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Filed November 18, 2025

**United States Court of Appeals
For the First Circuit**

No. 25-1007

FRANK THOMPSON,
Plaintiff, Appellant,
JOEL STROUT; JASON LORD; CHRISTOPHER
SMITH; JACK CUNNINGHAM,
Plaintiffs,

v.

CARL WILSON, in their official capacity as
Commissioner, Maine Department of
Marine Resources,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MAINE
[Hon. John A. Woodcock, Jr., U.S. District Judge]

Before
Montecalvo, Thompson, and Aframe,
Circuit Judges.

Edward M. Wenger, with whom Caleb Acker and
Holtzman Vogel Baran Torchinsky & Josefiak PLLC,
were on brief, for appellant.

Valerie A. Wright, Assistant Attorney General,
with whom Aaron M. Frey, Attorney General, Thomas
A. Knowlton, Deputy Attorney General, and Jack

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Dafoe, Assistant Attorney General, were on brief, for appellee.

Sean H. Donahue, with whom David T. Goldberg, Donahue, Goldberg & Herzog, Russell B. Pierce, Jr., and Norman Hanson DeTroy, LLC, were on brief, for Atlantic States Marine Fisheries Commission, amicus curiae.

Andrew C. Mergen, Sommer H. Engels, Rosa Hayes, Shannon Nelson, Aaron Kleiner, Riley Pfaff, Spencer Weisner, and Emmett Environmental Law & Policy Clinic, Harvard Law School, on brief for Environmental and Marine Law Scholars, amicus curiae.

Erica A. Fuller, Chloe C. Fross, Sarah Shahabi, and Conservation Law Foundation, on brief for Conservation Law Foundation and Ocean Conservancy, amicus curiae.

November 18, 2025

THOMPSON, Circuit Judge. According to New England legend, Maine law once restricted the amount of lobster that could be fed to prisoners before it was considered cruel and unusual punishment. Our Nation’s perspective on these succulent crustaceans has certainly changed since those early colonial days, but laws related to the American Lobster remain on Maine’s books today. Such is the topic of the present appeal: a Maine Department of Marine Resources (“MDMR”) Rule that requires all Maine lobstermen¹

¹ Just as the district court’s opinion and the parties’ briefing, we note “lobstermen” is a gender-neutral term. See Maine Lobster Community Alliance, A Lobstermen is a Lobstermen.

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who hold federal lobster fishing permits to install an electronic tracking device on their vessels and share their location data whenever those vessels are in the water.

After the MDMR Rule went into effect, appellant Frank Thompson and a group of Maine lobstermen filed suit in the United States District Court for the District of Maine seeking to enjoin the MDMR Rule and have it declared unconstitutional as per the Fourth Amendment's unreasonable searches and seizures prohibition. Following a motion to dismiss from the Commissioner of the MDMR (whom we will refer to in this opinion generally as "Maine"), the district court held that the lobstermen had failed to state a claim for which relief could be granted. However, before dismissing Thompson and the lobstermen's claim, the district court encouraged them to appeal their Fourth Amendment challenge to our court for an authoritative ruling. They did, and we respond to this request head on. In doing so, we affirm the district court's dismissal.

I

Because this appeal follows a motion to dismiss, we will pull our facts from Thompson's complaint, draw all reasonable inferences in Thompson's favor, and consider any materials fairly incorporated in the complaint or otherwise subject to judicial notice (namely the MDMR Rule we have looked up for ourselves). See, e.g., *Lowe v. Mills*, 68 F.4th 706, 711, 713-14 (1st Cir. 2023).

Regardless of Gender, (July 7, 2023)
<https://www.mlcalliance.org/post/a-lobsterman-is-a-lobsterman-regardless-of-gender>,
[<https://perma.cc/8DHC-V49M>].

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(A)

Our system of dual federalism has established a complex and shared regime of federal and state law to ensure the protection and continuous vitality of the Nation's fisheries.² Along the Atlantic coast, individual states like Maine regulate the fishery happenings within three nautical miles of their shores, while the National Marine Fisheries Service (a sub-agency of the National Oceanic and Atmospheric Administration) handles waters extending 200 nautical miles from the outer boundary of state waters (an area known as the exclusive economic zone or "EEZ"). See generally Me. Stat. tit 12, § 6001(6); 16 U.S.C. §§ 1801(b), 1802(11).

Fish (often along with their pursuers) tend to freely move about the open ocean, making regulation subject to clearly marked boundaries often impracticable. That said, protection of these aquatic resources remains crucial. To help combat this natural fish-shifting dilemma, fifteen states and the District of Columbia exercise joint regulatory authority through the Atlantic States Marine Fisheries Commission ("ASMFC" or the "Commission"). See generally 16 U.S.C. §§ 5101, 5102(3). Federal law encourages the Commission to draft and adopt fishery management plans ("FMPs") that specify actions to be taken by member states to protect coastal fishery resources. See generally id. §§ 5102(1), 5104(a)(1). Once an FMP is promulgated, federal law then requires member

² While we only recap the statutes and regulations essential to our analysis, the district court provided an in-depth summary of the entire statutory and regulatory backdrop for the MDMR Rule, which the curious reader may access. See Thompson v. Keliher, No. 1:24-cv-00001, 2024 WL 4851243, at *2-9 (D. Me. Nov. 21, 2024).

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states to “implement and enforce” it. Id. § 5104(b)(1); see generally R.I. Fishermen’s All., Inc. v. R.I. Dep’t of Env’t Mgmt., 585 F.3d 42, 46 (1st Cir. 2009) (outlining the history of the Commission and its shift to compulsory FMPs). In the state of Maine (an ASMFC member state), the MDMR regulates state waters subject to the Commission’s FMPs. See Me. Stat. tit. 12, §§ 4651-56.³

So, to summarize what we’ve covered thus far, the Commission creates an FMP to preserve fishery resources, and the MDMR promulgates rules to adopt and enforce, at a minimum, the requirements of the FMP. See Medeiros v. Vincent, 431 F.3d 25, 27-28 (1st Cir. 2005) (abrogated on other grounds) (describing the relationship between the Commission and state regulators in the context of the American Lobster FMP); see also 50 C.F.R. § 697.3(c) (requiring a federal lobster fishing license holder to adhere to the more restrictive regulation where different). With this backdrop in place, we can start narrowing down to the specifics of this case.

In March 2022, the Commission published an addendum to its existing American Lobster FMP entitled “Addendum XXIX to Amendment 3 to the American Lobster Fishery Plan; Addendum IV to the Jonah Crab Fishery Management Plan.” The Addendum’s primary purpose is to reduce the risk of North Atlantic right whales from getting entangled in fishing lines. In addition to protecting the right whales, the Addendum seeks to: (1) improve information available to fishery managers and stock

³ Maine participates in the ASMFC through three representatives, one being the active MDMR Commissioner. Me. Stat. tit. 12, § 4652.

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assessment scientists; (2) support the development of offshore renewable energy in U.S. waters; and (3) improve the efficiency and efficacy of fishery management and offshore enforcement efforts in the EEZ.

To pursue these goals, the Addendum requires member states to promulgate rules requiring federally permitted lobstermen to install electronic tracking devices that transmit location data using a global positioning system (“GPS”) on board their vessels by December 15, 2023. The required tracking devices must remain powered and transmit data at all times the vessel is in the water, including when a vessel is docked or being operated for personal use. The Addendum further specifies that compliant tracking devices must have a “ping rate” of once per minute, meaning that the tracker will collect data on a vessel’s longitude and latitude once every minute. Maine timely complied with Addendum XXIX by promulgating the MDMR Rule on September 13, 2023. 13-188 C.M.R. ch. 25, § 98 (2023).

The MDMR Rule adheres to the requirements of the Commission’s Addendum and makes some additions. In essence, those additions make it unlawful for a federally permitted lobstermen to fish or possess lobsters without having an approved tracking device aboard their vessel; to remove or tamper with the tracking device absent approval from the MDMR; and to operate their vessel without the tracking device installed and powered at all times (with different power source requirements for vessels in operation compared to docked). See *id.* § 98(C).⁴ In November

⁴ The MDMR Rule does not list any specific punishments for failure to comply with its requirements. Before the district court,

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2023, the MDMR began sending permitted lobstermen Particle TrackerOne devices to comply with the MDMR Rule.⁵

(B)

The original plaintiffs in this case -- Thompson and several Maine lobstermen subject to the MDMR Rule⁶ -- filed a federal suit against the Commissioner of the MDMR in his official capacity, which challenged the adoption and enforcement of the MDMR Rule on three grounds.⁷ First, they alleged the MDMR Rule violated the Fourth Amendment's prohibition on unreasonable searches and seizures, as applied to the states by the Fourteenth Amendment. Second, they claimed the MDMR Rule violated their equal protection rights pursuant to the U.S. Constitution and the Maine Constitution. And third, they alleged the MDMR Rule was arbitrary and capricious contrary to the protections of the Maine Administrative Procedure Act.⁸ Not long after the lobstermen filed their complaint, Maine moved to dismiss under Federal

Maine stated that violations of the MDMR Rule are treated like any other violation of an MDMR regulation with the possibility of a civil fine of not less than \$100 and the suspension of the individual's license. Thompson's appellate arguments do not draw on these potential penalties.

⁵ The MDMR presumably selected these tracking devices because they comply with the Addendum's standards and transmit GPS location data at a ping rate of once per minute.

⁶ Only Thompson has appealed to our court.

⁷ The named party in this appeal, Commissioner Wilson, has been substituted for the previously named party, Patrick Keliher, who held the office of MDMR Commissioner during the district court proceedings.

⁸ Only Thompson's Fourth Amendment claim has been presented on appeal. Accordingly, we focus our attention there and say no more about the other claims.

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Rule of Civil Procedure 12(b)(6). The district court heard argument from the parties on this motion and subsequently entered a remarkably thorough decision wherein the court granted Maine's motion in full.

In granting Maine's motion, in relation to Thompson's Fourth Amendment challenge, the district court specifically held that the MDMR Rule was not "gratuitously invasive of lobstermen's personal privacy" and therefore plaintiffs had not sufficiently stated a claim for relief under existing Fourth Amendment jurisprudence. To reach this resolution, the court first made note of four concessions from the parties that narrowed the scope of its analysis. We rehash these concessions here as they will help narrow the scope of our appellate review. First, Maine conceded that the GPS tracking requirement of the MDMR Rule constituted a search under the Fourth Amendment. Second, the lobstermen implicitly conceded (and then confirmed their position at oral argument before the district court) that the lobster fishery constitutes a closely-regulated industry per our understanding of the Fourth Amendment's scope.⁹ Third, the parties agreed in their papers before the district court that the MDMR Rule constitutes an "administrative search" under the Fourth Amendment. And fourth, the parties agreed that the MDMR has a substantial interest in regulating the lobster fishery and ensuring its long-term viability (an agreement that satisfies one prong of the legal test we will be discussing at length and applying).

⁹ Thompson seeks to repudiate this concession on appeal, a matter to be discussed, and rejected, later on.

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We will return to these concessions in a moment, but for now, we are sufficiently enlightened as to what happened below to start unpacking Thompson’s appellate contentions.

II

Before going any further (and before using any more Fourth Amendment lingo), here’s a Fourth Amendment backdrop to set the scene.

The Fourth Amendment protects us from “unreasonable searches and seizures.” U.S. Const. amend. IV. The same amendment also provides that “no Warrants shall issue, but upon probable cause.” Id. Building from these constitutional provisions, the Supreme Court has “repeatedly held that searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable subject only to a few specifically established and well-delineated exceptions.” City of Los Angeles v. Patel, 576 U.S. 409, 419 (2015) (citation modified). And it is well recognized that this general rule covers searches of homes and commercial premises. E.g., id. at 419-20; Marshall v. Barlow’s, Inc., 436 U.S. 307, 312 (1978); see also Johnson v. Smith, 104 F.4th 153, 158 (10th Cir. 2024) (“[F]or more than 50 years the Supreme Court has recognized that regulatory inspections are also constrained by [the Fourth] Amendment.”).

A bit more on the “well-delineated” exceptions. While “reasonableness” remains our North Star, see, e.g., Rivera-Corraliza v. Morales, 794 F.3d 208, 215-16 (1st Cir. 2015), “search regimes where no warrant is ever required may be reasonable where special needs make the warrant and probable-cause requirement impracticable, and where the primary

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purpose of the searches is distinguishable from the general interest in crime control,” Patel, 576 U.S. at 420 (citation modified). This type of warrantless-yet-reasonable regime can arise in administrative searches of closely-regulated industries.¹⁰ See Rivera-Corraliza, 794 F.3d at 216. The justification? Because “when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation,’ and thus a warrantless search to enforce that regulatory regime is not unreasonable.” Id. (quoting Marshall, 436 U.S. at 313).

Lest this potentially pervasive exception swallow the rule, it is cabined by a three-pronged test that serves as a “carefully-drawn screen” for upholding the Fourth Amendment’s promised protections. See Rivera-Corraliza, 794 F.3d at 217. So, even in the context of a search within a closely-regulated industry, three things must be true to justify the search. There must be: (1) “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 statute’s inspection program, in terms of the certainty and regularity of

¹⁰ This exception is more accurately described as an exception within an exception to the Fourth Amendment’s warrant requirement. Searches that serve a “special need” other than aiding criminal investigations have been categorized as “administrative searches.” See Patel, 576 U.S. at 420. These searches may skirt the general warrant requirement so long as the subject of the search “be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.” Id. Within this category are administrative searches of closely-regulated industries, which we examine under a different, “more relaxed standard.” Id. at 424.

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its application, must provide a constitutionally adequate substitute for a warrant.” Patel, 576 U.S. at 426 (citation modified). We (the royal “we” as we’re speaking for the legal community) refer to these three criteria as the Burger test. E.g., Rivera-Corraliza, 794 F.3d at 217; see also New York v. Burger, 482 U.S. 691, 702-03 (1987). And only by satisfying the requirements of the Burger test may we find an administrative search of a closely-regulated industry reasonable under the Fourth Amendment.

III

We review a district court’s dismissal of a complaint under Rule 12(b)(6) de novo. E.g., Lowe, 68 F.4th at 713. This means we will be giving Thompson’s claims a completely fresh look to see whether his complaint “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Id. (quoting Douglas v. Hirshon, 63 F.4th 49, 55 (1st Cir. 2023)).

Thompson submits three arguments on appeal for why he thinks the district court erred in throwing out his Fourth Amendment claim. First, he suggests that the MDMR Rule constitutes an unreasonable search outside of, and regardless of, any constitutional exception for warrantless searches. Second, Thompson argues the MDMR Rule flunks” the requirements of the Burger test for administrative searches of closely-regulated industries. And third, contrary to his position below, Thompson claims here that lobstering is not a closely-regulated industry and therefore the Burger test is wholly inapplicable. We will get to each argument; however, due to its impact on the other claims, we begin with Thompson’s third

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argument fighting against the current of his previous district court concession.

(A)

Thompson makes no attempt to hide his previous concession that lobstering is a closely-regulated industry, which dictates the specific legal test applicable to his Fourth Amendment claim. On appeal, in explaining why we should not hold him to his prior position, Thompson asks us to apply a “narrowly configured and sparingly dispensed” exception to this circuit’s standard raise-or-waive rule to his previously conceded claim. See Reyes-Colón v. United States, 974 F.3d 56, 62 (1st Cir. 2020) (quoting Daigle v. Me. Med. Ctr., Inc., 14 F.3d 684, 688 (1st Cir. 1994)). Thompson standardizes the test for considering issues previously conceded but deserving of reconsideration into four parts: (1) “the new issue is strictly a question of law”; (2) “it is almost certain to be presented in identical terms in other cases”; (3) “the point can be resolved with certitude on the existing record”; and (4) the argument “raises an issue of constitutional magnitude which, if meritorious, could substantially affect these, and future,” litigants. See United States v. La Guardia, 902 F.2d 1010, 1013 (1st Cir. 1990) (citation modified).¹¹

¹¹ Thompson’s test accurately reflects the facts important to the La Guardia court’s analysis; however, we have previously expressed interest in other factors when exercising our discretion to examine issues first raised on appeal. Specifically, on top of the factors Thompson names, we’ve reserved this discretionary authority for “exceptional cases” where the party seeking review makes a “highly persuasive” argument such that “failure to reach it would threaten a miscarriage of justice” implicating “matters of great public moment,” and the failure to raise below was “inadvertent and provided no tactical advantage.” See, e.g., In re

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For its part, Maine staunchly opposes its opponent's attempt to revive this issue. Maine first notes that Thompson's cited precedent for this argument refers to a narrow exception to our raise-or-waive rule inapplicable to issues specifically conceded. And where, as here, a party has specifically conceded an issue, our court has repeatedly rejected a litigant's "attempt to repudiate that concession and resurrect the issue." Baker v. Smith & Wesson, Inc., 40 F.4th 43, 45 n.1 (1st Cir. 2022) (quoting United States v. Miranda-Carmona, 999 F.3d 762, 767 (1st Cir. 2021)). Were we to disagree with its first contention, Maine also argues that our exception to the raise-or-waive rule requires that the "error is plain and the equities heavily preponderate in favor of correcting it." Correa v. Hosp. San Francisco, 69 F.3d 1184, 1196 (1st Cir. 1995). Here (according to Maine), Thompson cannot establish plain error because his argument requires us to make a series of legal and factual determinations on issues we have not yet considered.

We decline Thompson's invitation to throw a lifeline out to this argument. Even if we were to agree with Thompson that the boundary between our raise-or-waive rule and our rule regarding concession is a distinction without a difference, see Lang v. Wal-Mart Stores E., L.P., 813 F.3d 447, 455 (1st Cir. 2016), we disagree that the present situation amounts to such extraordinary circumstances warranting the application of our seldom-seen exception, see id.; see also Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 627-29 (1st Cir. 1995); United States v. Slade,

Net-Velázquez, 625 F.3d 34, 40-41 (1st Cir. 2010); Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 627-29 (1st Cir. 1995); United States v. Krynicki, 689 F.2d 289, 291-92 (1st Cir. 1982).

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980 F.2d 27, 31 (1st Cir. 1992) (requiring a “previously omitted ground [be] so compelling as virtually to insure appellant’s success” (citation modified)). So, despite Thompson’s adjuration, the fact of the matter remains that our court denies with near religious fervor a party’s attempt to repudiate its concession on appeal. See Alaniz v. Bay Promo, LLC, 143 F.4th 18, 30 (1st Cir. 2025) (declining to sanction the tactic of “agreeable acquiescence to perceivable error as a weapon of appellate advocacy” (quoting United States v. Gates, 709 F.3d 58, 63 (1st Cir. 2013))). Such is the fate of the issue at hand, and therefore, we proceed, as the district court did, with the understanding that lobstering is a closely-regulated industry.

(B)

We next address Thompson’s appellate asseveration focused on the stand-alone reasonableness of the MDMR Rule. His position expands from two premises: first, as he puts it, “[t]he Burger exception is *not* an exception to the Fourth Amendment’s reasonableness requirement,” and second, the government must prove its search is reasonable per that term’s original meaning. If we were to agree with these two premises, Thompson then asks that we conclude the MDMR Rule lacks a historical analogue (or even better, that it is the modern reincarnation of the British writs of assistance that fueled the American Revolution)¹² and is therefore unreasonable in violation of the Fourth Amendment. For reasons forthcoming, we find that Thompson’s first premise misunderstands our binding

¹² See Carpenter v. United States, 585 U.S. 296, 303-04 (2018), for John Adams’s recollection of how patriotic condemnation of the writs of assistance “helped spark the Revolution itself.”

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precedent, and as such, we need not consider his second premise to reject his contention outright.

Thompson pulls his first premise -- that the Burger test cannot save unreasonable searches of closely-regulated industries -- from general Fourth Amendment principles and his reading of our recent administrative-search opinion. To Thompson, the overbearing nature of the MDMR Rule is per se unreasonable -- particularly in its monitoring of activity beyond fishing -- such that any analysis cabined within the Burger test exception would impermissibly overlook the broad protections afforded by the Fourth Amendment.

Maine's immediate response is that this issue was not raised to the district court, and as a result, should be deemed unpreserved on appeal. And if we find otherwise, Maine says that Thompson's argument is "just plain wrong" because searches that satisfy the Burger test are deemed reasonable within the meaning of the Fourth Amendment. Because Thompson's claim may be swiftly settled on the merits (and we think he did just enough to preserve this issue below), we decline to tackle Maine's preservation argument and proceed.

The Supreme Court has consistently framed the Burger test as the relevant (and complete) metric of Fourth Amendment reasonableness in cases involving administrative searches within closely-regulated industries. Starting with Burger itself (as good a place as any), the Court explained that "[b]ecause the owner or operator of a commercial premises in a 'closely regulated' industry has a reduced expectation of privacy . . . a warrantless inspection of commercial premises may well be reasonable within the meaning

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of the Fourth Amendment.” Burger, 482 U.S. at 702. To continue, “[t]his warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met.” Id. (emphasis ours).¹³

Decades after the Burger Court clarified the three criteria for finding searches of this particular ilk reasonable, the Court again applied these criteria to determine whether a Los Angeles municipal scheme permitting searches of hotel registries was unreasonable under the Fourth Amendment. See Patel, 576 U.S. at 426-27. We will discuss the details of that case shortly, but for now, and for the purposes of the present analysis, we emphasize that the Court began its inquiry by stating that the searches at issue would need to satisfy three additional criteria to be reasonable under the Fourth Amendment.” Id. at 426 (emphasis added). Hence, a satisfactory passing of the Burger test stands in as proxy for “the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search.” Burger, 482 U.S. at 702.

