translates into conservation benefits. The Government fails to “ensure that the costs are not disproportionate to the benefits,” *Michigan*, 576 U.S. at 758, because it has not identified any conservation benefits that justify the high cost of GPS tracking. The GPS-tracking requirement is

therefore not an “appropriate” measure under the MSA. Furthermore, the Government attributed no “cost” to loss of constitutional rights.

### **III. THE FINAL RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT**

#### **A. The Government Failed to Provide Public Notice of What ‘Other Information’ Must Be Reported**

“The proposed regulatory text stated that the report must contain ... ‘any other information requested by the [agency],’ but did not specify what ‘other information’ means.” ROA.12436 (quoting 83 Fed. Reg. 54,076-77). The Government’s contention that this vague demand for “any other information ... should end the inquiry” of what the reports must contain is absurd on its face. Appellees’ Br. at 23-24. Only clairvoyant commenters—or those with non-public information—could divine what “any other information” means without further elaboration. The Government theory must be rejected because it would allow agencies to use “any other” language to introduce after-the-fact regulations and circumvent notice-and-comment requirements.

The Government’s argument that the Final Rule’s “elaboration complied with the APA’s [notice-and-comment] requirements,” Appellees’ Br. at 24, is mistaken. Notice of what the Final Rule would require must come from the proposal, not the Final Rule itself. *Texas Ass’n of Mfrs. v. CPSC*, 989 F.3d 368, 381 (5th Cir. 2021) (“Final rules under APA notice-and-comment rulemaking must be the ‘logical outgrowth’ of the proposed rule.”).

The only hint in the proposal regarding what “other information” must be reported is the phrase “socio-economic data,” 83 Fed. Reg. 54,071, which does not allow commenters to foresee and therefore comment on the reporting of charter fees, fuel costs, fuel usage, number of passengers, and number of crew, *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 447 (5th Cir. 2021) (“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.”) (cleaned up). The Government complains that “Plaintiffs’ parsimonious construction [of socio-economic] cannot be reconciled [with] that term’s common usage[,]” Appellees’ Br. at 25, but offers no support that people commonly refer to crew size as socio-economic data, for example. Even if “socio-economic” could encompass the business information sought, then that term would be meaninglessly broad, covering a nearly infinite set of data, ranging from health status to sexual orientation. *See* Opening Br. at 49.

### **B. The Government Misinterpreted Explicit Fourth Amendment Objections as Data Security Concerns**

Contrary to the Government’s contentions, there is no doctrine of judicial deference to an agency’s interpretation of comments to proposed rules. *See id.* at 27. Such deference would be a recipe for administrative abuse, as agencies could conveniently misconstrue objecting comments to avoid answering hard questions. The agency attempts precisely such bad-faith behavior here.

Commenters complained that: “Providing all confidential transiting details is a violation of our Fourth Amendment right to privacy” and that “to require detailed GPS data for vessels ... is also a violation of our 4th Amendment rights.” ROA.8696-97; *see also* ROA.8709-10, 8757-58. The Government misconstrued these clearly stated Fourth Amendment objections to GPS tracking as expressing a concern solely about “data confidentiality and protection of personal information online.” Appellees’ Br. at 26. This interpretation is indefensible. The Fourth Amendment’s most obvious application here protects citizens from warrantless government surveillance.

Commenters do not have to draft legal briefs with citations to *Jones* and *Carpenter* to voice obvious Fourth Amendment objections to Government-mandated GPS-tracking of their vehicles. The agency’s failure to respond to clearly stated Fourth Amendment objections to warrantless government surveillance is arbitrary and capricious under the APA.