In our review, no court has concluded differently. After applying the Burger test to a regulatory scheme involving searches of commercial trucks, we previously held that “[s]ince all three of the Burger

¹³ To remind the reader of the test criteria: (1) “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 statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.” Patel, 576 U.S. at 426 (citation modified).

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criteria [had been] satisfied, it follows inexorably that an administrative search of a commercial truck is constitutionally permissible.” United States v. Maldonado, 356 F.3d 130, 136 (1st Cir. 2004); see also Tart v. Massachusetts, 949 F.2d 490, 498 (1st Cir. 1991) (explaining that “a warrantless inspection in a ‘closely-regulated’ industry, pursuant to statute, is valid” if it satisfies the Burger test); Killgore v. City of South El Monte, 3 F.4th 1186, 1192 (9th Cir. 2021) (“Under Burger, a warrantless inspection of a commercial business in a ‘closely regulated’ industry is reasonable under the Fourth Amendment provided three conditions are met”). And when our sister circuit upheld a Department of Transportation regulation requiring commercial vehicles to install electronic logging devices, it used the Burger test and referred to it as “a three-part reasonableness test.” Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp., 840 F.3d 879, 895 (7th Cir. 2016). Despite Thompson’s suggestion otherwise, nowhere in the caselaw do we find a stand-alone reasonableness inquiry conducted in addition to the Burger test.

Thompson’s attempts to persuade us differently flounder. In his efforts to divorce the Fourth Amendment’s reasonableness standard from the Burger test, Thompson says that even if an exception applies, this court “must still, no matter what, ‘balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.’” (quoting Maryland v. King, 569 U.S. 435, 448 (2013)). In the case Thompson cites for this proposition -- Maryland v. King -- the Court considered the reasonableness of minimally invasive buccal swabs on detained individuals. 569 U.S. at 463-64. And with that important (but largely unrelated)

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question on the table, the Court did not have occasion to weigh in on whether a search may be unreasonable regardless of the Burger test.¹⁴

Regardless, Thompson’s proposed balancing overlooks the narrow context in which the Burger test comes into play. Closely-regulated industries “have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise.” Patel, 576 U.S. at 424 (citation modified). As we explained earlier, this diminished expectation of privacy exists because individuals entering closely-regulated industries subject themselves to a “full arsenal of governmental regulation.” Rivera-Corraliza, 794 F.3d at 216 (quoting Marshall, 436 U.S. at 313). Because the Burger test applies to searches of closely-regulated industries, which necessarily have a reduced expectation of privacy, see Burger, 482 U.S. at 702, the privacy concerns and judicial balancing Thompson requests come pre-baked into the Burger test, and need not be repeated outside of its application.

We also disagree with Thompson’s interpretation of Rivera-Corraliza and take a moment here to clarify any residual doubt. In Rivera-Corraliza, we prefaced

¹⁴ The Court did mention searches of closely-regulated industries in passing to emphasize that “[t]he reasonableness of any search must be considered in the context of the person’s legitimate expectations of privacy.” See King, 569 U.S. at 462. The Court used searches of closely-regulated industries as an example of “a context-specific benchmark inapplicable to the public at large” because “the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively.” Id. (quoting Skinner v. Ry. Lab. Execs. Ass’n, 489 U.S. 602, 627 (1989)).

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our discussion of the Burger test and exceptions to the Fourth Amendment's guarantees by stating that "[j]udges must never forget that while the Constitution okays warrantless searches in some situations, it never okays unreasonable ones." 794 F.3d at 217. Thompson reads these words of caution to mean that some searches are so far beyond the Fourth Amendment pale that an exception to the warrant requirement cannot save them.

First, the language of a judicial opinion is not always intended to be scrutinized as if it were the text of a statute. See, e.g., Brown v. Davenport, 596 U.S. 118, 141 (2022). And when read in context, this sentence from Rivera-Corraliza remains consistent with the Fourth Amendment principles we've just expounded. In the sentence immediately following the one Thompson sets his sights on, we described the Burger test as the "carefully-drawn screen" against unreasonable searches which judges must "jealously protect, lest this particular warrantless-search exception destroy the Fourth Amendment." Rivera-Corraliza, 794 F.3d at 217. A court applying the Burger test has not forgotten the Constitution's prohibition against unreasonable searches. It is indeed through the application of that test that a court may conclude that an administrative search of a closely-regulated industry is reasonable.

In sum, we reject Thompson's proposition that in the context of a search of a closely-regulated industry, a free-standing reasonableness inquiry must be conducted apart from the application of the Burger test, and we now proceed to review Thompson's challenge pursuant to that test of reasonableness.

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(C)

For the main event, Thompson argues that the MDMR Rule flunks the Burger test, particularly considering how this test has been narrowed by the Supreme Court’s decision in Patel. To (again) remind the reader, the Burger test consists of three criteria: “(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 statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.” Patel, 576 U.S. at 426 (citation modified). Like before, at the district court, the parties agree that the MDMR Rule satisfies the first Burger criterion: Maine has a substantial interest in regulating and conserving its lobster fishery. Therefore, we’re left with the second and third Burger criteria on our plate and discuss each in turn.

(1)

The second Burger criterion requires warrantless searches be necessary to further the regulatory scheme, typically because the element of surprise is crucial. Burger, 482 U.S. at 710; Rivera-Corraliza, 794 F.3d at 220. Thompson’s argument harps on the term “necessary,” and posits that Patel has elevated this prong of the Burger test to something “like strict scrutiny or [a] least-restrictive-means test” for the method of search being imposed. In support, Thompson points to Justice Scalia’s dissenting opinion in Patel, where he described the majority’s approach as “importing a least-restrictive-means test into Burger’s Fourth Amendment framework”

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Patel, 576 U.S. at 438 (Scalia, J., dissenting). To apply Thompson’s version of the heightened second Burger prong, we would need to ask whether the government’s interest would be “fatally undermine[d]” in the absence of the challenged regulation. So, because Maine’s conservation and sustainability interests in its lobster fishery would not be “completely defeated” without the MDMR Rule, Thompson concludes the Rule fails the Burger test at prong two.

While we have previously described the second Burger criterion in less demanding terms, see Rivera-Corraliza, 794 F.3d at 216 (“The [second criterion] is that warrantless inspections further [the substantial government] interest.”), in practically the same breath, we declined to decide one way or another whether Patel had changed the Burger test in any way, see id. at 217 n.12. For reasons we are about to unpack, we do not believe Patel has elevated the scrutiny owed at the second Burger criterion as Thompson suggests.¹⁵

In Patel, the Court reviewed a facial challenge to a provision of the Los Angeles Municipal Code that, in relevant part, required hotel operators to produce detailed records of their guests to any Los Angeles police officer immediately upon request. 576 U.S. at 412-13. The Court began its Fourth Amendment review by first acknowledging that government searches conducted without a warrant, or otherwise

¹⁵ Due to Thompson’s prior concession (and our refusal to allow him to repudiate that concession), our holding today does not resolve the question of whether Patel changed the closely-regulated industry standard under Burger. See Mexican Gulf Fishing Co. v. U.S. Dep’t of Com., 60 F.4th 956, 967 (5th Cir. 2023) (collecting cases).

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conducted without prior approval by a judge, are “*per se* unreasonable” under the Fourth Amendment. *Id.* at 419 (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009)). However, the Court continued that “[s]earch regimes where no warrant is ever required may be reasonable where special needs make the warrant and probable-cause requirement impracticable, and where the primary purpose of the searches is distinguishable from the general interest in crime control.” *Id.* at 420 (citation modified). Searches of this kind are referred to as “administrative searches,” and must meet certain requirements (*not* the *Burger* test) to pass constitutional muster. *Id.* The Los Angeles ordinance failed to do so. *Id.* at 423.

The *Patel* majority could have stopped there, but it continued to address an alternate position raised by Los Angeles and discussed by Justice Scalia in dissent. Both Los Angeles and the dissenting Justice believed the challenged regulation should have been considered under the “more relaxed standard” applied to administrative searches of closely-regulated industries (the exception within the exception). *See id.* at 424. The majority disagreed and held that hotels were not part of a closely-regulated industry, making the *Burger* exception inapplicable. *Patel*, 576 U.S. at 424-25.

Despite finding another dispositive basis for dismissing the arguments raised, the Court proceeded to find that the Los Angeles ordinance also failed the second and third *Burger* criteria. *Id.* at 426. In examining the second criterion, the Court first presented Los Angeles’s argument “that affording hotel operators any opportunity for precompliance review would fatally undermine the scheme’s efficacy by giving operators a chance to falsify their records.”

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Id. at 427 (citing Brief for Petitioner at 41-42) (emphasis added by us on behalf of Thompson). The Court rejected this argument because, in its view, officers of the Los Angeles Police Department could still maintain the element of surprise or otherwise protect the accuracy of hotel records through available, judicially-approved channels such as *ex parte* warrants. Id.

With our recap of Patel laid out, Thompson's characterization of Patel's influence on the Burger test flops. Thompson insists that the "necessary" element of the second Burger prong relates back to the "substantial government interest" required in the first prong -- here Maine's conservation and sustainability interests. Therefore, his argument goes, the MDMR Rule fails because 24/7 GPS tracking is not absolutely necessary to achieving Maine's conservation and sustainability goals. But Thompson misapprehends the question that we must reckon with.

Both the majority opinion and Justice Scalia's dissent in Patel (along with both pre- and post-Patel caselaw make clear that the necessity being scrutinized in the second prong of the Burger test is the need for a *warrantless* search to accomplish the regulatory scheme. See Patel, 576 U.S. at 437 (Scalia, J., dissenting) ("Respondents and the Court acknowledge that *inspections* are necessary to achieve the purposes of the recordkeeping regime, but insist that *warrantless* inspections are not."); id. at 427 (finding "surprise inspection[s]" unnecessary to the "scheme's efficacy"); see also Rivera-Corraliza, 794 F.3d at 220 (reviewing "whether the state's interest justifies warrantless inspections"); Johnson, 104 F.4th at 176-77 (requiring the government to prove its

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regulation could only be effectively enforced through a warrantless inspection regime).

As we touched on in our Patel recap, the hotel operators' Fourth Amendment rights were undermined because the proposed government searches did not need to be warrantless. Patel, 576 U.S. at 427. But importantly, the method of the warrantless search -- making hotel records available when police officers request them -- did not influence the Court's analysis. As in, the Court did not agonize over whether it was necessary for Los Angeles police officers to request hotel records in person because they could have made less intrusive requests via email to promote their goal of maintaining accurate hotel registries. See id. at 426. Critically, Thompson asks that we do what the Supreme Court did not. Rather than contesting the general need for warrantless searches in this regulatory scheme, Thompson takes issue solely with the method of search imposed by the MDMR Rule -- constant GPS tracking when a vessel is in the water. This interpretation turns a deaf ear to the music of the Burger test: it is a limited exception to the Fourth Amendment's warrant requirement in closely-regulated industries where the regulatory scheme wouldn't work without warrantless searches, and the scheme provides the functional equivalent of a warrant (the latter being a sneak peek into Burger's third prong).

Furthermore, the position advocated for by Thompson quickly proves untenable. With elusive (but nevertheless very important) goals such as conservation and sustainability, it would be futile to imagine what level of government conduct would be

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permissibly “necessary” to achieve them.¹⁶ So, while Thompson argues that “there are *far* less intrusive ways to improve the fishery data,” such as “limit[ing] tracking to vessels fishing for lobsters in federal waters” or “employing lesser ‘ping rates,’” his proposals would still amount to *warrantless* searches -- just ones more suited to his preferences.

Our Fourth Amendment precedent has not concerned itself with the necessity of ping rates. Instead, it has remained focused on protecting individuals from warrantless government searches and jealously protecting the few exceptions to that general rule. See Rivera-Corraliza, 794 F.3d at 217. Thus, what Thompson deems the “inherent contradiction” saddled in Burger and its progeny is no more than a boogeyman of his own design. A warrantless search must be necessary to satisfy the substantial government interest, but the method of conducting such a search need only reasonably serve or advance that interest. See Burger, 482 U.S. at 709-10; Patel, 576 U.S. at 427; Rivera-Corraliza, 794 F.3d at 220; Johnson, 104 F.4th at 176-77.

Due to his presentation of Patel’s influence on the Burger test, Thompson does not argue that warrantless searches are unnecessary to Maine’s interests. Indeed, Thompson has suggested less intrusive ways to accomplish Maine’s goals which nevertheless constitute warrantless searches. We need not dwell on this issue and reiterate that boatloads of caselaw have previously explained why warrantless searches on the high seas are unique.

¹⁶ This court momentarily engaged in this exercise in futility at oral argument, positing various methods of data collection that may be less intrusive, but never solidly “necessary.”

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See, e.g., United States v. Villamonte-Marquez, 462 U.S. 579, 593 (1983); United States v. Kaiyo Maru No. 53, 699 F.2d 989, 995-96 (9th Cir. 1983); Lovgren v. Byrne, 787 F.2d 857, 867 (3d Cir. 1986). Additionally, Maine has elucidated why this method of data collection is necessary to their regulatory scheme. The tracking devices on commercial lobster vessels ensure accurate, reliable, and precise data that allows Maine to assess its fishery stock and assist federal whale regulators. Alternative data collection schemes would require Maine lobstermen to turn on and off their tracking devices at certain points or amount to a self-reporting system, either of which could skew their data, thereby frustrating the purposes of the MDMR Rule entirely.

Accordingly, Maine was not on the hook for demonstrating that its chosen method of search was the least restrictive means of achieving its conservation and sustainability interests. The MDMR Rule satisfies the second Burger prong because warrantless searches are necessary to further the regulatory scheme.

(2)

The third and final Burger criterion requires the regulatory scheme, in terms of its certainty and regularity, “provide a constitutionally adequate substitute for a warrant.” Burger, 482 U.S. at 703 (citation modified); see also Patel, 576 U.S. at 426. This means the regulation must (1) give notice to those being regulated and (2) limit an inspecting officer’s discretion in terms of time, place, and scope. Rivera-Corraliza, 794 F.3d at 216-17 (citing Burger, 482 U.S. at 703).

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Thompson's protest under the third Burger criterion necessarily caters to some of the novel questions raised by the MDMR Rule. Thompson does not dispute that the MDMR Rule provides notice of the tracking requirement and the surrounding regulatory scheme. Nor, from what we can tell, does Thompson argue that the MDMR Rule gives any MDMR officials unfettered discretion to conduct searches.¹⁷ Instead, Thompson denounces the MDMR Rule as an impermissible general warrant because "it is *not* sufficiently tailored in scope and time to function akin to an actual, specific warrant." Maine sees the situation differently. The MDMR Rule (it says) only collects a limited and specific type of data -- the location of licensed commercial fishing vessels -- that properly limits the scope of the search and the government's discretion.

The MDMR Rule is unique compared to previous search regimes scrutinized under the Burger test. The "searches" are constantly conducted by GPS tracking devices installed on each federally licensed lobsterman's vessel; there are no friendly neighborhood inspectors periodically dropping in unannounced. Compare 13-188 C.M.R. ch. 25, § 98, with Burger, 482 U.S. at 711 (describing a New York law), and Tart v. Massachusetts, 949 F.2d 490, 497-98 (1st Cir. 1991) (describing a Massachusetts law). And this difference cuts both ways for our review.

¹⁷ The parties mutually describe the search as taking place through the tracking device and not at a later point when the collected data is examined by a government official. Contra Owner-Operator Indep. Drivers Ass'n, 840 F.3d at 895. Accordingly, we will apply the Burger test to this search, as prompted.

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Minimally intrusive, mindless tracking devices remove discretionary judgment calls from the equation entirely, alleviating the concern of any intrusive government officials overstepping their authority. See Tart, 949 F.2d at 498, 499; see also Patel, 576 U.S. at 427. But, in exchange, tracking devices engage in a constant search anytime the predetermined vessels are in the water, testing the limits of the time restrictions considered in the Burger test. See, e.g., Rivera-Corraliza, 794 F.3d at 221. This latter fact limits the persuasiveness of parallels drawn to prior schemes offered by Maine, but it does not paint the Orwellian picture offered by Thompson, either.¹⁸

As a whole, the search regime imposed by the MDMR Rule satisfies the third Burger criterion because the searches are non-discretionary across the industry, minimally intrusive, and sufficiently clear in both timing and scope.

Notwithstanding the uniqueness just described, we have previously said that “a regime may pass the Burger test even if there are no time limits,” but “context is key.” Rivera-Corraliza, 794 F.3d at 221. And that “context” comes down to whether time limits “would make inspections unworkable.” Id. To use a tried and tested example, an inspection scheme for

¹⁸ Thompson seeks to analogize here to Supreme Court caselaw concerning advanced technologies in government searches. But the cases he cites are criminal in nature and involve government searches to uncover evidence of criminal activity. See Carpenter v. United States, 585 U.S. 296, 316 (2018). Therefore, any direct comparison to the MDMR Rule falls short. Furthermore, the Supreme Court has not banned the advancement of technologies used in government searches outright, as Thompson suggests.

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commercial trucks cannot have a feasible time restriction because trucks operate twenty-four hours a day. See id. (citing United States v. Ponce-Aldona, 579 F.3d 1218, 1225-26 (11th Cir. 2009)). Thus, a truck regulation limiting inspections to typical business hours would incentivize those seeking to avoid detection to travel solely by night, making the scheme unworkable. See Ponce-Aldona, 579 F.3d at 1226.

So too here. Maine lobstermen may raise or haul their traps at any time, subject to specified seasonal and weekend restrictions. See Me. Stat. tit. 12, § 6440. And, while Thompson frames the MDMR Rule as a “perpetual, technology-driven, and omnipresent search,” it only applies to the vessels of federally-licensed lobstermen when they are in the water, and only at a near-constant rate while the vessel is moving. Cf. Tart, 949 F.2d at 498-99. Any other “time limit” would frustrate the regime’s design; lobsters are caught in the water and thus lobstermen need to be tracked while they too are in the water. So, the timing and frequency of the searches here, in the context of the statutory scheme, are sufficiently akin to a warrant, as required. See Burger, 482 U.S. at 711 n. 21.

As for scope, the MDMR Rule poses no risk. The tracking devices relay time and position data only, and the Rule does not authorize the search of any vessels more broadly. See Owner-Operator Indep. Drivers Ass’n, 840 F.3d at 896. As such, we fail to see Thompson’s perspective of how this amounts to an unlimited scope. The tracking devices do not record and report everything done aboard the vessel; they record a limited and specific type of data and report only that.

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Putting everything together, the MDMR Rule, as an administrative search of a closely-regulated industry, passes the Burger test and does not violate the Fourth Amendment.

For the reasons above, we **affirm**. No costs to either side.

Filed 11/21/24

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRANK THOMPSON, et al.)
 Plaintiffs,)
 v.)
PATRICK KELIHER, *in his*)
official capacity as)
COMMISSIONER, MAINE) No. 1:24-cv-
DEPARTMENT OF) 00001-JAW
MARINE RESOURCES,)
 Defendant.)

**ORDER ON MOTION TO DISMISS AND
MOTION FOR PRELIMINARY INJUNCTION**

Maine lobstermen brought suit against the commissioner of the Maine Department of Marine Resources, seeking to enjoin the enforcement of a rule issued by the department that compels federally licensed lobstermen to install a tracking device on their fishing vessels.¹ The lobstermen challenge the rule under Maine’s Administrative Procedure Act and on federal and state constitutional grounds as a violation of their right to be free from unreasonable searches and seizures and right to equal protection under the law. The defendant moves to dismiss the case for failure to state a claim and for lack of subject

¹ Throughout this order, the Court uses “lobstermen” as a gender-neutral term. *See* Maine Lobster Community Alliance, *A Lobsterman is a Lobsterman, Regardless of Gender* (Jul. 7, 2023), [A Lobsterman is a Lobsterman, Regardless of Gender \(mlcalliance.org\)](https://mlcalliance.org).

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matter jurisdiction. The lobstermen seek a preliminary injunction, which the defendant also opposes. The court dismisses the plaintiffs' claim under the Maine Administrative Procedure Act for lack of subject matter jurisdiction and dismisses the Fourth Amendment and equal protection claims for failure to state a claim on which relief can be granted. Although the court grants the motion to dismiss the Fourth Amendment claim pursuant to Supreme Court and First Circuit caselaw on administrative searches, this case raises significant Fourth Amendment issues, and the court encourages the lobstermen to appeal this decision to the Court of Appeals for the First Circuit for an authoritative ruling.

Having granted the defendant's motion to dismiss, the court dismisses the motion for preliminary injunction as moot.

I. PROCEDURAL HISTORY

On January 2, 2024, Frank Thompson, Joel Strout, Jason Lord, Christopher Smith, and Jack Cunningham (collectively, the Plaintiffs) filed a facial complaint against Patrick Keliher, in his official capacity as Commissioner of the Maine Department of Marine Resources (MDMR), seeking declaratory and injunctive relief against a rule issued by the MDMR that requires federally permitted lobstermen to install an electronic tracking device on their fishing vessels. *Compl. for Declaratory and Injunctive Relief* (ECF No. 1) (*Compl.*).

On January 12, 2024, the Plaintiffs filed a motion for preliminary injunction. *Pls.' Mot. for Prelim. Inj.* (ECF No. 7). On March 1, 2024, Commissioner Keliher responded in opposition to the motion for preliminary injunction. *Def.'s Opp'n to Mot. for Prelim. Inj.* (ECF

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No. 16). That same day, the Atlantic States Marine Fisheries Commission (ASMFC), as amicus curiae, also opposed injunctive relief. *Amicus Curiae Atl. States Marine Fisheries Comm'n's Mem. in Opp'n to Pls.' Mot. for Prelim. Inj.* (ECF No. 15). On March 12, 2024, the Plaintiffs replied. *Pls.' Reply to Opp'n to Mot. for Prelim. Inj.* (ECF No. 17).

On April 8, 2024, Commissioner Keliher moved to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Def.'s Mot. to Dismiss* (ECF No. 23) (*Mot. to Dismiss*). That same day, ASMFC filed an amicus curiae memorandum in support of Commissioner Keliher's motion to dismiss. *Amicus Curiae Atl. States Marine Fisheries Comm'n's Mem. in Support of Def.'s Mot. to Dismiss* (ECF No. 22) (*Amicus Mem. in Support of Mot. to Dismiss*). On April 29, 2024, the Plaintiffs responded in opposition to the motion to dismiss. *Pls.' Opp'n to Def.'s Mot. to Dismiss* (ECF No. 24) (*Pls.' Opp'n*). On May 13, 2024, Commissioner Keliher replied. *Def.'s Reply to Pls.' Opp'n to Def.'s Mot. to Dismiss* (ECF No. 25) (*Def.'s Reply*).

On June 3, 2024, the Plaintiffs moved for oral argument on the motion for preliminary injunction and the motion to dismiss, *Unopposed Mot. for Oral Arg.* (ECF No. 26); the Court granted the motion for oral argument on the same day. *Order* (ECF No. 27). On June 19, 2024, ASMFC requested leave to participate in oral argument as amicus curiae. *Mot. of Amicus Curiae Atl. States Marine Fisheries Comm'n for Leave to Participate in Oral Arg. on Mot. to Dismiss and Mot. for Prelim. Inj.* (ECF No. 28). The Court granted the ASMFC's motion on June 25, 2024, *Order*.

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(ECF No. 29), and held oral argument on November 19, 2024. *Min. Entry* (ECF No. 32).

II. FACTUAL BACKGROUND²

A. The American Lobster Fishery

The American Lobster fishery is one of the nation's most valuable fisheries. *Compl.* ¶ 1. In 2016 alone, approximately 159 million pounds of lobster were landed within the fishery. *Id.* Over 97% of this haul was landed in the Gulf of Maine and Georges Bank, an area far offshore between Massachusetts and Nova Scotia. *Id.*

Roughly 4,800 lobster license holders, 1,100 student license holders, and a great number of lobster dealers, processors, sternmen, bait dealers, trap builders, boat mechanics, shipyards, and local coastal merchants depend on the Maine lobster fishery for their very survival. *Id.* ¶ 2. Maine's lobster supply chain contributes \$1 billion to the state's economy each year, in addition to the value of its actual lobster landings. *Id.* By virtue of custom and practice over generations of lobstering men and women, the placement of lobster traps and trip routes is akin to "coveted individual trade secrets used by lobstermen to optimize their harvest." *Id.* ¶ 3. Accordingly, this

² Consistent with the motion to dismiss standard, the Court relied on the complaint's well-pleaded facts. "[T]he court must distinguish 'the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" *García-Catalán v. United States*, 734 F.3d 100, 103 (1st Cir. 2013) (quoting *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012)); see also *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (stating that a court may "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements").

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information has substantial economic value to each lobsterman. *Id.*

Federal and state regulators share oversight of the Atlantic coast fisheries. *Id.* ¶ 4. Individual states regulate waters within three nautical miles of shore, while the National Marine Fisheries Service (NMFS), a sub-agency of the National Oceanic and Atmospheric Administration (NOAA), regulates the federal waters extending 200 nautical miles from the inner boundary of state waters (known as the Exclusive Economic Zone or EEZ). *Id.*

B. The Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) governs fishing within the EEZ. *Id.* ¶¶ 7, 29 (citing 16 U.S.C. § 1802). In recognition of the economic importance of commercial and recreational fishing, Congress adopted the MSA to protect, manage, and grow the United States' fishery resources. *Id.* ¶ 28. To these ends, the MSA delineates scientific and conservation-based statutory obligations to sustainably manage fishery resources for the benefit of the fishing industry and the environment. *Id.* (citing 16 U.S.C. §§ 1801 *et seq.*). The MSA grants the U.S. Department of Commerce the ability to exercise “sovereign rights” to conserve and manage fishery resources “for the purposes of exploring, exploiting, conserving, and managing all fish” in the EEZ. *Id.* § 29 (citing 16 U.S.C. §§ 1801(b)(1), 1811(a)).

The MSA created eight Regional Fishery Management Councils (the Councils) and empowers both the regional councils and Secretary of Commerce to prepare fishery management plans (FMPs). *Id.*

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¶ 30. Maine is governed by the New England Council, which also oversees the fisheries of New Hampshire, Massachusetts, Rhode Island, and Connecticut. *Id.* The New England Council has authority over fisheries in the Atlantic Ocean seaward from those states. *Id.* (citing 16 U.S.C. § 1852(a)(1)). Under the MSA, FMPs must be “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promulgate the long-term health and stability of the fishery.” *Id.* (citing 16 U.S.C. § 1853).

Section 301 of the MSA lists ten “National Standards” that all FMPs, regardless of the drafting entity, are required to follow. *Id.* ¶ 33. At least six national standards are implicated by the Addendum at issue in the case at bar:

1. National Standard One, which requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”
2. National Standard Two, which requires that “[c]onservation and management measures shall be based upon the best scientific information available.”
3. National Standard Four, which requires that all agency measures that allocate or assign fishing privileges among various ... fisherm[e]n” should be “fair and equitable” and “reasonably calculated to promote conservation” Furthermore, “[n]o particular individual, corporation, or other

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entity [should] acquire[] an excessive share of such privileges.”

4. National Standard Six, which requires that “[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.”
5. National Standard Seven, which requires that “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.”
6. National Standard Eight, which requires that “[c]onservation and management measures shall, consistent with the conservation requirements ... , take into account the importance of fishery resources to fishing communities by utilizing economic and social data that [are based upon the best scientific information available], in order to (A) provide for the sustained participation of such communities, and (b) to the extent practicable, minimize adverse economic impacts on such communities.”

Id. (citing 16 U.S.C. § 1851(a)(1), (2), (4), (6)-(8)) (internal citations omitted).

The MSA does not authorize or permit any collection of information on vessel movements when the vessel is not fishing under its permit. *Id.* ¶ 32. The MSA also “does not require lobster boats to have a vessel tracker[,] nor does it mention or contemplate 24-hour location and movement surveillance of any vessel, whether by GPS or otherwise,” regardless of whether the vessel is fishing in federal waters under a federal permit or being used for an unregulated

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purpose. *Id.* ¶ 34. Rather, the MSA “only permits the collection of information that is beneficial for developing, implementing, or revising FMPs.” *Id.* at ¶ 32 (citing 16 U.S.C. § 1881a(a)(1)³). If a Council determines information collection is necessary in order to prepare an FMP, it may request that the Secretary of Commerce implement such collection.⁴ *Id.* (citing 16 U.S.C. § 1881a(a)(1)⁵).

C. The Atlantic States Marine Fisheries Commission

Both the federal and state governments regulate lobster fishing in U.S. waters through the Atlantic States Marine Fisheries Commission. *Id.* ¶ 4. The ASMFC is a multi-state collaborative organization through which fifteen Atlantic Coast states, including Maine, coordinate their conservation efforts and share in the management of migratory fisheries within their state waters. *Id.* ¶¶ 4, 5. Pursuant to the Atlantic Coastal Fisheries Cooperative Act (ACA), “[t]he responsibility for managing Atlantic Coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the [ASMFC].” *Id.* ¶ 25 (citing 16 U.S.C. § 5101). The ACA says that it is the federal

³ Plaintiffs’ complaint ¶ 32 cites 18 U.S.C. § 1881a(a)(1). This is incorrect. The proper citation is 16 U.S.C. § 1881a(a)(1).

⁴ “Only where the Secretary has determined that the collection is justified does he or she have a duty to promulgate regulations implementing the collection program.” *Compl.* ¶ 32 (citing 16 U.S.C. § 1881a(a)(2)). The Secretary may also initiate an “information collection program . . . if deemed necessary.” *Id.*

The Court has again corrected Plaintiffs’ citation from 18 U.S.C. § 1881a(a)(1) to 16 U.S.C. § 1881a(a)(1).

⁵ The Court has again corrected Plaintiffs’ citation from 18 U.S.C. § 1881a(a)(1) to 16 U.S.C. § 1881a(a)(1).

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government's responsibility "to support such cooperative interstate management of coastal fishery resources." *Id.* (citing 16 U.S.C. § 5101).

The ACA encourages this shared responsibility by requiring the ASMFC to draft interstate FMPs, pursuant to which each of the member-states regulates that portion of the migratory fishery falling within their individual waters. *Id.* ¶ 5 (citing 16 U.S.C. § 5104(a)). Under the ACA, states are required to adopt and enforce fishery plans promulgated by the ASMFC. *Id.* ¶ 5. However, FMPs implemented by any of the NOAA Councils or the Secretary of Commerce pursuant to the MSA supersede any conflicting regulation issued by the ASMFC. *Id.* ¶ 31 (citing 16 U.S.C. § 5103). Thus, while the ACA empowers the ASMFC to draft regulations governing the EEZ, it cannot supplant regulations issued by NOAA, NMFS, or the Secretary of Commerce. *Id.* ¶ 36.

When the ASMFC drafts FMPs containing regulations and enforcement guidelines, it specifies the requirements for state compliance. *Id.* ¶ 6. The states then draft their own rules; in Maine, this work is done by the MDMR, which regulates lobster fishing in the state's waters pursuant to an FMP. *Id.* ¶¶ 5-6 (citing 12 M.R.S. §§ 6421-6482; 13-188 C.M.R. ch. 25, § 98). If a member state fails to timely enact rules adopting the ASMFC's plan for a particular fishery, the Secretary of Commerce has the authority to impose a moratorium on fishing in that state's waters. *Id.* (citing 16 U.S.C. § 5106).

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D. Addendum XXIX to Amendment 3 to the American Lobster Fishery Management Plan

In March 2022, the ASMFC published an addendum to an existing FMP entitled Addendum XXIX to Amendment 3 to the American Lobster Fishery Management Plan; Addendum IV to the Jonah Crab Fishery Management Plan (the Addendum). *Id.* ¶ 8; *see also Compl.*, Attach. 1, *Addendum XXIX to Amend. 3 to the Am. Lobster Fishery Mgmt. Plan; Addendum IV to the Jonah Crab Fishery Mgmt. Plan* (ECF No. 1-1) (*Addendum XXIX*). The primary purpose of the Addendum is to support risk reduction efforts promulgated in NMFS’s 2021 Atlantic Large Whale Take Reduction Plan (Take Reduction Plan), which is designed to reduce the risk of North Atlantic right whale entanglement in fishing lines. *Compl.* ¶ 8. As promulgated by NMFS, the Take Reduction Plan does not contain a vessel tracking requirement. *Id.*

In addition to protecting the North Atlantic right whale, the Addendum identifies three secondary objectives for its “24/7” tracking requirement: 1) to improve information available to fishery managers and stock assessment scientists; 2) to support the development of offshore renewable energy and the conservation of U.S. waters; and 3) to promote improved fishery management and offshore enforcement of federal lobster fisheries in the EEZ.” *Id.* ¶ 9.

The Addendum requires states to issue rules mandating federally permitted lobstermen to install an electronic tracking device onboard their respective fishing vessels that will transmit their spatial data

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using a Global Positioning System (GPS). *Id.* ¶ 10. “According to the Addendum, the ‘vessel tracker must remain powered and transmitting when the vessel is in the water regardless of landing state, trip type, location fished or target species.’” *Id.* The Addendum mandated compliance with the tracking program by December 15, 2023. *Id.*

1. The Origins and Drafting of Addendum XXIX

When the ASMFC published the Addendum, it gave no indication that it had consulted with any Council during the drafting process. *Id.* ¶ 53.

The Addendum was initiated from what the American Lobster Management Board (ALMB) characterized as a “critical need for high resolution spatial and temporal data.” *Id.* ¶ 54. At the time of the Addendum’s drafting, however, the ALMB’s purported need for more spatial data had been previously addressed by a prior addendum published in February 2018, Addendum XXVI. *Id.*; *see also Compl., Attach. 2, Addendum XXVI to Amend. 3 to the Am. Lobster Fishery Mgmt. Plan; Addendum III to the Jonah Crab Fishery Mgmt. Plan* (ECF No. 1-2) (*Addendum XXVI*). Addendum XXVI initiated a pilot program for electronic tracking of vessels that required all federally permitted vessels to self-report harvester data either electronically or manually. *Id.*

Addendum XXVI mandated that federally licensed lobstermen self-report: 1) a unique trip identification number; 2) a vessel identification number, 3) the trip start date, the location (by NMFS Statistical Area) of the trip; 4) the lobster management area; 5) a ten-minute square level; 6) the number of traps hauled on the trip; 7) the number of traps set on the trip; 8) the

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species harvested; 9) the quantity (in pounds) of the harvest; 10) the length of the trip; 11) the number of traps employed per trawl; 12) the number of buoy lines employed; and 13) the soak time of the traps. *Compl.* ¶ 55; *see also Addendum XXVI.*

At the end of Addendum XXVI's one-year pilot program, the ASMFC was directed to assess the effectiveness of different tracking technologies and consider whether the adoption of an electronic vessel tracking requirement was appropriate. *Compl.* ¶ 56. The ASMFC did so, formally adopting the vessel tracking program piloted under Addendum XXVI when it issued Addendum XXIX. *Id.* ¶ 57.

2. The Requirements of Addendum XXIX

As noted, the Addendum requires that federally licensed lobstermen install and activate an electronic tracking device on their vessels by December 15, 2023. *Id.* The device must be installed directly on the vessel and remain activated so that it can continually transmit location data at all times, even when the vessel is not in use (i.e., when it is docked) or when it is not fishing in federal waters (i.e., when the vessel is being operated by a lobsterman for personal use). *Id.* The electronic tracking data is in addition to data that lobstermen are already required to self-report about their location. *Id.*

The Addendum requires the electronic tracker to have a once-per-minute "ping rate"; this means that the device will "ping," or collect the device's longitude, latitude, corresponding vessel identifier, and the date, at one-minute intervals. *Id.* ¶ 58. The Addendum also requires lobstermen to use a device that can track their vessel's location within 100 meters of accuracy. *Id.*

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Per the Addendum:

To date, the majority of spatial analyses of lobster . . . fishery data ha[s] been constrained to NOAA statistical areas and state management areas, hindering the ability to quantify effort in specific regions or identify important transit routes and fishing grounds. The application of electronic vessel tracking to this fishery could significantly improve the information available to fishery managers and stock assessment scientists. In particular, a number of challenges the fishery is currently facing pose a critical need for electronic tracking data in the offshore fishery.

Id. ¶ 59.

3. The Goals of Addendum XXIX

The Addendum enumerates four goals of its electronic tracking requirement:

1. To improve spatial information data concerning the location of where the majority of fishing effort occurs by collecting spatial data more frequently and with more accurate precision;
2. To improve risk reduction efforts under the [Take Reduction Plan] that are based on models that estimate the location of vertical buoy lines using effort data of a similarly coarse resolution;
3. To promote and prioritize the development of offshore renewable energy and the conservation of federal waters, including wind energy, aquaculture, and marine protected areas that may all create marine spatial

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planning challenges for the lobster and Jonah crab fisheries; and

4. To combat difficulties associated with locating gear for compliance checks and to increase the efficiency and efficacy of enforcement efforts in offshore federal management areas.

Id. ¶ 60. *See also Addendum XXIX* at 2.

“The Addendum further addresses the ASMFC’s offshore enforcement goals by enabling the ASMFC to use this newly available data to identify subjects for investigations into potential illegal fishing practices.”

Compl. ¶ 61. The Addendum states, in part, that:

Enforcement personnel have consistently noted that having the ability to differentiate when a boat is steaming versus hauling is critical to efforts to inspect gear and identify when fishermen are using illegal gear. Even if location data are not reported in real-time, once a fishing location can be identified from vessel tracking data, enforcement personnel would be able to go to that location to inspect gear for appropriate markings, buoys, escape vents, and ghost panels. Given finite enforcement resources, information on distinct fishing locations would improve the efficiency and capability of offshore enforcement efforts.

Id.

4. Data Sharing Pursuant to Addendum XXIX

The data collected from the tracking devices is shared with and managed by the Atlantic Coastal Cooperative Statistics Program (ACCSP), which maintains a database referred to as the Standard Atlantic Fisheries Information System (SAFIS). *Id.*

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¶ 62. SAFIS currently hold self-reported data from lobstermen as required by Addendum XXVI in the form of “SAFIS reports” or “trip tickets.” *Id.* SAFIS will be the repository of both self-reported trip data (eVTR data) and the new electronic monitoring data collected by the vessel trackers. *Id.* The Addendum indicates that ACCSP will match the two sources of data by means of trip identification numbers and other vessel registration information. *Id.* ¶ 63.

The Addendum “contains little to no information on how this data will be protected from unauthorized use and disclosure.” *Id.* ¶ 64. There are no references to encryption, and there is no data governance policy detailing the specific intended use of the data. *Id.* Instead, “the Addendum gives the ASMFC and MDMR broad discretion on how they can use the data collected, without assurances that the data will be immune from third party subpoena or how access by third parties will be limited, even though ACCSP data has been subject to subpoenas in the past.” *Id.*

Unlike electronic devices or tracking applications available in the private marketplace, the Addendum does not provide lobstermen with the ability to view the reporting dashboards associated with the tracking data or to agree to terms of service describing the data collection process, nor does it provide any limits regarding how and in what format the data can be used. *Id.* ¶¶ 65-66. It also does not place any upward limits on how sophisticated the data collection can be, “i.e., whether the data collected is limited to spatial data or whether other types of data such as voice, speed, and other data categories can be collected.” *Id.* ¶ 66.

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The Addendum enumerates only two exceptions to the tracking requirement. *Id.* ¶ 67. First, the requirement does not apply to vessels in Trap Area 6, which covers state waters off the coast of New York and Connecticut, because a federal permit is not required for lobster fishing in that area. *Id.* Second, the Addendum exempts holders of state-only lobster permits without a federal commercial trap gear area permit. *Id.*

The Addendum states that the ASMFC “recommends that the federal government promulgate all necessary regulations in Section 3.0 to implement complementary measures to those approved in this addendum” and “requests that NOAA Fisheries publish the final rule on vessel tracking by May 1, 2023, with implementation no later than December 15, 2023.” *Id.* ¶ 68. At the time of the Plaintiffs’ filing of the complaint, no such final federal rule has been published by NOAA fisheries, much less implemented.⁶ *Id.*

E. The MDMR Rule

As noted, MDMR is responsible for enforcing ASMFC’s amendments in the state of Maine. *Id.* ¶ 69. On September 13, 2023, MDMR complied with the Addendum by publishing a final rule entitled “Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders” (the MDMR Rule). *Id.* ¶ 11 (citing 13-188 C.M.R. ch. 25, § 98). The MDMR Rule required all

⁶ The Court recites this fact as recounted by Plaintiffs in their complaint, *Compl.* ¶ 68; however, NOAA appears to have implemented a final rule on May 30, 2024. *See* Removal of American Lobster Effort Control Measures, 89 Fed. Reg. 46825 (May 30, 2024) (to be codified at 50 C.F.R. pt. 697).

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Maine lobstermen holding federal lobster permits to comply with the tracking device installation requirement by December 15, 2023. *Id.* ¶¶ 10, 70.

The MDMR Rule adopts the Addendum and also lists five new actions that MDMR deems unlawful:

1. It is unlawful for a federally permitted lobster . . . fishing license holder to fish for, take, possess, or land lobster . . . taken with trap gear without having an approved tracking device installed aboard the permitted vessel listed on their license.
2. It is unlawful for a federally permitted lobster . . . fishing license holder to remove or have removed the approved tracking device from the permitted vessel listed on their license without written approval from the [MDMR].
3. It is unlawful for a federally permitted lobster . . . fishing license holder to allow the permitted vessel listed on their license to be operated in the coastal waters of the State without the approved tracking device being powered by an external power source at all times; an exception to this requirement exists when the vessel is moored or docked at berth.
4. The approved tracking device must remain in an operational condition, minimally powered by an internal battery, when a permitted vessel is docked, moored, or removed from the water. The license holder shall notify the [MDMR] prior to an approved tracking device being rendered inoperative in instances where the permitted vessel is removed from the coastal waters for an extended period of time

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or for purposes of repairing or replacing an approved tracking device.

5. It is unlawful for a person to tamper with an approved tracking device or device signal; tampering includes any activity that may affect the unit's ability to operate or signal properly or to accurately compute or report the vessel's position. Tampering with an approved tracking device is not considered to occur in circumstances where an approved tracking device is being repaired or replaced provided the license holder has written approval from the [MDMR].

Id. ¶ 69.