**IV. EVERY LEVIATHAN ATTRACTS PILOT FISH AND THE GOVERNMENT  
AMICI’S ARGUMENTS ARE NOT WELL TAKEN**

A group of *amici* “represent[ing] a coalition of industry and environmental groups” purported to “support the challenged rule because it will improve conservation and management of certain fish species in the Gulf of Mexico.” Government *amici* Br.

at 1. They are using the MSA to help commercial fishermen at the expense of recreational fishermen.<sup>5</sup>

Government *amicus* Charter Fisherman’s Association was started with \$48,000 in funding from its co-*amicus* “environmental” group, in order to support the positions of commercial fisherman.<sup>6</sup> They partner with “Sea Lords” to drive out recreational fishers. Hence, commercial fishing interests that already must use VMS have zero concern about the actual charter operators and just wish to raise their rivals’ costs.<sup>7</sup>

Mr. Guindon from a case cited by Government *amici* was one of these so-called Sea Lords. *Guindon v. Pritzker*, 240 F. Supp. 3d 181 (D.D.C. 2017). The Government

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<sup>5</sup> Instead, they are “rent-seekers.” See *District Intown Properties Ltd. v. District of Columbia*, 198 F.3d 874, 885 (D.C. Cir. 1999) (Williams, J. concurring in the judgment) (“While the resulting proposals are naturally advanced in the name of the public good, many are surely driven by interest-group purposes, commonly known as ‘rent-seeking.’ Among these proposals, at least some inflict aggregate costs considerably outweighing their aggregate benefits ... .”); see also *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017) (Brown, J. dissenting from denial of reh’g en banc) (noting that the Court’s denial “shows signs of a government having grown beyond the consent of the governed” including “a preference for rent-seeking over liberty”).

<sup>6</sup>Ben Raines, *How a ‘Rogue’ Environmental Group Transformed American Fisheries*, AL.com (Oct. 05, 2016, 11:32 AM), [https://www.al.com/news/mobile/2016/10/edf\\_how\\_a\\_rogue\\_environmental.html](https://www.al.com/news/mobile/2016/10/edf_how_a_rogue_environmental.html) (last visited June 22, 2022).

<sup>7</sup> Ben Raines, *Kingpins of the Gulf Make Millions off Red Snapper Harvest Without Ever Going Fishing*, AL.com (Jan. 24, 2016, 11:00 AM), [https://www.al.com/news/2016/01/kingpins\\_of\\_the\\_gulf\\_make\\_mill.html](https://www.al.com/news/2016/01/kingpins_of_the_gulf_make_mill.html) (last visited June 22, 2022).



*amicus*'s sly suggestion that "Appellants could avoid VMS Reporting by transferring their limited access permits and using their vessels for purely recreational pursuits or charter fishing in state waters" gives away the game. Government *amici* Br. at 24. Who, pray tell, would benefit from transferring those permits?

Government *amicus*'s disquisition on Red Snapper and other fish does not change the fact that charter boats (unlike perhaps the coalition represented by Government's *amici*) do not take many fish from the Gulf.<sup>8</sup>

## 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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<sup>8</sup> Ben Raines, *How a 'rogue' environmental group transformed American fisheries*, AL.COM (Oct. 05, 2016, 11:32 AM), <https://www.al.com/news/mobile/2016/10/edf-how-a-rogue-environmental.html> (last visited June 21, 2022). The Government and its *amici* dispute the claim that charter boats account for a tiny portion of total Gulf fishing by asserting estimates should focus on 34 species identified 50 C.F.R. Pt. 622, App. A, Table 3 and § 622.2, rather than total Gulf fishing. Appellees' Br. at 6 n.1; Government *amici* Br. at 14-15. But doing so would not change the result. Using the Government's own on recreational fishing database (<https://www.fisheries.noaa.gov/data-tools/recreational-fisheries-statistics-queries>) to query those 34 species indicates charter fishing accounts for approximately 10 percent of total recreational fishing of those species in the Gulf. Recreational fishing in turn accounts for a tiny portion of total Gulf fishing.

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Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that, on June 22, 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*

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### **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 it contains 6,311 words according to the count of Microsoft Word.

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

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