The MDMR Rule does not list specific punishments for failure to comply with its requirements. *Id.* ¶ 71. Rather, the rule “simply states that individuals will not be punished for a device malfunction if the fisherman notifies MDMR of the issue and makes efforts to restore it to operation in an unspecified ‘timely manner.’” *Id.* Because the MDMR Rule does not specify how enforcement will be handled in any other exigent circumstance, “it remains unclear what responsibilities and repercussions will be applied to fishermen unaware of malfunction of their electronic tracking device.” *Id.* Plaintiffs emphasize this as a particular concern given that lobstermen are not given access to the settings on the device itself, or in the instance where a lobsterman is unable to repair the device. *Id.* It is also unclear if lobstermen are entitled to appeal any fines, penalties, or other enforcement actions levied against them regarding the MDMR Rule. *Id.*

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Like the Addendum, the MDMR Rule requires continuous tracking and monitoring of lobstermen even when they are not fishing in federal waters, despite the fact that lobstermen use their vessels in other commercial capacities (such as scallop, tuna, and menhaden fishing) as well as recreationally. *Id.* ¶ 72. Thus, lobstermen’s “movements will be tracked on a minute-by-minute basis even during emergency search and rescue operations.” *Id.*

“Upon information and belief, the scope of potential privacy and security intrusions associated with the MDMR Rule far exceed those of any other vessel (or motor vehicle) tracking requirement ever implemented in [Maine].” *Id.* ¶ 73. The existing scallop tracking requirement, for example, mandates that a tracker be active only when the vessel is entering the federal scallop fishery and requires a once-per-hour ping rate. *Id.*

1. The Particle TrackerOne Device

In November 2023, MDMR began sending federally permitted lobstermen electronic trackers that complied with the MDMR Rule. *Id.* ¶ 74. MDMR received funding for the electronic trackers and the associated data plans through a NOAA and National Fish Wildlife Grant. *Id.* MDMR represents that it will pay for the associated data plan for the first three years of the program; it is unclear who will fund the data plan beyond that period. *Id.*

MDMR used these grant funds “to select and purchase one of the many available electronic trackers meeting the specifications called for by the Addendum.” *Id.* ¶ 75. The tracking device MDMR selected is the “TrackerOne,” an electronic tracker distributed by Particle, a U.S.-based company. *Id.*

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Particle intends to store the data on their U.S.-based servers and offers “dashboards” that allow users visibility into the data being collected by the TrackerOne device in real time. *Id.* The TrackerOne is manufactured in China based on Particle’s design. *Id.*

In the materials that accompany each TrackerOne device, see *Compl.*, Attach. 3, *Fed. Permit Holder Vessel Tracking Requirements* (ECF No. 1-3) (*Vessel Tracking Requirements*), MDMR requires that the TrackerOne be installed directly on fishing vessels either via a USB port or by hardwiring the tracker to the vessel. *Compl.* ¶ 76. After installation, the lobsterman is then responsible for ensuring that the tracker remains activated at all times, either by running a generator or by using the vessel’s house batteries. *Id.*

MDMR did not provide lobstermen with any of the manufacturer’s specifications, privacy agreements, dashboard access, or other information associated with the tracker. *Compl.* ¶ 77. Lobstermen are thus unaware of what data will be collected, how that data will be used, or the circumstances under which that data can be shared. *Id.* Plaintiffs note “[t]his is particularly worrisome given that, in addition to determining a user’s GPS coordinates, the TrackerOne appears to be Bluetooth compatible, may be adapted in order to collect audio information, and employs a predictive algorithm that can anticipate vessel movements.” *Id.*

F. Plaintiffs’ Attempts to Raise their Concerns

In the fall of 2023, the Plaintiffs voiced their concerns about the Addendum to the Sustainable Maine Fishing Foundation (SMFF), a non-profit

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entity established to support efforts to sustain the lobster fishery and protect the rights of the fishing communities that depend on the lobster industry. *Id.* ¶ 78.

In response to the confidentiality, privacy, and enforcement concerns voiced by many affected lobstermen, SMFF corresponded with Commissioner Keliher, in his official capacity, on December 13, 2023 to detail the lobstermen’s apprehensions and to request further information on the TrackerOne and how its data would be collected, stored, maintained, and protected. *Id.* ¶ 79; *see also Compl.*, Attach. 4, *Dec. 13, 2023 Correspondence* (ECF No. 1-4). SMFF also requested an extension of the December 15, 2023 implementation date. *Id.* At the time of filing, SMFF had not received a formal response to its correspondence.⁷ *Id.* However, Commissioner Keliher “informed a member of the [Maine Lobstermen’s Union] that the tracking requirement was ‘out of his hands.’” *Id.*

G. The Parties

The Plaintiffs in this case are individual Maine lobstermen subject to the tracking device requirements of the MDMR Rule. *See id.* ¶¶ 13-18.

Plaintiff Frank Thompson is an individual residing in Vinalhaven, Maine. *Compl.* ¶ 13. Mr. Thompson and his spouse, Jean Thompson, are co-owners of Fox Island Lobster Company LLC (FILCO). *Id.* He is also a federally permitted lobsterman and fishes 800 traps in federal waters. *Id.* MDMR gave Mr. Thompson a

⁷ The Court restates this fact as recounted in Plaintiffs’ complaint. *Compl.* ¶ 79.

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vessel tracker and required that he install the device on his vessel by December 15, 2023. *Id.*

Plaintiff Joel Strout is an individual lobsterman residing in Harrington, Maine and the President of the District 4 Lodge of the International Association of Machinist and Aerospace Workers, Local Lodge 207, formerly known as IAMAW Maine Lobstering Union – Local 207 (MLU). *Id.* ¶ 14. All MLU members hold active Maine commercial lobster and crab fishing licenses. *Id.* Mr. Strout himself is a federally permitted lobsterman who fishes 800 traps in federal waters. *Id.* MDMR gave Mr. Strout a vessel tracker and required that he install the device on his vessel by December 15, 2023. *Id.*

Plaintiff Jason Lord is an individual lobsterman residing in Pemaquid, Maine. *Id.* ¶ 15. Mr. Lord is a federally permitted lobsterman who fishes 800 traps in federal waters. *Id.* MDMR gave Mr. Lord a vessel tracker and required that he install the device on his vessel by December 15, 2023. *Id.*

Plaintiff Christopher Smith is an individual residing in Jonesport, Maine. *Id.* ¶ 16. Mr. Smith is a federally permitted lobsterman who fishes 800 traps in federal waters. *Id.* MDMR gave Mr. Smith a vessel tracker and required that he install the device on his vessel by December 15, 2023. *Id.*

Plaintiff Jack Cunningham is an individual residing in Bar Harbor, Maine. *Id.* ¶ 17. Mr. Cunningham is a federally permitted lobsterman who fishes 800 traps in federal waters. *Id.* MDMR gave Mr. Cunningham a vessel tracker and required that he install the device on his vessel by December 15, 2023. *Id.*

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Defendant Patrick Keliher is the Commissioner of the MDMR, appearing as a Defendant in his official capacity. *Id.* ¶ 18. Commissioner Keliher is also a member of the ASMFC. *Id.* In his official role, Commissioner Keliher “supervises and directs all business conducted by the MDMR and is responsible for ensuring that the actions, decisions, and rules of that agency comply with all applicable laws and regulations.” *Id.*

III. THE PARTIES’ POSITIONS ON WHETHER DISMISSAL IS APPROPRIATE

A. The Plaintiffs’ Allegations

Plaintiffs challenge the adoption and enforcement of the MDMR Rule on three grounds. *Compl.* ¶ 12. They argue, first, that the MDMR Rule’s requirement of a twenty-four-hour-a-day vessel tracker is an unreasonable search and seizure in violation of due process protections in the Fourth and Fourteenth Amendments to the U.S. Constitution. *Id.* They argue, second, that the MDMR Rule violates Plaintiffs’ equal protection rights pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, § 6-A of the Maine Constitution by failing to describe any of the conditions under which it will be enforced and the penalties for noncompliance, such that the Court should find it to be void for vagueness.⁸

⁸ The Plaintiffs state in their complaint that they bring their federal equal protection claim pursuant to Articles V and XIV of the U.S. Constitution. *Compl.* ¶ 12. As Plaintiffs’ counsel acknowledged at oral argument, the references to Articles V and XIV, not Amendments V and XIV, are an obvious typographical error, and the Court has treated the references to be to the Amendments.

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Id. Third, Plaintiffs aver that the MDMR Rule violates the Maine Administrative Procedure Act (the Maine APA), 5 M.R.S. §§ 8001 *et seq.*, because it is arbitrary and capricious and contrary to law. *Id.*

1. Count One: The Fourth Amendment

Plaintiffs begin by informing the Court that the Fourth Amendment to the U.S. Constitution protects individuals from unreasonable searches and seizures; a search or seizure is “unreasonable” when the government trespasses into personal property, without a warrant, in violation of a reasonable expectation of privacy. *Id.* ¶ 21 (citing U.S. CONST. amend. IV). Plaintiffs aver that the use of information or evidence obtained through an unconstitutional search and seizure is a violation of the due process protections in the Fourteenth Amendment. *Id.* ¶ 22 (citing U.S. CONST. amend. XIV).

Plaintiffs point out that the United States Supreme Court has held that long-term “GPS monitoring of even a vehicle traveling on public streets constitutes a search,” and that individuals have a reasonable expectation of privacy in physical movements captured by GPS monitoring. *Id.* ¶ 23 (citing *Carpenter v. United States*, 585 U.S. 296, 309, 314-15 (2018) (“Whether the Government employs its own surveillance technology . . . or leverages the technology of a wireless carrier, we hold that an

The Court also notes that allegations of “void for vagueness” are typically argued as a violation of due process rights, not equal protection. However, the Court views the complaint “in the light most favorable to the plaintiff,” *Germanowski*, 854 F.3d at 71, and infers that Plaintiffs intended to bring Count Two as a violation of their rights to due process.

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individual maintains a legitimate expectation of privacy in the record of his physical movements”).

These constitutional protections extend, Plaintiffs argue, to an individual’s right to conduct a business free from government incursion. *Id.* ¶ 24 (citing *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 487-88 (S.D.N.Y. 2019) (finding businesspeople “ha[ve] a constitutional right to go about [their] business free from unreasonable official entries upon [their] private commercial property”). To comply with the Fourth Amendment, Plaintiffs contend, “an administrative search of a business must have a limited scope, a relevant purpose, specificity in its demands, and a neutral arbiter.” *Id.*

Turning to the case at hand, Plaintiffs contend that, under the Fourth Amendment’s protection against unreasonable searches and seizures, they “have a reasonable expectation of privacy in the movements of their fishing vessels and the precise location of their lobster traps.” *Id.* ¶ 81. Plaintiffs argue that they also have a reasonable expectation of privacy “in the data produced by the tracker itself.” *Id.* ¶ 82. They assert that they have a constitutional right to be free from unreasonable official entries upon their private commercial property when acting in a business capacity, *id.* ¶ 83, and that the tracking requirements set forth in the Addendum and the MDMR Rule constitutes a Fourth Amendment search “insofar as the Defendant, without a warrant, is tracking the Plaintiffs’ movements while conducting business activities within federally regulated waters, as well as their personal movements while in state-controlled waters.” *Id.* ¶ 84.

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They aver that neither the ASMFC nor MDMR have articulated the “limited scope, relevant purpose, and specificity required to otherwise obtain this satellite tracking data through a constitutional administrative search.” *Id.* ¶ 85. “Because ASM[F]C and MDMR intend to use the tracker’s surveillance data in connection with offshore enforcement efforts,” they opine, “the information being collected without [a] warrant from the Plaintiffs, and potentially used punitively against them, violates their right to be free from the deprivation of life, liberty, and property without due process of law.” *Id.* ¶ 86.

2. Count Two: Equal Protection

Plaintiffs assert that the guarantee of equal protection enshrined in the Fifth and Fourteenth Amendments of the federal Constitution and Article I, § 6-A of the Maine Constitution, “applies to the conduct and action of the Defendant and its officials and employees.” *Id.* ¶ 88. They aver that they “have a constitutionally protected right to equal protection under the law when the government regulates their private property, movements, and business activities.” *Id.* ¶ 89.

The MDMR Rule, Plaintiffs contend, does not provide this constitutionally required protection and is thus “void for vagueness in that it is designed to enforce criminal and regulatory offenses without defining the contours of offenses with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.* ¶ 91.

“By way of example,” Plaintiffs continue, “the MDMR Rule does not list the penalties for

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noncompliance, indicate what offenses can be prosecuted based on the data that is collected, what enforcement efforts can be used in connection with the tracking device, or whether any non-compliance has implications on their fishing licensure.” *Id.* ¶ 92. They also argue that the MDMR Rule does not state what penalties, if any, may be imposed for unintentional, as opposed to intentional, violations, “whether MDMR will make efforts to distinguish server-side errors from fisherman error,” or what appellate rights plaintiffs have pursuant to the rule. *Id.* ¶ 93. “Given the lack of clarity on how MDMR intends to incorporate the ‘offshore enforcement’ efforts called for by the Addendum, and the fact that there are no detailed penalties in the MDMR rule for noncompliance,” Plaintiffs conclude that “the MDMR Rule is void for vagueness in that it violates the equal protection guarantees provided by both the [U.S.] and Maine constitutions.” *Id.* ¶ 94.

3. Count Three: The Maine APA

Plaintiffs inform the Court that rules promulgated by a Maine administrative agency can be challenged under the Maine APA on procedural and substantive grounds, *id.* ¶ 49 (citing 5 M.R.S. § 8058(1)), and that a court reviewing a challenged agency action:

must set aside an agency rule that 1) does not contain the written statement required by Section 8057-A; 2) involves a procedural effort that is substantial and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if the error had not occurred; or 3) is arbitrary, capricious, an abuse

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of discretion, or otherwise not in accordance with law.

Id. ¶ 96 (citing 5 M.R.S. § 8058).

First, Plaintiffs establish that the Maine APA requires agencies engaged in rulemaking to publish a written statement explaining the factual and policy basis for the proposed rule.⁹ *Id.* ¶ 48 (citing 5 M.R.S. § 8052(5)). They assert that the MDMR Rule violates 5 M.R.S. § 8052(5) by failing to “specify the operation, fiscal impact, or information considered by MDMR in its promulgation of the Rule,” in particular regarding the MDMR Rule’s 1) specific enforcement provisions or data governance policy, 2) “specification of the fiscal implications to fisherm[e]n once the grant funding for the trackers expires,” and 3) “specification as to how MDMR arrived at a required ping rate or determined a need for the tracking of licensees beyond the scope of their lobster fishing activity.” *Id.* ¶ 97.

Second, Plaintiffs contend that the MDMR Rule also violates the Maine APA because it is arbitrary and capricious for being “inconsistent with the goals of the MSA,” offering the following examples of the MDMR Rule’s failures:

1. Does not contain an adequate explanation for why minute-by-minute surveillance (as opposed to the hourly surveillance called for by

⁹ Plaintiffs note that Maine APA § 8052(5) further requires the written statement include information identifying persons who commented on the proposed rule, including the organizations they represent and a summary of their comments. *Compl.* ¶ 48 (citing 5 M.R.S. § 8052(5)). They note that the same section mandates agencies publish “their rationales for adopting, or failing to adopt, any changes to proposed rules, or when they draw findings and recommendations different from those expressed by commentators.” *Id.* (citing 5 M.R.S. § 8052(5)).

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the scallop tracking program) of federally permitted lobster fishing vessels is required to protect, conserve, grow or manage the American lobster fishery;

2. Authorizes the tracking of lobster vessels in state waters, when the vessel is being used for other commercial purposes unrelated to lobster fishing, and/or when the vessel is being used recreationally;
3. Calls for a substantial increase in surveillance without an explanation as to why the self-reported spatial information that fishermen have gathered since 2018 under [the Addendum] is insufficient information for purposes of [Magnuson-Stevens Act] compliance and/or does not violate National Standard 7, which specifically states that any fishery plan shall “avoid unnecessary duplication”;
4. Risks exposing the Plaintiffs’ trade secrets to third-parties without any explanation of what efforts, if any, are being taken to encrypt and protect that information from third parties, including whether third parties will be able to subpoena this information or whether this information will be available as part of the administrative record in challenges to other agency actions;
5. States that the information collected will be shared with “appropriate state or federal agencies” without defining those agencies that MDMR deems to be appropriate, limit what these agencies can subsequently do with that information, or state whether this information

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will be available to other agencies or private parties interested in developing wind energy projects in lobster fishing grounds;

6. Has a stated purpose of furthering renewable energy projects, including wind energy, that is well beyond the goals of FMPs authorized by the [Magnuson-Stevens Act];
7. Requires a tracker that can be Bluetooth enabled and is capable of collecting nonspatial data; and
8. Is more expensive and intrusive than necessary to achieve the Addendum's stated goals.

Id. ¶ 98.

Third, Plaintiffs argue that the MDMR Rule violates the Maine APA by being contrary to law. *Id.* ¶¶ 12, 99. They specifically assert that the MDMR Rule is contrary to the Consolidated Appropriations Act, 2023 Pub. L. No. 117-328, Div. JJ, 136 Stat. 4459, 6089-92 (2022) (CAA), which includes a provision specifying that the Take Reduction Plan is “sufficient to ensure that the continued Federal and State authorizations of the American Lobster . . . fisher[y] are in full compliance with both the Marine Mammal Protection Act [MMPA] and the Endangered Species Act [ESA] until December 31, 2028.” *Id.* ¶ 12 (internal quotation marks omitted).

Plaintiffs assert that the MDMR Rule is contrary to the CAA because the former is not an extension of an emergency rule existing at the time of the CAA's passage, but rather is a new regulation or administrative action designed to bring the lobster industry into compliance with the ESA and MMPA in violation of the CAA's express provision that the

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existing amendments to the Take Reduction Plan are to be deemed sufficient for compliance until December 2028. *Id.* ¶ 99. Plaintiffs further claim that the MDMR Rule is contrary to law because “Section . . . 101 creates field preemption over regulations of federally licensed lobster and Jonah Crab fisheries such that MDMR has no authority to create state regulations affecting them.” *Id.* Finally, Plaintiffs argue that the Addendum and the MDMR Rule are both inconsistent with the mandatory National Standards articulated in the MSA. *Id.*

After acknowledging that federal review of state administrative action or rules is “generally inappropriate when a federal court is asked to answer questions specific to state law concerns and administration,” *id.* ¶ 50, Plaintiffs insist that their challenge to the MDMR Rule “does not involve questions specific to Maine state law because the MDMR Rule adopts the federal policy contained in the . . . Addendum that Maine is required to adopt under federal law.” *Id.* ¶ 100. Plaintiffs suggest that their challenge thus survives the narrowly tailored *Burford*¹⁰ abstention doctrine, which requires federal courts to show deference to state administrative processes when “the rule or action involved pertains *only* to state-law issues that serve a significant local interest.” *Id.* ¶ 51 (citing *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 29 (1st Cir. 2011) (emphasis added by Plaintiffs)).

B. Commissioner Keliher’s Motion to Dismiss

Commissioner Keliher moves to dismiss Counts One and Two in Plaintiffs’ complaint for failure to state a claim upon which relief can be granted and

¹⁰ *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

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Count Three for lack of subject matter jurisdiction.
Mot. to Dismiss at 9-24.

1. Federal Rule of Civil Procedure 12(b)(1)

a. Count Three: The Maine APA

Commissioner Keliher begins by moving to dismiss Count Three against him on jurisdictional grounds pursuant to Federal Rule of Civil Procedure 12(b)(1). *Id.* at 9-10. Commissioner Keliher argues that “[t]he Complaint on its face . . . establishes that the Court does not have jurisdiction over [Count Three] because the Eleventh Amendment to the U.S. Constitution ‘denies federal courts jurisdiction to award . . . relief against state officials based upon violations of state law.’” *Id.* at 9 (quoting *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 529 (1st Cir. 2009) (collecting cases)). When a plaintiff asks a federal court to compel state officers to comply with state law, Commissioner Keliher says that “the only appropriate response is to dismiss the state law claims,” “even in a suit also bringing claims grounded in federal law.” *Id.* (citing *Cuesnongle v. Ramos*, 835 F.2d 1486, 1497 (1st Cir. 1987) (“If the plaintiff wishes the federal court to address the federal claims, bifurcation will be the only option”); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (“neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment”)).

In response to Plaintiffs’ argument that “[a] challenge to the [MDMR] Rule does not involve questions specific to Maine state law because the [MDMR] Rule adopts . . . federal policy,” *Compl.* ¶ 100, Commissioner Keliher says this “does not help them for two reasons.” *Mot. to Dismiss* at 9. First, Commissioner Keliher says, Plaintiffs’ suggestion

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that the MDMR Rule “is a creature of state law is simply incorrect” because the MDMR Rule arises from the Addendum, “which is itself a creation of the multistate [ASMFC] and not of any federal entity.” *Id.* (citing *Mot. to Dismiss, supra*, sect. II). On this point, Commissioner Keliher also avers that the MDMR Rule does not have to be consistent with the MSA’s National Standards. *Id.* (citing *Mot. to Dismiss, supra*, n. 5).

“Second, and most importantly,” he says, the relevant issue is whether Count Three seeks relief against a state official based on violations of state law, not whether the count involves “questions specific to Maine law.” *Id.* at 9-10 (citing *Guillemard-Ginorio*, 585 F.3d at 529). In other words, Commissioner Keliher opines, “the major problem with Count III is this Court’s lack of jurisdiction under the Eleventh Amendment, not the principles underlying *Burford* abstention.” *Id.* at 10 (citing *Compl.* ¶¶ 50-52; *Chico Serv. Station, Inc.*, 633 F.3d at 29 (“the fundamental concern in *Burford* is to prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution”); *Burford*, 319 U.S. 315).

Concluding that the complaint, on its face, shows that the Court lacks jurisdiction over Plaintiffs’ third count because of Defendant’s sovereign immunity, Commissioner Keliher accordingly asks the Court to dismiss Count Three pursuant to Federal Rule of Civil Procedure 12(b)(1). *Id.*

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2. Federal Rule of Civil Procedure 12(b)(6)

a. Count One: The Fourth Amendment

Commissioner Keliher next argues the facts alleged in Count One of Plaintiffs' complaint, "even drawing all reasonable inferences in Plaintiffs' favor, show no plausible path to relief because the [MDMR] Rule unquestionably meets the requirements for a lawful 'administrative search'" and thus does not violate the Fourth Amendment. *Id.* at 10-11.

The Fourth Amendment's prohibition on "unreasonable searches and seizures," Commissioner Keliher admits, has long established that "warrantless searches of private premises are presumptively unreasonable." *Id.* at 11 (quoting *United States v. Almonte-Baez*, 857 F.3d 27, 31 (1st Cir. 2017)) (citing *Brigham City v. Stuart*, 547 U.S. 398 (2006)). However, Commissioner Keliher continues, courts have recognized several exceptions to this presumption of unreasonableness. *Id.* "Of relevance here," he says, the United States Supreme Court has found that "an 'administrative search' is a warrantless search that 'serve[s] a "special need" other than conducting criminal investigations.'" *Id.* (quoting *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015)). Commissioner Keliher asserts that, generally, these warrantless searches do not run afoul of the Fourth Amendment if the subject of the search is afforded an opportunity for pre-compliance review before a neutral arbiter. *Id.* (citing *Patel*, 576 U.S. at 420).

When the search involves commercial premises in a "closely regulated" industry, Commissioner Keliher continues, "an even 'more relaxed standard' applies." *Id.* (citing *Patel*, 576 U.S. at 424). These searches do

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not violate the Fourth Amendment so long as (1) there is a substantial government interest behind the regulatory scheme pursuant to which the search is made; (2) the search is necessary to furthering that interest; and (3) the regulatory scheme “perform[s] the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” *Id.* (citing *Burger*, 482 U.S. 691, 702-03 (1987); *Rivera-Corraliza v. Morales*, 794 F.3d 208, 216-17 (1st Cir. 2015) (articulating the “*Burger* test”); *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2006) (same)).

Commissioner Keliher explains that this “more relaxed standard” is applied to administrative searches of closely regulated industries because “[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual’s home [and] is particularly attenuated in commercial property employed in ‘closely regulated’ industries.” *Id.* at 11-12 (citing *Burger*, 482 U.S. at 700; *Giragosian v. Bettencourt*, 614 F.3d 25, 29 (1st Cir. 2010) (“[T]he owner of commercial property in a closely regulated industry has a reduced expectation of privacy in those premises”). Commissioner Keliher notes that this diminished expectation of privacy also applies when the “premises” being searched is a vehicle. *Id.* at 12, n. 14 (citing *United States v. Maldonado*, 356 F.3d 130, 135 (1st Cir. 2004) (“For purposes of the *Burger* doctrine, we see no meaningful distinction between commercial premises and commercial vehicles”).

Turning to the instant case, Commissioner Keliher concedes that the electronic tracking requirement in

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the MDMR Rule constitutes a Fourth Amendment search. *Id.* at 12 n.16. However, he contests Plaintiffs' contention that the MDMR Rule amounts to an unreasonable search in violation of the Fourth Amendment. *Id.* at 12. Commissioner Keliher argues that by requiring the installation of devices on commercial lobster fishing vessels that transmit vessel location data while the vessel is lobstering in federal and state waters, "the [M]DMR Rule constitutes an administrative search of a commercial premises engaged in a closely regulated industry." *Id.* at 12.

Commissioner Keliher first argues that the American lobster fishery is a closely regulated industry, and then, by analyzing the MDMR Rule under the three elements of the *Burger* test, submits the MDMR Rule "complies with the well-established requirements for such a search, . . . is consistent with reasonable expectations of privacy[,] and does not violate the Fourth Amendment."¹¹ *Id.*

¹¹ In a footnote, Commissioner Keliher says that his motion to dismiss, "like Plaintiffs' Complaint," focuses on Plaintiffs' privacy expectations in their movements while engaged in the lobster fishery, and in the location of their lobster traps. *Mot. to Dismiss* at 12 n.17 (citing *Compl.* ¶¶ 81-83).

He notes that "Plaintiffs assert in passing that fishing vessels covered by the [M]DMR Rule are also occasionally used for other purposes . . . [b]ut these allegations do not support a plausible inference that they have a reasonable expectation of privacy in their movements while fishing for non-lobster species – activity within the scope of the pervasively regulated commercial fishing industry – or engaging in search-and-rescue operations at sea." *Id.* at 12-13 n.17.

Commissioner Keliher continues, "To the extent Plaintiffs have a reasonable expectation of privacy in their commercial fishing vessels' movements while using these vessels for personal

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i. Closely Regulated Industry

An industry is “closely regulated” when it is subject to pervasive regulation and inspection, says Commissioner Keliher. *Id.* at 13 (citing *U.S. Dep’t of Just. v. Ricco Jonas*, 24 F.4th 718, 734 (1st Cir. 2022)). Commissioner Keliher contends that courts have recognized commercial fishing as a closely regulated industry. *Id.* at 13 (citing *United States v. Raub*, 637 F.2d 1205, 1209 (9th Cir. 1980) (“Commercial fishing has a long history of being a closely regulated industry”); *Lougren v. Byrne*, 787 F.2d 857, 865 & n.8 (3d Cir. 1986) (“the fishing industry has been the subject of pervasive governmental regulation since the founding of the Republic”).

While he acknowledges that the Supreme Court has not deemed commercial fishing to be closely regulated, Commissioner Keliher opines that “a comparison with other closely regulated industries demonstrates that commercial fishing is closely regulated.”¹² *Id.* at 13. In

travel, Plaintiffs’ allegations do not support a plausible inference the collection of location data from these trips as occasional incident to the lawful administrative search regime falls outside the de minimis exception to the Fourth Amendment’s warrant requirement.” *Id.* at 13 n.17 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); *Taylor v. City of Saginaw*, 620 F. Supp. 3d 655, 664 (E.D. Mich. 2022); *United States v. Jacobsen*, 466 U.S. 109, 125 (1984)).

¹² Commissioner Keliher acknowledges in a footnote that the U.S. Supreme Court in *Patel*, 576 U.S. at 424, questioned the scope of the closely regulated industry doctrine and noted that it had only recognized four industries (liquor sales, firearms dealing, mining, and automobile junkyards) as “closely regulated.” *Mot. to Dismiss* at 13 n.18. However, Commissioner Keliher says, “the Court’s actual holding in *Patel* was only that ‘hotels’ ... do not constitute a closely regulated industry,” *id.* citing *Patel*, 576 U.S. at 425-26, and, “post-*Patel*, courts have

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Burger, he says, the Supreme Court concluded that automobile junkyards were closely regulated because operators must obtain a license, must maintain records and make them available for government inspection, must display their registration number in various ways, and are subject to criminal penalties, loss of license, or civil fees for failure to comply. *Id.* at 13-14 (citing *Burger*, 482 U.S. at 704-05). Commissioner Keliher argues that “[a] sample of the federal and state laws and regulations governing commercial lobster fishing in Maine, of which this Court may take judicial notice, . . . demonstrates requirements that are just as stringent and wide-ranging as those in *Burger*, if not more so.”¹³ *Id.* at 14. He includes examples of lobster fishery regulations which, he says, support finding the industry to be “closely regulated”:

1. The ACFCMA, 16 U.S.C. §§ 5101-5108, requires the [ASMFC] to adopt [FMPs] and, should a member state fail to comply with a [FMP], gives the U.S. Secretary of Commerce authority to declare a moratorium on that state’s fishery;

continued to recognize various industries as closely regulated.” *Id.* (collecting cases).

¹³ Commissioner Keliher argues that “[a] court may take judicially noticeable ‘matters of public record’ without converting a motion to dismiss to a motion for summary judgment.” *Mot. to Dismiss* at 14, n.19 (citing *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir. 2000)). “In general,” he continues, “federal courts may take judicial notice of federal and state laws and regulations. *Id.* (citing 21B Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Evid.* § 5102.1 (2d ed.); *Greene v. Rhode Island*, 398 F.3d 45, 48-49 (1st Cir. 2005) (taking judicial notice of a federal statute at the motion to dismiss stage)).

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2. 50 C.F.R. Part 697 manages lobster fisheries by, among other things, requiring vessel permits, trap limits and tags, restricting gear in certain areas, and providing for at-sea sampler/observer coverage.
3. Under 46 C.F.R. Chapter 1, the U.S. Coast Guard and the Department of Homeland Security require commercial fishing vessels to carry certain safety equipment.
4. Title 12, Chapter 619, of the Maine Revised Statutes and Chapter 25 of [M]DMR's rules, 13-188 C.M.R. ch. 25, manages the lobster fishery by, among other things, requiring licensure, limiting the size of lobsters that may be taken, requiring that certain lobsters be notched and thrown back, and managing how lobster gear is tagged and handled and how traps are constructed.
5. Maine law provides that any person who "receives a [marine resources] license . . . has a duty to submit to inspection and search for violations related to the licensure activities by a marine patrol officer" and that "[w]atercraft or vehicles . . . used primarily in a trade or business requiring a license . . . may be searched or inspected at any time." 12 M.R.S. § 6306(1).

Mot. to Dismiss at 14-15.

In addition to the above, Commissioner Keliher asserts that "people operating vessels at sea—whether or not they are engaging in commercial fishing—are subject to a network of regulations that allow officials to board and inspect vessels." *Id.* at 15. While reasonable suspicion is needed to stop a personal vehicle on a highway or a pedestrian on a

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public street, “a vessel at sea . . . can be stopped for document checks and safety inspections at any time even without reasonable suspicion.” *Id.* (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 592-93 (1983); *United States v. Green*, 671 F.2d 46, 53 (1st Cir. 1982); *State v. Giles*, 669 A.2d 192, 193 (Me. 1996)). He informs the Court that “Maine law specifically provides that ‘[m]arine patrol officers may stop and board any watercraft at any time to inspect its documents, licenses, and permits of the occupants of the watercraft and to conduct a safety inspection.’” *Id.* (citing 12 M.R.S. § 6133(1)).

Based on the foregoing, Commissioner Keliher concludes that commercial fishing is a closely regulated industry and Plaintiffs thus have a “greatly reduced expectation of privacy.” *Id.* He further notes that Plaintiffs “have alleged no facts that would support a different conclusion,” emphasizing that “in their Motion for Preliminary Injunction, Plaintiffs ‘concede that commercial fishing is a closely[] regulated industry.’” *Id.*; *id.* at 15 n.20 (citing *Pls.’ Mot. for Prelim. Inj.* at 12).

Commissioner Keliher proceeds to the first prong of the *Burger* test.

ii. Substantial Government Interest

Commissioner Keliher acknowledges that, to comply with the Fourth Amendment, “[a] lawful administrative search of a closely regulated industry must be necessary to furthering a substantial government interest.” *Id.* at 15 (citing *Burger*, 482 U.S. at 702). He then avers that the MDMR “undoubtedly has a substantial interest in regulating the lobster fishery and ensuring its long-term viability as an economic and cultural pillar of Maine society.”

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Id. (citing 12 M.R.S. § 6021 (establishing MDMR in part to “conserve and develop marine . . . resources”); *Tarabochia v. Adkins*, 766 F.3d 1115, 1123 (9th Cir. 2014) (“To be sure, protecting the fishery is an important governmental interest”)).

iii. Necessary to Further Substantial Government Interest

Proceeding to the second prong of the *Burger* test, Commissioner Keliher argues that the MDMR Rule is necessary to further the government’s substantial interest in the lobster fishery because, as stated in the Addendum, “the detailed data based on a one-ping-per-minute rate that will be collected from the electronic trackers is necessary to accurately characterizing activity in the fishery . . . which is critical to addressing current and future threats to the fishery and ensuring successful management through improved stock assessment.” *Id.* at 16 (citing *Mot. to Dismiss*, Attach 1., *Addendum XXIX to Amend. 3 to the Am. Lobster Fishery Mgmt. Plan*; *Addendum IV to the Jonah Crab Fishery Mgmt. Plan* § 2.1 (ECF No. 23-1) (*Addendum XXIX*)). Further, the “current system of self-reported data lacks the accuracy, reliability, and precision that would all [M]DMR and other fishery managers to characterize a fishery occurring over vast areas and far from shore.” *Id.* (citing *Addendum XXIX* § 2.1). He concludes by asserting that not only is MDMR required to implement the MDMR Rule pursuant to its obligations as a member of the ASMFC, but MDMR has also concluded, based on scientific evidence and its fishery management expertise, that the electronic tracking requirement is necessary to protect and manage the fishery. *Id.* Plaintiffs, he says, “have not

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alleged facts supporting a plausible inference to the contrary.” *Id.*

iv. Functions as Warrant

Commissioner Keliher argues that the MDMR Rule also satisfies the third prong of the *Burger* test because it “perform[s] the two basic functions of a warrant” by “[1] advis[ing] the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and . . . [2] limit[ing] the discretion of the inspecting officers.” *Id.* (citing *Burger*, 482 U.S. at 703). Regarding the first element, Commissioner Keliher avers that the MDMR Rule “clearly puts covered lobstermen on notice that data regarding the location of their fishing vessels is being collected per the [MDMR] Rule’s terms.” *Id.* at 16-17 (citing *Tart v. Commonwealth of Mass.*, 949 F.2d 490, 498 (1st Cir. 1991) (finding adequate notice where the regulation informed commercial fishermen “that routine documentation checks might occur at any time, particularly when fishing in Commonwealth coastal waters or landing raw fish at Commonwealth ports”)). Turning to the second element, Commissioner Keliher says that the MDMR Rule “properly limits government discretion by tracking only location data of licensed commercial fishing vessels.” *Id.* at 17. Citing cases in which courts found administrative searches to comply with this element, he asserts that the MDMR Rule is analogous to other administrative search regimes courts have deemed lawful. *Id.*

Acknowledging that the MDMR Rule requires vessel location data to be collected “around-the-clock whenever a vessel is in operation,” Commissioner Keliher opines that this does not violate the *Burger*

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test: “the *Burger* [C]ourt . . . made clear that temporal limitations on administrative searches are only relevant to the extent they demonstrate that the administrative search regime ‘place[s] appropriate restraints upon the discretion of the inspecting officers.’” *Id.* (citing *Burger*, 482 U.S. at 711). Commissioner Keliher interprets the Supreme Court’s holding to mean that “timing restrictions for timing restrictions’ sake are not necessary,” and points to two cases where federal courts of appeal have approved administrative searches with no time limitations. *Id.* at 17-19 (citing *Tart*, 949 F.2d at 497-99; *United States v. Ponce-Aldona*, 579 F.3d 1218, 1226 (11th Cir. 2009)).

Commissioner Keliher argues that the MDMR Rule “presents the circumstances identified in *Tart* and *Ponce-Aldona*.” *Id.* at 19. As in *Tart*, he asserts, the MDMR Rule’s collection of location data is “minimally intrusive in the context of the ‘entire regulatory scheme applicable to the commercial fishing industry,” *id.* (citing *Tart*, 949 F.2d at 499), and is notably “less intrusive than the suspicionless boarding and search of a vessel, which is already authorized [in the lobster industry] under state and federal law.” *Id.* (citing 16 U.S.C. §§ 5101-5108; 50 C.F.R. Part 697; 46 C.F.R. ch. 1; 12-619 M.R.S.; 13-188 C.M.R. ch. 25; 12 M.R.S. § 6306(1)). In addition, he says, timing restrictions on the MDMR Rule’s electronic data collection would not be feasible because, like the commercial trucking industry at issue in *Ponce-Aldona*, commercial lobstering does not follow regular business hours,” *id.* (citing *Ponce-Aldona*, 579 F.3d at 1226), such that timing restrictions, or the ability of vessel owners to turn the tracker on and off at their discretion, would “seriously

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undermine the reliability and administrability of the entire data collection program.” *Id.*

Further, Commissioner Keliher notes, the MDMR Rule takes steps to limit its data collection. *See id.* at 6-7. The Particle TrackerOne collects the position of the vessel once per minute while the vessel is moving, but only once every six hours when the vessel is moored or docked. *Id.* at 6 (citing *Vessel Tracking Requirements* at 1). In addition, he says, although the MDMR Rule makes it generally unlawful for license holders to fish for lobster without an installed and operating tracking device on their vessel, several exceptions apply: (1) the license holder is not required to keep the tracker externally powered (plugged in) when the vessel is moored or docked; (2) the device may be inoperative when the vessel is removed from coastal waters for an extended period of time; (3) the device may be inoperative for the purpose of being repaired or replaced; and (4) if the device fails and becomes inoperable, the license holder may continue fishing with approval from MDMR while the situation is addressed. *Id.* at 6-7 (citing *Mot. to Dismiss*, Attach. 2, *Certificate of Authenticity* §§ (B)-(D) at § (C) (ECF No. 23-2) (*MDMR Rule*)).

Furthermore, Commissioner Keliher says, vessel location data is transmitted to the ACCSP, which maintains the SAFIS database. *Id.* at 7 (citing *Compl.* ¶ 62). Commissioner Keliher avers that “ACCSP has protected confidential information relating to fisheries—including self-reported Vessel Trip Report data—for years using the same electronic transmittal systems (approved by NMFS) and SAFIS database, as described in Addendum XXIX.” *Id.* (citing *Addendum XXIX* § 3.2.3). Further, he says, “the vessel location data is ‘designated as confidential through Maine law

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and regulation.” *Id.* (quoting *Vessel Tracking Requirements* at 2). Specifically, Commissioner Keliher continues, “Maine law requires that fisheries data be kept confidential and not be disclosed in a manner that permits identification of any person or vessel.” *Id.* (citing 12 M.R.S. § 6173). “[MDMR] regulations also require that publicly released data do not identify individual vessels or license holders.” *Id.* (citing 13-188 C.M.R. ch. 5).

v. Reasonable Expectation of Privacy

Based on the foregoing, Commissioner Keliher argues that the Plaintiffs’ contention that the MDMR Rule violates their reasonable expectation of privacy is “unavailing” because the administrative search doctrine holds that a warrantless search of commercial premises in a closely regulated industry is reasonable within the meaning of the Fourth Amendment so long as it meets the requirements for an administrative search. *Id.* at 19-20 (citing *Burger*, 482 U.S. at 700).

In response to Plaintiffs’ citation of *Carpenter* in support of an individual’s expectation of privacy “in the record of his physical movements” as captured through cell-site location information, Commissioner Keliher responds “that case is entirely inapposite” because, first, *Carpenter* involved data collected as part of a criminal investigation and, second, the data at issue in *Carpenter* “provide[d] an intimate window into a person’s life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations.” *Id.* at 20 (citing *Carpenter*, 585 U.S. at 310-11).

Commissioner Keliher next responds to Plaintiffs’ contention that the location of their lobster traps

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amounts to a “trade secret.” *Id.* (citing *Compl.* ¶ 3). He argues, first, that Plaintiffs “have not pleaded any facts supporting [this] general assertion,” and “it is difficult to comprehend how the location of Plaintiffs’ lobster traps could constitute a ‘secret’ considering that (1) traps must be marked for identification . . . and (2) traps are placed in the open ocean, where marker buoys are subject to visual identification by anyone in the vicinity.” *Id.* at 20-21 (citing *Oliver v. United States*, 466 U.S. 170, 179 (1984) (noting that so-called “open fields” “do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance”). Second, Commissioner Keliher says that “every lawful administrative search may reveal to the government how an entity does business; the target of an administrative search is often precisely those documents and other materials containing such information.” *Id.* at 21 (citing *Ricco Jonas*, 24 F.4th at 734). Third, he posits that Plaintiffs do not plausibly allege how the MDMR Rule, “which only exposes vessel-specific data to the government and keeps such data confidential from the broader public, including fishing competitors,” will violate their expectation of privacy in their “trade secrets.” *Id.*

In a footnote, Commissioner Keliher responds to Plaintiffs’ concern with the potential use of vessel location data in criminal or civil enforcement proceedings. *Id.* at 21 n. 22 (citing *Compl.* ¶ 86). He contends that “they have not pleaded any facts supporting a plausible claim to relief,” and “[b]inding precedent forecloses any argument that the use of information collected through an administrative search in separate enforcement proceedings renders an otherwise lawful administrative search

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unconstitutional.” *Id.* (citing *Burger*, 482 U.S. at 704-05 (discussing an administrative search regime where business owners were subject to criminal penalties, loss of license, or civil fines for violations of the regulations the searches were conducted to enforce); *Burger*, 482 U.S. at 716 (“Nor do we think this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself”).

Commissioner Keliher concludes that Plaintiffs have failed to plausibly allege the MDMR Rule’s tracking requirement exceeds a lawful administrative search of a closely regulated industry and asks the Court to dismiss Plaintiffs’ Fourth Amendment claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. *Id.*

b. Count Two: Equal Protection

Commissioner Keliher next addresses Plaintiffs’ contention that the MDMR Rule violates the equal protection clauses of the U.S. and Maine Constitutions because it is vague. *Id.* at 22. Noting first that a “void-for-vagueness” claim is usually analyzed under the Due Process Clause, *id.* at 22 n.23, Commissioner Keliher maintains that a rule is unconstitutionally vague “only when it ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited[] or is so standardless that it authorizes or encourages seriously discriminatory enforcement.’” *Id.* at 22 (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)). Further, he says, “the Supreme Court has applied a less strict vagueness test to commercial regulation . . . [a]nd

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vagueness review is less exacting still where the law at issue carries no criminal penalties.” *Id.* at 22 (citing *ACA Connects – Am.’s Commc’ns Assoc. v. Frey*, 471 F. Supp. 3d 318, 330 (D. Me. 2020)).

Turning to the case at hand, Commissioner Keliher contends that Plaintiffs’ complaint does not identify “what terms of the [M]DMR Rule are unconstitutionally vague, in what way a person of ordinary intelligence would not have fair notice of what conduct the Rule prohibits, or how the Rule is so standardless as to encourage seriously discriminatory enforcement.” *Id.* Rather, he says, Plaintiffs say that the rule is impermissibly vague because “the consequences of violating it are unclear.” *Id.* at 22-23. To this, Commissioner Keliher responds that, “even assuming the precise penalties a person may incur from violating a rule are the subject of constitutional vagueness analysis, the consequences of violating this Rule are clearly set out in State law.” *Id.* at 23. “Like many civil violations,” he says, the MDMR Rule “prohibits certain conduct, regardless of whether it is intentional.” *Id.* (citing *MDMR Rule* § (C)). He notes that, under Maine law, a violation of the MDMR Rule is a “civil violation for which a fine of not less than \$100 for each violation may be adjudged.” *Id.* at 7 n.12 (citing 12 M.R.S. § 6174(3)). A violation of the MDMR Rule, Commissioner Keliher claims, is thus “subject to the same process and procedures—including appellate procedures—as a violation of any other [M]DMR Rule.” *Id.* at 23. He further informs the Court that a civil violation of the M.R.S. “is subject to the due process provided through a court adjudication, and the [MDMR] may suspend a license after such adjudication.” *Id.* at 7 n.12 (citing 12 M.R.S. § 6351(1)(D)). He says 12 M.R.S. § 6371(3)(A)

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alternatively provides that the MDMR may administratively suspend a license without a prior court adjudication based on the license holder's commission of a marine resource violation; an administrative suspension is subject to procedural requirements and judicial review on appeal. *Id.* (citing 12 M.R.S. §§ 6371(3)(A), 6374). Commissioner Keliher concludes that “[i]t is simply not plausible that covered vessel owners are in the dark about the potential consequences of their conduct, especially considering that they operate in a highly regulated industry and can be expected to know the applicable regulations.” *Id.* at 23 (citing *United States v. Facteau*, 89 F.4th 1, 33 (1st Cir. 2023)).

Based on the foregoing, Commissioner Keliher opines that the complaint “simply does not contain factual allegations that support a plausible void-for-vagueness claim” and the Court should thus dismiss Count Two pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Id.* at 24.

C. Amicus Curiae Atlantic States Marine Fisheries Commission’s Memorandum in Support of Defendant’s Motion to Dismiss

The ASMFC submitted an amicus curiae memorandum in support of Commissioner Keliher’s motion to dismiss Count One. *Amicus Mem. in Support of Mot. to Dismiss* at 1.

1. Count One: The Fourth Amendment

The ASMFC asserts that Plaintiffs’ Fourth Amendment argument, if accepted by the Court, “would severely hamper governments’ ability to manage fisheries in the public interest and to respond in an informed manner to the serious challenges and

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conflicts that often mark modern marine fishery management—and would cause that harm without sound support in Fourth Amendment precedent or principle.” *Id.*

The ASMFC argues, first, that commercial fishing in marine waters “is, and has long been, a highly regulated activity” and “a privilege that comes with conditions and limitations to protect the public’s interests in maintaining sustainable fisheries, the marine environment, and other resources that could be affected by commercial fishing.” *Id.* at 1-2. Commercial permit holders, it continues, “reasonably understand that their activities on the water are subject to observation (including by law enforcement),” are typically required to “carry conspicuous markings on their vessels and on their gear,” and may also be required to allow a governmental agent or third-party observer onboard throughout a fishing trip to monitor catch and bycatch, document marine mammal interactions, and ensure regulations compliance. *Id.* at 2.

Second, the ASMFC asserts that the Addendum’s requirement of licensees does not conform to the traditional premise of Fourth Amendment search cases, which is that the government will gain “access to ‘private’ things,” because the location of a vessel “required to be marked prominently with various identifiers” is not private. *Id.* In contrast with the “constant video surveillance continually ongoing in myriad workplaces (mass transit locations, banks, building lobbies, etc.),” the Addendum’s tracking requirement amounts to a limited intrusion which “matches the legitimate management needs but does not intrude unreasonably on any limited privacy interests.” *Id.*

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The ASMFC next emphasizes that it “did not establish this minimally intrusive requirement lightly or arbitrarily”; rather, it “had compelling reasons for wanting to correct a long-recognized gap in information about lobster fishing activity,” as “the [ASMFC] repeatedly explained in the lengthy public process that led to the Addendum’s adoption.” *Id.* at 3. Plaintiffs “barely acknowledge and never seriously try to refute the legitimacy or importance of the ASMFC’s purposes in establishing the monitoring requirement—or the direct way in which the monitoring program will serve those purposes,” the ASMFC avers. *Id.*

Turning to Plaintiffs’ concerns as to data collection, the ASMFC points out that Plaintiffs bring a facial challenge against the MDMR Rule, despite “hav[ing] not shown there is an imminent risk it will be unreasonable in *any* case, even their own.” *Id.* at 4 (emphasis in original). The ASMFC says:

The theoretical harms that [Plaintiffs] raise are speculative and only arise based upon speculations about someone other than the Defendant doing something improper. For example, their concerns that – despite being kept in accord with procedures and by institutions that have handled such data successfully – data could be accidentally disclosed or misused, is entirely conjectural and disregards the robust and proven confidentiality regime that governs the data collecting already taking place in the program. Plaintiffs fail to adduce any real-world examples – whether from the pilot version of the program, from other jurisdictions where electronic tracking is in effect, or even from more

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intrusive fishery monitoring programs – to support their speculative, theoretical fears.

Id. at 4-5.

Based on the foregoing, the ASMFC urges the Court to reject the Plaintiffs' Fourth Amendment claim and grant Commissioner Keliher's motion to dismiss. *Id.* at 5.

D. The Plaintiffs' Opposition

The Plaintiffs oppose Commissioner Keliher's motion to dismiss and the ASMFC's amicus curiae memorandum in support of dismissal. *Pls.' Opp'n* at 1.

Before addressing the Defendant's arguments for dismissal of the three counts included in their complaint, the Plaintiffs first reassert their position that "[t]he constant monitoring required by the MDMR Rule is what can only be characterized as a drastic departure from past reporting requirements." *Id.* at 2. The data collected pursuant to the MDMR Rule, they say, "will be uploaded into a digital map interface that then can be queried by any number of 'authorized federal and state administrators,' as well as other 'state or federal entities with confidential data access,' to 'query and visualize trip locations' indiscriminately and apparently for any purpose." *Id.* (citing *Addendum XXIX* § 3.2.3). Indeed, they say, recent reports "suggest that this data has already been provided to students at Maine's public universities studying the fishery, as well as to the U.S. Department of Energy's National Renewable Energy Laboratory as part of its efforts to develop floating wind energy projects in the Gulf of Maine." *Id.* (citing *Pls.' Opp'n*, Attach. 1, *Considerations for Floating Wind Energy Dev. in the Gulf of Me.* at 10 (ECF No. 24-1) (*NREL Rep.*) (describing how "[e]fforts are being

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made to gain more knowledge around commercial fishing activities in federal waters including through a new reporting requirement for lobstering in federal waters.”)).

With this preface, the Plaintiffs turn to the arguments made by Commissioner Keliher in his motion to dismiss.

1. Federal Rule of Civil Procedure 12(b)(1)

a. Count Three: The Maine APA

In response to Commissioner Keliher’s argument that Count Three must be dismissed for lack of subject matter jurisdiction pursuant to the Eleventh Amendment’s bar on federal courts granting relief against state officials for violations of purely state law, the Plaintiffs assert that Commissioner Keliher “cites no authority for [its] proposition” that the MDMR Rule “does not arise under federal law.” *Id.* at 4 (citing *Mot. to Dismiss* at 9). Plaintiffs contend that “[t]he MDMR Rule specifically incorporates the requirements of federal Addendum XXIX,” and “specifies that it will apply to all ‘federally permitted’ lobster license holders regardless of whether or not they are fishing within MDMR’s jurisdiction.” *Id.* (citing 13 C.M.R. 188, ch. 25, § 98). Thus, Plaintiffs contend, their challenge to the MDMR Rule “necessarily and obviously exceeds the scope of a simple challenge to a state action under a purely state regulatory scheme,” because it concerns “the adoption of a federal policy, promulgated under a federal rule, that is aimed solely at *federally* permitted fishing vessels for the purpose of protecting a *federal* fishery.” *Id.* at 4-5 (emphasis in original).

Finally, Plaintiffs remind the Court that “[w]hile the Eleventh Amendment prohibits a party from

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bringing suit against a state in federal court, it does not prohibit a party from bringing suit against a state officer in federal court for prospective declaratory or injunctive relief under federal law.” *Id.* (quoting *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 24 (1st Cir. 2007) (internal citations omitted)).

2. Federal Rule of Civil Procedure 12(b)(6)

a. Count One: The Fourth Amendment

Plaintiffs contend the Court should deny Commissioner Keliher’s motion to dismiss as to Count One because their complaint “properly pleads a violation of the Plaintiffs’ Fourth Amendment rights to be free from unreasonable searches and seizures.” *Id.* at 5 (capitalization altered). The Plaintiffs argue that “viewing the [MDMR] Rule in [its] full context reveals it as both unnecessary to achieve its overarching purpose and as having a scope greatly exceeding that permitted for a constitutional administrative search.” *Id.* at 6.

Plaintiffs first address Commissioner Keliher’s argument that they have a “greatly reduced expectation of privacy when engaging in an industry that is subject to such pervasive regulation.” *Id.* (quoting *Mot. to Dismiss* at 15). To this, they argue that “[w]hile an expectation of privacy may admittedly be reduced in a closely regulated industry, this does not equate to a non-existent expectation of privacy.” *Id.* (citing *United States v. Hamad*, 809 F.3d 898, 904 (7th Cir. 2016)) (emphasis added by Plaintiffs). In addition, they argue their reasonable expectation of privacy is heightened in the present case because the scope of MDMR’s search extends beyond commercial vessels fishing for lobsters in federal waters, “the only

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closely-regulated industry the [MDMR] Rule seeks to govern,” to encompass the tracking of vessels “while they are docked or used for any number of other utterly unregulated purposes.” *Id.*

Turning to the *Burger* test, the Plaintiffs argue that the MDMR Rule is invalid because the “administrative search” the rule authorizes is not necessary to further a substantial government interest. *Id.* at 6-7. While Plaintiffs concede that MDMR has a substantial interest in “regulating the lobster fishery and ensuring its long-term viability,” *Mot. to Dismiss* at 15, they aver that the MDMR Rule fails for lack of necessity to protect the long-term health of the lobster fishery. *Pls.’ Opp’n* at 7. In response to MDMR’s assertion that the one-ping-per-minute rate “is necessary to accurately characterize[e] activity in the fishery, including the locations and density of commercial fishing gear, which ‘is critical to addressing current and future threats to the fishery and ensuring successful management through improved stock assessment,’” *id.* (citing *Mot. to Dismiss* at 16), Plaintiffs insist that “[t]he ASMFC’s own statistics . . . reveal that the lobster fishery currently is not in danger of being overfished.” *Id.* at 7. Plaintiffs characterize MDMR’s description of “future threats” as an “inherently vague allegation” for which MDMR “has made no effort to identify . . . , let alone articulate how its existing data collection efforts . . . are insufficient to address these ‘threats.’” *Id.*

Plaintiffs also assert that the MDMR Rule fails the *Burger* standard for a reasonable search because it is not sufficiently limited in scope. *Id.* It is unclear, Plaintiffs assert, what “current threats” exist that “could justify the near-constant surveillance of Maine

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lobstermen and women that could not be addressed through less intrusive means (such as limiting tracking to vessels fishing for lobsters in federal waters or to the lesser ‘ping rates’ employed by trackers in other fisheries like the scallop fishery).” *Id.* at 8. Acknowledging MDMR’s argument that its rule is necessary because “common sense” supports that a less-intrusive method “would compromise reliability and increase the chances of operator error or intentional evasion,” *Mot. to Dismiss* at 16, the Plaintiffs say this “flies in the face of evidence that Maine lobster fishermen have a history of regulatory compliance.” *Pls.’ Opp’n* at 8.

Relatedly, Plaintiffs argue the “indefinite” “duration of the search” shows that the MDMR Rule “does not serve the same functions as a warrant.” *Id.* at 9 (capitalization altered). “Unlike traditional warrants,” they say, “the scope of the ‘warrant’ authorized by the [MDMR] Rule is almost limitless.” *Id.* Plaintiffs distinguish the MDMR Rule from the cases cited by MDMR on this basis, submitting (1) “the searches undertaken in those cases are best described as ‘spot checks’ narrowly designed to enforce specific regulations, and each search was only approved when the premises searched were actually engaged in the regulated activity,” *id.* at 10 (citing *Burger*, 482 U.S. 691), and (2) the agencies permitted to conduct the search in the cases cited by MDMR were limited to those authorized to regulate the industry itself. *Id.* at 10.

b. Count Two: Equal Protection

Plaintiffs reassert that “questions remain about how and to what extent MDMR will enforce the [MDMR] Rule.” *Id.* at 11. Amendment 3 underlying

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the Addendum allows MDMR and other agencies to use the data collected pursuant to the MDMR Rule for “offshore enforcement” purposes; however, Plaintiffs say, “despite all of the ink spilled in defense of the [MDMR] Rule, MDMR still fails to define what it means by ‘offshore enforcement’ and whether this [two]-word phrase is limited to regulations that MDMR is tasked with enforcing or whether it extends to regulations promulgated by other agencies.” *Id.* “Because the permutations are endless,” Plaintiffs contend, the MDMR Rule is “so standardless as to encourage discriminatory enforcement’ because it lacks articulated standards and ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited.” *Id.* (quoting *Mot. to Dismiss* at 24).

Based on the foregoing, Plaintiffs request that the Court deny Commissioner Keliher’s motion to dismiss as to all three counts in their complaint. *Id.*

E. Commissioner Keliher’s Reply¹⁴

As a preliminary matter, Commissioner Keliher asserts that Plaintiffs’ complaint and opposition to his motion to dismiss “blatantly misquote” the Addendum

¹⁴ Commissioner Keliher informs the Court that his reply incorporates his opposition to the motion for preliminary injunction (ECF No. 16) and “limits [itself] to addressing Plaintiffs’ few new substantive arguments and correcting misstatements presented in their Opposition [to dismissal].” *Def.’s Reply* at 1.

The Court accordingly compared Commissioner Keliher’s reply to the Plaintiffs’ opposition to the motion to dismiss with Commissioner Keliher’s opposition to the motion for preliminary injunction. However, the Court did not find any arguments in Commissioner Keliher’s opposition to injunctive relief that did not also appear in his reply in the motion to dismiss sequence. Thus, the Court confines its restatement of Defendant’s Reply to the assertions raised in that submission.

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and “thus mischaracterize” its purpose and the purpose of the MDMR Rule. *Def.’s Reply.* at 2. He continues to say that the Addendum explains that collection of high-resolution data regarding activities in the American lobster fishery is necessary to respond to various challenges facing the industry, “including, but not limited to, the development of offshore renewable energy and the inevitable imposition on the industry of further whale risk reduction measures.” *Id.* (citing *Addendum XXIX* § 2.1). However, he says, the Addendum and the MDMR Rule “in no way purport to promote the development of offshore renewable energy development or the implementation of whale risk reduction efforts.” *Id.* Commissioner Keliher says, “Plaintiffs take one section of the Addendum out of context to assert that data collected pursuant to the [M]DMR Rule will be accessed ‘indiscriminately and apparently for any purpose,’” and argues this “assertion is squarely contradicted by the Addendum itself.” *Id.* (quoting *Pls.’ Opp’n* at 2) (citing *Addendum XXIX* §§ 1.0, 2.1).

Commissioner Keliher similarly asserts that the NREL Report attached by Plaintiffs to their opposition to the motion to dismiss is “entirely inapposite,” arguing it “has no bearing on Defendant’s Motion to Dismiss,” “was produced by two entities not involved with [the Addendum] or the [M]DMR Rule,” and its “distinct purpose” is to discuss considerations for developing offshore wind energy. *Id.* at 3 (citing *NREL Rep.* at iv, vii). To the extent the NREL Report discusses the Addendum, he avers, it is as an example of “investments in data collection for lobster and other commercial fishing activities [to] begin to close important ocean-use knowledge gaps,” *id.* (citing

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NREL Rep. at 40); this “does not in any way support Plaintiffs’ suggestion that data collected pursuant to the [M]DMR Rule is being shared with ‘students.’” *Id.* (citing *Pls.’ Opp’n* at 2).

1. Federal Rule of Civil Procedure 12(b)(1)

a. Count Three: The Maine APA

Turning to Plaintiffs’ response to the motion to dismiss Count Three for lack of subject matter jurisdiction, Commissioner Keliher argues that “Plaintiffs continue to fail to grapple with the fact that Count Three alleges that Defendant has violated *state law*, Maine’s [APA].” *Id.* at 4 (emphasis in original). Commissioner Keliher argues that “[o]n its face, Count III asks a federal court to order a state agency to comply with state law.”¹⁵ *Id.* Precedent is clear that the Court lacks jurisdiction over this claim, he says, and “Plaintiffs have not cited a single case supporting abrogation here of this principle of black letter law.”¹⁶ *Id.*

2. Federal Rule of Civil Procedure 12(b)(6)

a. Count One: The Fourth Amendment

¹⁵ Commissioner Keliher additionally opines that Plaintiffs’ argument is inconsistent with their characterization of the MDMR Rule as “involve[ing] the adoption of a federal policy, promulgated under a federal rule.” *Def.’s Reply* at 4 (citing *Pls.’ Opp’n* at 4-5).

¹⁶ Commissioner Keliher asserts that Plaintiffs’ citation to cases involving Burford abstention, including *Chico Serv. Station, Inc.*, 633 F.3d 20, are inapposite. *Def.’s Reply* at 4, n.4. Plaintiffs’ citation to *Flores Galarza*, 484 F.3d 1, he says, “also is inapposite because that case dealt with a federal court’s jurisdiction to order relief ‘against a state officer ... *under federal law.*” *Id.* (citing *Flores Galarza*, 484 F.3d at 24) (emphasis added by Defendant).

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Addressing Plaintiffs' response in opposition to his motion to dismiss Count One, Commissioner Keliher argues the Plaintiffs "substantively shift away from the Fourth Amendment theory pleaded in their complaint, to no avail." *Id.* (capitalization altered). He opines that while Plaintiffs' complaint focused on their privacy interests in the location of their lobster traps ("that is, their privacy interests while engaging in commercial lobstering"), their opposition to the motion to dismiss instead focuses on the implications of the tracking requirement when their vessels are being used for purposes other than commercial lobstering. *Id.* at 4-5. This shift, he says, "does not help Plaintiffs, for two reasons": first, in assessing a Rule 12(b)(6) motion, a court must "assume the truth of all well-pleaded facts and indulge all reasonable inferences *that fit the plaintiff's stated theory of liability.*" *Id.* at 5 (quoting *Redondo-Borges v. U.S. Dep't of Hous. & Urban Dev.*, 421 F.3d 1, 5 (1st Cir. 2005) (emphasis added by Defendant). "This Court therefore must assess the plausibility of the theory *pleaded in Plaintiffs' Complaint,*" which is that "the [M]DMR Rule violates the Fourth Amendment because it impinges on Plaintiffs' reasonable expectation of privacy while engaging in commercial lobstering." *Id.* (emphasis added by Defendant).

Second, he says the arguments Plaintiffs advance in their opposition "have failed to plausibly *plead*" that either Plaintiffs specifically, or federally permitted commercial lobstering vessels generally, typically use their licensed lobstering vessels for non-lobstering purposes such that the MDMR Rule raises either "accuracy concerns (when a vessel is used for commercial fishing purposes other than lobstering)" or "non-incidental privacy concerns when a vessel is

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used for non-commercial fishing purposes).” *Id.* (emphasis in original). On the issue of accuracy, Commissioner Keliher says that Plaintiffs have not, for example, pleaded that scallop fishing by commercial lobstering vessels is so prevalent, and that the movement patterns of vessels while scalloping is so indistinguishable from the patterns of vessels while lobstering, that the American lobster fishery data “will be substantially inaccurate.” *Id.* Regarding non-incidental privacy concerns, he contends “it is simply not plausible that grocery runs or a family picnic in a cove would be misinterpreted as lobstering.” *Id.* (citing *Pls.’ Opp’n* at 8). Commissioner Keliher adds that the MDMR adopted the ping-per-minute data collection rate “precisely because it best allows for distinguishing between the distinctive movement pattern of setting and hauling lobster traps and other activities, such as ‘steaming’ (transitioning) and remaining stationary.” *Id.* at 5-6 (citing *Addendum XXIX* at §§ 2.2.1, 2.2.5; 15-16, 36-37).

Commissioner Keliher further contends privacy concerns miss the point, arguing that “Plaintiffs’ newfound emphasis on their purported privacy interests while not engaging in commercial fishing is misplaced because the premises in question—commercial fishing vessels—already may be boarded and inspected *at any time* by government authorities without reasonable suspicion of a violation.” *Id.* at 6 (citing *Mot. to Dismiss* at 15) (emphasis added by Defendant). Commissioner Keliher characterizes the Plaintiffs’ insistence of their right to a heightened expectation of privacy when using their vessels for non-commercial purposes as “simply false.” *Id.*

Responding to Plaintiffs’ argument that active management of the American lobster fishery is

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unnecessary because the fishery “currently is not in danger of being overfished,” *id.* (citing *Pls.’ Opp’n* at 7), Commissioner Keliher says Plaintiffs’ citation in support is a 2020 stock assessment, and “it is axiomatic that the state of a fishery changes over time due to harvesting practices, natural conditions, and anthropogenic environmental impacts, like climate change.” *Id.* In addition, he says, Plaintiffs “are entirely off-base in suggesting that the future imposition of regulations concerning right whales is not a legitimate concern.” *Id.* (citing *Pls.’ Opp’n* at 8).

b. Count Two: Equal Protection

Turning to Count Two, Commissioner Keliher says that although Plaintiffs “speculate about future uses of the location data collected pursuant to the [M]DMR Rule,” they “have not pleaded that the [M]DMR fails to provide affected lobstermen with fair notice of *what the Rule itself requires.*” *Id.* at 6-7 (emphasis in original). The MDMR Rule, he states, “plainly requires installation of tracking devices on certain licensed lobster vessels and prohibits disabling those devices while the vessels are in operation.” *Id.* at 7 (citing *MDMR Rule* §§ (B)-(D)). Thus, Plaintiffs’ “[s]peculation about future uses of the location data collected by the tracking devices is not properly a part of the constitutional vagueness analysis regarding the [M]DMR Rule.” *Id.*

Based on the foregoing, Commissioner Keliher requests that the Court grant his motion and order the dismissal of the Plaintiffs’ complaint.

IV. MOTION TO DISMISS LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1)

“A motion to dismiss an action under Rule 12(b)(1) . . . raises the fundamental question whether the

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federal district court has subject matter jurisdiction over the action before it.” *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 8 n.6 (1st Cir. 2005) (internal citation omitted). “The burden falls on the plaintiff to clearly allege facts demonstrating that he is a proper party to invoke federal jurisdiction.” *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1281 (1st Cir. 1996) (citation and internal quotation marks omitted); see also *Me. Council of the Alt. Salmon Fed’n v. Nat’l Marine Fisheries Serv. of the Nat’l Oceanic Atmospheric Admin.*, 203 F. Supp. 3d 58, 75 (D. Me. 2016) (“The plaintiff, as the party asserting subject matter jurisdiction, has the burden of demonstrating its existence”); *Fábrica de Muebles J.J. Álvarez, Incorporado v. Inversiones Mendoza, Inc.*, 682 F.3d 26, 33-34 (1st Cir. 2012) (“The party asserting jurisdiction has the burden of demonstrating the existence of federal jurisdiction”). In ruling on a Rule 12(b)(1) motion, the Court “must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff.” *Aversa v. United States*, 99 F.3d 1200, 1209-10 (1st Cir. 1996). “If the Court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” FED. R. CIV. P. 12(h)(3).

B. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) requires dismissal of a complaint that “fail[s] to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). To state a claim, a complaint must contain, at minimum, “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). In other words, a complaint must contain “sufficient factual matter, accepted as true, to

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‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). Plausible means “something more than merely possible’ or ‘merely consistent with a defendant’s liability.” *Germanowski v. Harris*, 854 F.3d 68, 71-72 (1st Cir. 2017) (internal citation omitted) (quoting *Schatz*, 669 F.3d at 55); *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 11 (1st Cir. 2011) (quoting *Iqbal*, 556 U.S. at 678). Evaluating the plausibility of a claim is a “‘context-specific’ job that compels [judges] ‘to draw on’ [their] ‘judicial experience and common sense.’” *Schatz*, 669 F.3d at 55 (quoting *Iqbal*, 556 U.S. at 679).

This is a “two-step analysis.” *Cardigan Mountain Sch. v. N.H. Ins. Co.*, 787 F.3d 82, 84 (1st Cir. 2015). “First, the court must distinguish ‘the complaint’s factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).” *García-Catalán*, 734 F.3d at 103 (quoting *Morales-Cruz*, 676 F.3d at 224; *see also* *Schatz*, 669 F.3d at 55 (stating that a court may “isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements”). “Second, the court must determine whether the factual allegations are sufficient to support ‘the reasonable inference that the defendant is liable for the misconduct alleged.’” *García-Catalán*, 734 F.3d at 103 (quoting *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011)).

V. MOTION TO DISMISS DISCUSSION

A. Federal Rule of Civil Procedure 12(b)(1)

1. Count Three: The Maine APA

In its entirety, the Eleventh Amendment to the U.S. Constitution states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court “determined that federal jurisdiction over suits against unconsenting States ‘was not contemplated by the Constitution when establishing the judicial power of the United States.’ In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1983) (internal citations omitted) (quoting *Hans*, 134 U.S. at 1); *see also Alden v. Maine*, 527 U.S. 706, 728-29 (1999) (“The Eleventh Amendment confirmed, rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated not only by the text of the Amendment alone but by fundamental postulates implicit in constitutional design”). The Supreme Court’s “decisions [] establish that ‘an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.’” *Pennhurst*, 465 U.S. at 100 (quoting *Emps. v. Missouri Pub. Health Dep’t*, 411 U.S. 279, 280 (1973)). “This jurisdictional bar applies regardless of the nature of the relief sought.” *Id.*

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Given the “vital role of the doctrine of sovereign immunity in our federal system,” the Supreme Court has “required an unequivocal expression of congressional intent to ‘overturn the constitutionally guaranteed immunity of the several States.’” *Id.* at 99 (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979)). Otherwise, “a State may at its pleasure waive its sovereign immunity by consenting to suit.” *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

The Maine Department of Marine Resources is not named in the complaint, but Commissioner Keliher is sued in his official capacity as Commissioner of the department. “The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” *Id.* at 101 (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam)); *see also Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978) (official capacity suits are “another way of pleading an action against an entity of which an officer is an agent”).

“The doctrine of *Ex parte Young*, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity.” *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (discussing *Ex parte Young*, 209 U.S. 123 (1908)). But this “exception is narrow.” *Id.* (citing *Green v. Mansour*, 474 U.S. 64, 73 (1985); *Cory v. White*, 457 U.S. 85, 90-91 (1982)).

The Supreme Court explained, “[t]he theory of [*Ex parte Young*] was that an unconstitutional enactment is ‘void’ and therefore does not ‘impart to [the officer]

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any immunity from responsibility to the supreme authority of the United States.” *Pennhurst*, 465 U.S. at 102 (third alteration in original) (quoting *Ex parte Young*, 209 U.S. at 160). The *Pennhurst* Court continued, “[s]ince the State could not authorize the action, the officer was ‘stripped of his official or representative character and [was] subjected to the consequences of his official conduct’” in *Ex parte Young*. *Id.* (quoting *Ex parte Young*, 209 U.S. at 160).

Following the reasoning in *Ex parte Young*, the Supreme Court held in *Edelman v. Jordan*, 415 U.S. 651 (1974) “that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official’s future conduct.” *Pennhurst*, 465 U.S. at 103. This is the doctrine pursuant to which the Plaintiffs bring Count Three.

In *Pennhurst*, the Supreme Court was faced with “the question [of] whether a federal court may award injunctive relief against state officials on the basis of state law.” 465 U.S. at 91. It answered no. The *Pennhurst* Court wrote:

A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are

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inapplicable in a suit against state officials on the basis of state law.

Id. at 106. The Supreme Court continued, “*Larson* thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it.” *Pennhurst*, 465 U.S. at 113 (citing *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 690, 695 (1949)).

On this preliminary point, the parties disagree as to whether the Plaintiffs seek relief under state or federal law. Commissioner Keliher asserts that Plaintiffs seek relief for a violation of state law, and the Court must dismiss Count Three pursuant to Federal Rule of Civil Procedure 12(b)(1) because the Eleventh Amendment to the U.S. Constitution grants sovereign immunity to the MDMR as a state entity. *Mot. to Dismiss* at 9-10. The Eleventh Amendment, Commissioner Keliher says, “denies federal courts jurisdiction to award relief against state officials based upon violations of state law.” *Id.* at 9 (citing *Guillemard-Ginorio*, 585 F.3d at 529). When a plaintiff asks a federal court to compel state officers to comply with state law, Commissioner Keliher says that “the only appropriate response is to dismiss the state law claims . . . even in a suit also bringing claims grounded in federal law.” *Id.* (citing *Cuesnongle*, 835 F.2d at 1497) (“If the plaintiff wishes the federal court to address the federal claims, bifurcation will be the only option.”); *Pennhurst*, 465 U.S. at 121 (“neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment”).

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Plaintiffs, for their part, respond that their challenge to the MDMR Rule “necessarily and obviously exceeds the scope of a simple challenge to a state action under a purely state regulatory scheme because it involves the adoption of a federal policy, promulgated under a federal rule, that is aimed solely at *federally* permitted fishing vessels for the purpose of protecting a *federal* fishery.” *Pls.’ Opp’n* at 4-5 (emphasis in original). Commissioner Keliher replies that “Plaintiffs continue to fail to grapple with the fact that Count [Three] alleges that Defendant has violated *state law*, Maine’s [APA].” *Def.’s Reply* at 4 (emphasis in original).

The Court agrees with Commissioner Keliher. Although a court considering a Rule 12(b)(1) motion “must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff,” *Aversa*, 99 F.3d at 1209-10, the Court sees it as decisive that Plaintiffs themselves, in their Complaint, classify Count Three as a “violation of the Maine Administrative Procedure Act (5 M.R.S. 8058).” *Compl.* at 26. The Maine APA is a Maine state law. *Larson* and *Pennhurst* thus make clear that Commissioner Keliher, in his official capacity, insofar as the Plaintiffs are suing for injunctive relief pursuant to a challenge to state law, has sovereign immunity; thus, Commissioner Keliher cannot be sued absent the state consenting to suit or Congress unequivocally expressing their congressional intent to abrogate the State’s immunity.

14 M.R.S. § 8818 states “[n]othing in this chapter or any other provision of state law shall be construed to waive the rights and protections of the State under the Eleventh Amendment to the United States

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Constitution, except where such waiver is explicitly stated by law.” In the case at bar, the Plaintiffs do “not direct us to any law to the contrary, nor do they argue that the [State] has waived its immunity by any other means.” *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 34 (1st Cir. 2006). The Plaintiffs also have not provided any evidence of an unequivocal congressional intent to overturn the state of Maine’s immunity.

Accordingly, the Court concludes Count Three is barred by state sovereign immunity and the Court therefore lacks jurisdiction to enjoin Commissioner Keliher acting in his official capacity based on an alleged misinterpretation of *state law*.¹⁷ Thus, the

¹⁷ The Court is aware of the United States Supreme Court’s recent holding in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (June 28, 2024), which similarly concerned a rule promulgated pursuant to the MSA. *See Loper Bright*, 144 S. Ct. at 2254-57. Although the parties do not raise *Loper Bright* in their motions to this Court (understandably, as the Supreme Court published its decision after parties submitted the two present motions) and also chose to not amend their motions to incorporate *Loper Bright*, the Court nonetheless considered whether *Loper Bright* may be decisive in this case, as the Court is, of course, bound by the holdings of the United States Supreme Court.

In *Loper Bright*, Atlantic herring fishermen argued that a rule promulgated by the National Marine Fisheries Service (NMFS) pursuant to the MSA unconstitutionally exceeded the bounds of what the MSA empowers the NMFS to do. *Id.* at 2255-56. The District Court granted summary judgment to the Government, concluding that the MSA authorized the Rule, but noting that “even if these petitioners’ arguments were not enough to raise an ambiguity in the statutory text, deference to the agency’s interpretation would be warranted under *Chevron*,” *id.* at 2256 (quoting *Loper Bright Enters. v. Raimondo*, 544 F. Supp. 3d 82, 107 (D.D.C. 2021) (citing *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984))); the Court

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Court grants the Defendant's motion to dismiss Count Three.

B. Federal Rule of Civil Procedure 12(b)(6)

The Court begins with a preliminary statement on the scope of the record. “[A] motion to dismiss under Rule 12(b)(6) generally provides no occasion upon which to consider documents other than the complaint.” *Doe v. Pawtucket Sch. Dep’t*, 969 F.3d 1, 8 (1st Cir. 2020); *see also James D. Julia, Inc. v. Dan Murphy Auctions, LLC*, No. 1:21-cv-00025-JAW, 2021 U.S. Dist. LEXIS 115124, at *21 (D. Me. June 21, 2021) (“Ordinarily, a court ruling on a motion to dismiss may only consider whether the factual allegations within the four corners of the plaintiff’s complaint state a plausible claim for relief”). Here, the Plaintiffs attach the Addendum as an exhibit to the complaint, *Addendum XXIX*, and refer to, but do not

of Appeals for the D.C. Circuit affirmed. *Loper Bright Enters. v. Raimondo*, 45 F.4th 359, 370 (D.C. Cir. 2022). The Supreme Court reversed, overturning the doctrine of *Chevron* deference. *Loper Bright*, 144 S. Ct. at 2273 (“*Chevron* is overruled”).

This Court concludes that *Loper Bright* is distinguishable from the claims the parties raised in their motions, and it does not rely on *Loper Bright* in ruling on Commissioner Keliher’s motion to dismiss. *Loper Bright* involved a question of statutory interpretation; more specifically, whether an agency’s rulemaking was lawful, pursuant to the agency’s understanding of the authority granted to it by the Magnuson-Stevens Act – a federal law. While Plaintiffs in the present case argue that the MDMR Rule violates the Maine APA for being both arbitrary and capricious and contrary to law, the Maine APA is a state law, not a federal one. Because the Court concludes that it does not have subject matter jurisdiction over Count Three pursuant to the Eleventh Amendment, it does need to (and, in fact, cannot) consider whether MDMR’s interpretation of their authority in promulgating the MDMR Rule was unlawful in violation of the Maine APA.

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attach, the MDMR Rule. *See* Compl. Commissioner Keliher did, however, attach the MDMR Rule to his motion to dismiss. *MDMR Rule*. The parties have submitted arguments about the language of the Addendum and the MDMR Rule in favor of and against the pending motion to dismiss, and the Court has accepted the authenticity of those documents for purposes of ruling on the motion. *See Beddall v. State St. Bank & Tr. Co.*, 137 F.3d 12, 17 (1st Cir. 1998) (when, as now, “a complaint’s factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)”).

The claims currently before the Court turn on the terms of the Addendum and the MDMR; thus, the Court considers the Addendum attached by the Plaintiffs and the MDMR Rule attached by the Defendant, both of which the parties agree are authentic without challenge.

1. Count One: The Fourth Amendment¹⁸

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers,

¹⁸ Any analysis of whether Government conduct violates the Fourth Amendment must first determine that the conduct at issue is a search or seizure, and thus within the bounds of Fourth Amendment protections. It is only after determining that conduct constitutes a search or seizure that the next question is considered: is the search or seizure reasonable? *See, e.g., Terry v. Ohio*, 392 U.S. 1, 26, 27-28 (1968) (first finding an officer’s “brief, though far from inconsiderable intrusion” in patting down two men to be a search, and then finding the officer’s search to be reasonable where he reasonably feared for his safety); *Torres v. Madrid*, 592 U.S. 306, 309, 325 (2012) (finding officers’

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and effects, against unreasonable searches and seizures” and provides that “no Warrants shall issue, but upon probable cause.” U.S. CONST. amend. IV. The Supreme Court has repeatedly held that “searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Grant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). This rule “applies to commercial premises as well as to homes.” *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978).

The Supreme Court has also held that “[s]earch regimes where no warrant is ever required may be reasonable where ‘special needs . . . make the warrant and probable-cause requirement impracticable,’” *Patel*, 576 U.S. at 420 (citing *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989)) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)), and “where the ‘primary purpose’ of the searches is [d]istinguishable from the general interest in crime control.” *Id.* (citing *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)). The Supreme Court treats this kind of search as an “administrative search.” *See id.*; *Camara v. Municipal Court of City and Cnty. of San Francisco*,

application of force to the defendant’s body with the intent to restrain to constitute a seizure; remanding the question of whether the seizure was unreasonable in violation of the Fourth Amendment).

As Commissioner Keliher explicitly conceded in a footnote that the electronic tracking requirements in the MDMR Rule in fact constitutes a search, the Court proceeds as the parties do, and begins with the analysis of whether the search is reasonable. *See Mot. to Dismiss* at 12 n.16. Commissioner Keliher confirmed this concession at oral argument.

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387 U.S. 523, 534 (1967). “Absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.” *Patel*, 576 U.S. at 420.

Here, the MDMR Rule’s electronic tracking device requirement serves a “special need” other than conducting criminal investigations, *see Patel*, 576 U.S. at 420, and the parties accordingly agree it is an administrative search. *Mot. to Dismiss* at 11 (“the [MDMR] Rule unquestionably meets the requirements for a lawful ‘administrative search’”); *Compl.* ¶ 85 (arguing that “neither the ASMC nor MDMR have articulated the limited scope, relevant purpose, and specificity required to otherwise obtain this satellite tracking data through a constitutional administrative search”). The parties also seem to agree that the lobster fishery is a “closely regulated” industry.¹⁹ *See Mot. to Dismiss* at 13-15; *Pls.’ Opp’n*.

¹⁹ In their response in opposition to the motion to dismiss, Plaintiffs say:

At bottom, MDMR argues that, under . . . *Patel* . . . and *New York v. Burger* . . . , its Rule is a valid administrative search of a closely regulated industry because the Rule is necessary to further a substantial government interest and is sufficiently limited in scope. . . . Contrary to MDMR’s argument, however, viewing the Rule in full context reveals it as both unnecessary to achieve its overarching purpose and as having a scope greatly exceeding that permitted for a constitutional administrative search.”

Pls.’ Opp’n at 5-6. Plaintiffs then proceed to analyze the MDMR Rule under the *Burger* test. *Id.* at 5-11.

The Court reads Plaintiffs’ assertion as rejecting Commissioner Keliher’s conclusion that the MDMR Rule’s electronic tracking device requirement is a lawful administrative

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at 5-6. The Court thus proceeds to analyze the MDMR Rule from this premise.

The Supreme Court has adopted a “more relaxed standard” for “closely regulated” industries. *Patel*, 576 U.S. at 424. The Supreme Court held that administrative searches of closely regulated industries do not violate the Fourth Amendment so long as (1) there is a substantial government interest behind the regulatory scheme pursuant to which the search is made; (2) the search is necessary to furthering that interest; and (3) the regulatory scheme “perform[s] the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” *Id.* (citing *Burger*, 482 U.S. at 702-03).

The Court now proceeds to analyze the MDMR using the *Burger* test. *See id.*; *Burger*, 482 U.S. at 702-03.

a. Substantial Government Interest

The Plaintiffs do not dispute Commissioner Keliher’s assertion that MDMR has a substantial interest in regulating the lobster fishery and ensuring its long-term viability. *Pls.’ Opp’n* at 6-7. They say, “MDMR argues that its interest in ‘regulating the

search; however, Plaintiffs do not reject Commissioner Keliher’s conclusion that the MDMR Rule should be analyzed pursuant to the Fourth Amendment test for “closely regulated” industries. The Court reads Plaintiffs’ analysis of the MDMR Rule pursuant to the *Burger* test as further indication that Plaintiffs concede the MDMR Rule should be analyzed as a closely regulated industry. The Plaintiffs confirmed their understanding of the lobster fishery as a “closely regulated” industry at oral argument.

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lobster fishery and ensuring its long-term viability’ supports the scope of the Rule While there is no dispute that this interest is substantial—the long-term health of the fishery is essential to the livelihoods of Maine’s lobster fleet—the real issue is whether the Rule as applied is indeed necessary to protect the long-term health of the fishery.” *Id.* at 7.

The Court proceeds to the second prong of the *Burger* test.

b. Necessary to Further a Substantial Government Interest

As noted, the Plaintiffs disagree with Commissioner Keliher that the MDMR Rule is necessary to furthering a substantial government interest. *Id.* Plaintiffs say that “the lobster fishery currently is not in danger of being overfished,” and thus that the “future threats” MDMR warns of are “inherently vague.” *Id.* Beyond the “alleged dangers to the North Atlantic right whale population,” which Plaintiffs say Congress has already addressed through the Consolidated Appropriations Act, *id.* at 8, “MDMR has made no effort to identify these ‘future harms,’ let alone articulate how its existing data collection efforts . . . are insufficient to address these ‘threats.’” *Id.* at 7 (citing *Compl.* ¶ 55).

In determining the Rule’s necessity, it is helpful to return to the text of the MDMR Rule and the Addendum on which it is based. As Plaintiffs explain in their complaint, once the ASMFC drafts an FMP containing regulations and enforcement guidelines, it specifies the requirements for state compliance. *Compl.* ¶ 6. The states then draft their own rules to meet these requirements; in Maine, the rules are drafted by the MDMR. *Id.* If a member state fails to

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implement an essential element of an ASMFC plan for a particular fishery, the Secretary of Commerce has the authority to declare a moratorium on that fishery in that state's waters. *Keliher Decl.* ¶ 6; *Compl.* ¶ 6 (citing 16 U.S.C. § 5106).

While the MDMR Rule does not include a statement of the problem the rule sets out to address, the Addendum does. *See Addendum XXIX* at 1-5. Because the MDMR Rule is legally required to be consistent with the Addendum, the Court looks to the text of the Addendum to determine whether the MDMR Rule is necessary to further the substantial government interest articulated in the Addendum. The Addendum begins with Section 2.1 (Statement of the Problem) which discusses the four problems the FMP seeks to address. *Addendum XXIX* at 1-2. Section 2.1 begins:

To date, the majority of spatial analyses of lobster . . . fishery data have been constrained to NOAA statistical areas and state management areas, hindering the ability to quantify effort in specific regions or identify important transmit routes and fishing grounds. The application of electronic vessel tracking to this fishery could significantly improve the information available to fishery managers and stock assessment scientists.

Id. Section 2.1 goes on to identify “a number of challenges the fishery is currently facing [that] pose a critical need for electronic tracking data in the offshore fishery”:

1. The stock assessment is currently limited by the coarse spatial scale of available harvest data for American lobster. NOAA Fisheries statistical areas and latitude/longitude coordinates are

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collected on the NOAA Fisheries Greater Atlantic Regional Fisheries Office (GARFO) Vessel Trip Report (VTR)[;] however, the collected spatial data represent the location of where the majority of the fishing effort occurred. The nature of the coarse spatial data is insufficient for management and scientific purposes. Though harvester reporting at the 10-minute square level was adopted for federally-permitted lobster vessels reporting to the states and the federal VTR continued to collect latitude and longitude data for each trip, the precision of spatial information is not consistent across federal permit holders. This finer scale does not provide the precision to accurately apportion effort within the stock units.

2. Due to interactions between protected marine resources and the lobster ... fisher[y], the fisher[y] will be required to implement significant risk reduction efforts under the . . . Take Reduction Plan. These risk reduction efforts are based on models that estimate the location of vertical buoy lines using effort data of a similarly coarse resolution.
3. Recent executive orders have prioritized the development of offshore renewable energy and the conservation of US waters. The development of emerging ocean uses such as wind energy, aquaculture, and marine protected areas may all create marine spatial planning challenges for the lobster ... fisher[y].
4. The large geographic footprint and low density of lobster gear in the offshore federal management area makes it difficult to locate gear for

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compliance checks, reducing the efficiency and efficacy of offshore enforcement efforts.

Id. at 2. “Each of these issues,” Section 2.1 continues, “pose an acute need for high-resolution data on where and when fishery effort in the federal fleet occurs. Electronic tracking requirements in the federal fishery would fill this information gap and support fishery managers in addressing the aforementioned challenges.” *Id.*

Regarding the issue of stock assessment, enumerated at § 2.1(1), the Addendum proceeds to explain that “[a] complicating factor in the management of lobster is that the boundaries of the [Lobster Conservation Management Areas] do not align with the biological boundaries of the stocks ([Gulf of Maine/Georges Bank v. Southern New England]).” *Id.* at 3. This is particularly problematic in LCMAS 2 and 3 which span both stocks, the Addendum continues. *Id.* “To date,” the Addendum says, “the stock assessment has only been able to analyze stock composition data at the spatial resolution of the NOAA statistical area.” *Id.* This is because not all lobster permit holders report at a more granular level than the NOAA statistical area; for each trip, some provide a single latitude and longitude point meant to represent where the majority of fishing occurred, some provide 10-minute squares fished, and others provide only the statistical area fished. *Id.* The Addendum explains,

This creates challenges for the assessment because some parameters in the stock assessment model vary at a finer spatial scale than statistical area Improved spatial resolution of total harvest data from vessel

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tracking will improve size composition data used in the stock assessment models to improve the accuracy of exploitation and reference abundance estimates.

Id. at 3-4.

As to § 2.1(2), the Addendum says that one of its aims is to comply with the goals of the Marine Mammal Protection Act, the Endangered Species Act, and the Take Reduction Plan. *Id.* at 4. The Take Reduction Plan, which sets out to reduce the risks to endangered North Atlantic right whales and other large whales associated with the presence of fishing gear in waters where these animals occur, includes a significant reduction in the number of vertical buoy lines in the fishery in order to reduce right whale encounters with such buoy lines, weak-link rope requirements to reduce mortalities and serious injuries when entanglements do occur, and changes to seasonal restricted areas closed to pot/trap gear that use stationary vertical buoy lines. *Id.* These risk reduction approaches in the Take Reduction Plan, the Addendum explains, “are informed by the co-occurrence model, which pairs information regarding the distribution of whales and commercial fishing gear to predict areas where whales may be prone to entanglement.” *Id.* The Addendum asserts that “[e]lectronic vessel tracking data would significantly improve the models used to assess the location of vertical lines in the fishery and their associated risk to right whales in the [Take Reduction Plan].” *Id.* The Addendum describes the need as “critical” to “gather and provide updated and enhanced spatial effort data to improve the associated risk reduction models”

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ahead of the timeline mandated by the May 2021 Biological Opinion's Conservation Framework.²⁰ *Id.*

On § 2.1(3), the Addendum says that “[i]t is critically important to record the footprint of the U.S. lobster fishery as spatial allocation discussions occur as a result of emerging ocean uses such as aquaculture, marine protected areas, and offshore energy development.” *Id.* The Addendum gives the example of the New England Fishery Management Council's (NEFMC) Omnibus Deep-Sea Coral Amendment, which looked to provide protection to corals in the northwest Atlantic Ocean through the creation of discrete regions and/or broad depth zones. *Id.* When NEFMC “took action” on the amendment in 2016, it asked the Commission to provide information on the magnitude of lobster catch in specific regions in order to understand potential economic impacts. *Id.* At the time, the Addendum explains, the lobster FMPs required harvesters to report landings via NOAA statistical areas, regions much larger than those being considered for coral protection. *Id.* at 4-5. The spatial resolution of catch and effort data for the lobster fishery “proved too coarse; without fine scale spatial information, impacts to the lobster . . . fisher[y] had to be estimated by piecing together information from harvester reports, industry surveys, and fishermen interviews.” *Id.* at 5. The Addendum says that similar challenges occurred when the Northeast Canyons and Seamounts Marine National Monument

²⁰ The Addendum cites the Biological Opinion issued on May 27, 2021, which “outlines a Conservation Framework that intends to reduce mortality and serious injury to North Atlantic Right Whales by 95% over ten years. Within this Framework, additional risk reductions could be required in the US lobster fishery starting in 2025.” *Addendum XXIX* at 4.

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was established in 2016, and that “it is expected that these challenges will continue given increased activity surrounding offshore wind, aquaculture, and oil and gas exploration.” *Id.* The Addendum adds that “documentation of the US lobster fishery footprint” is also essential for compliance with recent executive action taken towards addressing climate change. *Id.*

On § 2.1(4), the Addendum says that a “potential benefit” of collecting electronic vessel tracking data is the ability to improve enforcement in the offshore area, as “[i]t has long been recognized that enforcement efforts in the offshore federal lobster fishery need to be improved.” *Id.* The Addendum says that enforcement personnel have consistently noted that having the ability to differentiate when a boat is steaming versus hauling is critical to efforts to inspect gear and identify when lobstermen are using illegal gear. *Id.* Once a fishing location can be identified using vessel tracking data, the Addendum says, enforcement personnel would be able to go to that location to inspect gear for appropriate markings, buoys, escape vents, and ghost panels. *Id.* “Given finite enforcement resources, information on distinct fishing locations would improve the efficiency and capability of offshore enforcement efforts.” *Id.*

The Addendum continues to state that “[f]ederal lobster . . . vessels issued commercial trap gear permits are required to install an approved electronic tracking device to collect and transmit spatial data in order to participate in the trap gear fishery.” *Id.* It continues to say that the installation and activation of an approved device must happen prior to beginning a lobster trip with trap gear, and the device must then remain on board the vessel and powered at all times when the vessel is in the water, “unless the device is

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authorized to power down by the principal port state.” *Id.* at 5-6. The Addendum then proceeds to discuss exceptions, which the Court addresses below.

In *Burger*, the Supreme Court explained that warrantless inspections are permitted only as “necessary to further [the] regulatory scheme.” *Burger*, 482 U.S. at 702 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1980)). In *Dewey*, the Court deemed warrantless inspections “necessary to further [the] regulatory scheme” when it found that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to impending inspection, thus frustrating the Mine Safety and Health Act’s purposes of detecting and deterring safety and health violations. *Dewey*, 452 U.S. at 603. And in *Burger* itself, the Court found the second prong satisfied upon concluding that “regulation of the vehicle-dismantling industry reasonably serves the State’s substantial interest in eradicating automobile theft.” *Burger*, 482 U.S. at 709.

The *Burger* Court applied a standard akin to rational basis review to analyze this second prong, saying that, because it is well established that vehicle theft can be effectively addressed by controlling the receiver of, or market in, stolen property, “the State rationally may believe that it will reduce car theft by regulations that prevent automobile junkyards from becoming markets for stolen vehicles and that help trace the origin and detention of vehicle parts.” *Id.* The First Circuit took a similar approach in *Rivera-Corraliza v. Puig-Morales*, 794 F.3d 208, 220 (1st Cir. 2015), finding the second prong of the *Burger* test satisfied when “Plaintiffs . . . do not say how reasonable officials . . . would have reasonably thought that warrantless inspections do not advance the just-

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described state interest.” The *Rivera-Corraliza* Court concluded that the second prong was satisfied by “administrative searches that advance this [substantial government] interest.” *Id.* at 216-17.

Applying these precedents to the present case, the Court concludes that the electronic tracker requirement articulated in the MDMR Rule and the Addendum on which it is based are “necessary” to advance the long-term health and stability of the Maine lobster fishery. It agrees with Commissioner Keliher that the Addendum clearly outlines four reasons why it, and the MDMR Rule which adopts it, are necessary means to protect its substantial interest in the lobster fishery. *Mot. to Dismiss* at 4-5. The ALMB wrote and implemented the Addendum to address four “challenges the fishery is currently facing [that] pose a critical need for electronic tracking data.” *Addendum XXIX* § 2.1. First, the ALMB explained that currently available data is insufficiently detailed for management and scientific purposes, including stock assessments. *Id.* §§ 2.1, 2.2.2. Second, the ALMB noted that the current data’s limitations make it difficult to contribute valuable information about commercial lobster fishing to the NMFS’s whale reduction efforts pursuant to the Take Reduction Plan. *Id.* §§ 2.1, 2.2.3. Third, the ALMB explained that better data will improve assessment of the potential effects on the lobster fishery of competing uses, including aquaculture, creation of new marine protected areas, offshore wind energy development, and offshore oil and gas exploration. *Id.* §§ 2.1, 2.2.4. The ALMB noted that the lack of sufficiently detailed fishery activity data currently hinders analysis of the potential effects of proposed projects on the lobster fishery. *Id.* Fourth, the Addendum says that better

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fishery activity data will improve the efficiency and effectiveness of limited enforcement resources in federal waters, with their “large geographic footprint and low density of lobster gear,” thus conserving the lobster resource and ensuring the ongoing viability of the commercial fishery. *Mot. to Dismiss* at 5 (quoting *Addendum XXIX* § § 2.1, 2.2.5).

Plaintiffs have failed to plead plausible facts sufficient for the Court to conclude the MDMR Rule is unnecessary to respond to these regulatory needs as Supreme Court and First Circuit precedent requires.

The Court is not persuaded this bar is met by Plaintiffs’ argument that the “future threats” the MDMR Rule seeks to address are “inherently vague” and that the MDMR “has made no effort to identify . . . , let alone articulate how its existing data collection efforts . . . are insufficient to address these ‘threats.’” *See Pls.’ Opp’n* at 7. The Addendum, with which the MDMR Rule is legally required to comply, addresses each of these concerns in detail, as discussed above. *See Addendum XXIX*.

Having found the second prong of the *Burger* test satisfied, the Court continues to prong three.

c. Functions as Warrant

The third prong of the *Burger* test for an administrative search of a closely regulated industry is that the challenged regulation must “perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” *Burger*, 482 U.S. at 702-03; *Rivera-Corraliza*, 794 F.3d at 216-17. To satisfy this first function, the *Burger* Court explained that “the

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statute must be ‘sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.’” *Burger*, 482 U.S. at 703 (quoting *Dewey*, 452 U.S. at 600). As to the second function, “in defining how a statute limits the discretion of the inspectors . . . it must be ‘carefully limited in time, place, and scope.’” *Id.* (citing *United States v. Biswell*, 406 U.S. 311, 315 (1987)).

Both the Plaintiffs and the Defendant treat these two functions together in their respective motion and responsive filings; thus, the Court follows their approach. The Plaintiffs on this point essentially argue that the MDMR Rule fails because it is not sufficiently limited. *Pls.’ Opp’n* at 7. Plaintiffs question why the Government could not have limited tracking to vessels fishing for lobster in federal waters or adopted “the lesser ‘ping rates’ employed by trackers in other industries like the scallop fishery.” *Id.* at 8. The MDMR Rule, they say, “requires constant surveillance of vessels while they are fishing for other species, or even when they are not fishing at all”; the “indefinite . . . duration of the search” shows that the MDMR Rule “does not serve the same functions as a warrant.” *Id.* at 8-9 (capitalization altered).

Commissioner Keliher, in contrast, avers that the MDMR Rule “clearly puts covered lobstermen on notice that data regarding the location of their fishing vessels is being collected per the Rule’s terms.” *Mot. to Dismiss* at 16-17 (citing *Tart*, 949 F.2d at 498 (finding adequate notice where the regulation informed commercial fishermen “that routine documentation checks might occur at any time, particularly when

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fishing in Commonwealth coastal waters or landing raw fish at Commonwealth ports”).

Commissioner Keliher also argues that the MDMR Rule functions as a warrant because it “properly limits government discretion.” *Id.* at 17. He argues that the MDMR Rule is limited, first, because it “track[s] only location data of licensed commercial fishing vessels.” *Id.* Although he acknowledges that the MDMR Rule requires vessel location data to be collected whenever a vessel is in operation, he argues that the rule still complies with *Burger* because its collection of location data is “minimally intrusive in the context of the ‘entire regulatory scheme applicable to the commercial fishing industry,’” *id.* at 19 (citing *Tart*, 949 F.2d at 499), and is particularly “less intrusive than the suspicionless boarding and search of a vessel, which is already authorized under state and federal law.” *Id.* (citing 16 U.S.C. §§ 5101-5108; 50 C.F.R. Part 697; 46 C.F.R. ch. 1; 12-619 M.R.S.; 13-188 C.M.R. ch. 25; 12 M.R.S. § 6306(1)). In addition, he says, timing restrictions on the MDMR Rule’s electronic data collection would not be feasible because “commercial lobstering does not follow regular business hours” and timing restrictions would thus “seriously undermine the reliability and administrability of the entire data collection program.” *Id.* (citing *Ponce-Aldona*, 579 F.3d at 1226).

Commissioner Keliher also avers that the MDMR Rule functions as a warrant because it takes steps to limit the collection of data. *See id.* at 6-7. First, the Particle TrackerOne collects the position of the vessel once per minute while the vessel is moving, but only once every six hours when the vessel is moored or docked. *Id.* at 6 (citing *Vessel Tracking Requirements* at 1). Second, although the MDMR Rule makes it

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generally unlawful for license holders to fish for lobster without an installed and operating tracking device on their vessel, the Rule enumerates specific exceptions.²¹ *Id.* at 6-7 (citing *MDMR Rule* § (C)).

In response to Plaintiffs' argument that the MDMR Rule does not take sufficient care to protect the location data it collects, Commissioner Keliher explains that vessel location data is transmitted to the ACCSP which "has protected confidential information relating to fisheries—including self-reported Vessel Trip Report data—for years using the same electronic transmittal systems (approved by NMFS) and SAFIS database, as described in Addendum XXIX." *Id.* at 7 (citing *Addendum XXIX* § 3.2.3). Further, he says, "the vessel location data is 'designated as confidential through Maine law and regulation,'" *id.* (quoting *Vessel Tracking Requirements* at 2); "Maine law requires that fisheries data be kept confidential and not be disclosed in a manner that permits identification of any person or vessel." *Id.* (citing 12 M.R.S. § 6173). Commissioner Keliher avers that MDMR's own regulations also "require that publicly released data do not identify individual vessels or license holders." *Id.* (citing 13-188 C.M.R. ch. 5).

²¹ As discussed above, Mr. Keliher notes that the MDMR Rule Section (C) enumerates the following exceptions: (1) the license holder is not required to keep the tracker externally powered (plugged in) when the vessel is moored or docked; (2) the device may be inoperative when the vessel is removed from coastal waters for an extended period of time; (3) the device may be inoperative for the purpose of being repaired or replaced; and (4) if the device fails and becomes inoperable, the license holder may continue fishing with approval from MDMR while the situation is addressed. *Mot. to Dismiss* at 6-7 (citing *MDMR Rule* § (C)).

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The Court is persuaded by Commissioner Keliher and the ASMFC's arguments and finds the MDMR Rule complies with the third prong of the *Burger* test. First, the Court concurs with Commissioner Keliher that MDMR Rule "clearly puts covered lobstermen on notice that data regarding the location of their fishing vessels is being collected per the Rule's terms." *Mot. to Dismiss* at 16-17. When the MDMR sent Particle TrackerOne devices to federally licensed lobstermen, it included in these mailings a document entitled Federal Permit Holder Vessel Tracking Requirements, which Plaintiffs attached to their complaint, that clearly inform licensees of what the Addendum requires and that these requirements apply to them because of their license. *See Fed. Permit Holder Vessel Tracking Requirements*. The mailing includes information on the kind of data the tracker will collect, who will pay for the tracking device and the data program (the latter, for the first three years), why ASMFC established the tracker requirement, whether the collected data will be kept confidential, and whether tracking is mandatory. *See id.* at 1-2. The mailing also includes a link to a form for lobstermen who believe the MDMR Rule should not apply to them because their vessel is powered down, instructions on how the tracker can be connected and installed, and ways to tell if the tracker is operating correctly. *See id.* at 1-5. The mailing also contains a phone number and email address that lobstermen may use to contact the MDMR for troubleshooting or additional support. *Id.* at 5. Finally, the document provides a link to the full text of the Addendum. *Id.* at 5. Thus, the Court concludes that covered lobstermen were sufficiently on notice of the MDMR Rule.

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The Court also agrees with Commissioner Keliher and the ASMFC that the MDMR Rule has “a properly defined scope” and “limit[s] the discretion of the inspecting officers.” *Burger*, 482 U.S. at 702-03. As discussed above, the MDMR Rule complies with Maine’s existing requirements for data collection which are designed to protect individual information, *see Fed. Permit Holder Vessel Tracking Requirements* at 2; *Addendum XXIX* § 3.2.3; 12 M.R.S. § 6173; 13-188 C.M.R. ch. 5; the rule includes exemptions for individuals not subject to its provisions, *MDMR Rule* § (C); and it only collects data on “the time and position” of fishing vessels, *Fed. Permit Holder Vessel Tracking Requirements* at 1, not “audio information” or a “predictive algorithm that can anticipate vessel movements” as Plaintiffs feared. *See Compl.* ¶ 77.

d. Other Privacy Concerns

The lobstermen have legitimate privacy concerns about the degree of governmental intrusion from the MDMR Rule. Lobstermen are not always fishing on their boats. They have their own lives. Even though they use their boats to fish for lobsters, they also use these vessels to perform personal errands, to visit family and friends, and even in some cases to live on. In the ordinary case, the government, whether state or federal, would not have the right to track a citizen’s location and to force a citizen to wear an electronic monitoring device or to attach one to a company car. The degree of state intrusion would be inimical to the restraint on government guaranteed by the Fourth Amendment but for the *Burger* exception for administrative searches of a closely regulated industry.

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Despite this significant state intrusion, the state correctly rejoins that it has the legal authority to enter onto a lobster boat without a search warrant to inspect the boat for compliance with the numerous regulations that constrain lobster fishing. However, a MDMR search of a particular lobster boat must be limited to one boat at a single time. Here, the MDMR Rule contemplates a constant search of each licensed lobster boat in the entire lobstering fleet. The data collection under the MDMR Rule is vastly different in kind and intensity to past MDMR practice.

The lobstermen's concern is not limited to data collection. It extends to the use of the data and who will have access to it. The Commissioner revealed at oral argument that the data would be available for others within federal and state government. The state could share this data with other governmental agencies, whose concerns are distinct from lobstering and could involve such areas as protections of the right whale and the siting of wind power facilities.

Moreover, although the Commissioner properly observed that Maine's privacy and confidentiality laws apply to the collected data, the data, including personal location data, remain vulnerable to potential revelation through the legal process. For example, if the location of a lobsterman's boat at a particular time became relevant to a criminal investigation or a civil action, such as a divorce or commercial dispute, the seeker of the information, such as a law enforcement agency or civil adversary, could make a case for its disclosure. Thus, unlike virtually any other businessperson, data exist for Maine lobstermen that can confirm his or her precise location at a particular time, which may be discoverable and held against the personal interests of the lobsterman.

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In addition, although the state promises to place the collected data in secure information vaults so that lobstermen's personal information will not be available to the general public, it is apparent, given the magnitude of the hacking of data in other scenarios, including government-held data, that there can be no guarantee the collected information will be absolutely secure.

Lastly, the lobstermen fear that after three years, when state funding for the monitoring program runs dry, the state will not only cease its funding but will foist the cost of the monitoring onto the lobstermen themselves, essentially mandating the lobstermen pay the state to invade their privacy. The Commissioner acknowledged at oral argument that it could be that the state will look to the lobstermen to pay for monitoring, but the Commissioner sees this program in a fundamentally different way than the fishermen do. The Commissioner sees the program as assuring the long-term viability of the lobster as a resource, whereas the lobstermen see the program as an unwarranted governmental restriction on their way of life.

e. The Lobstermen's Privacy Concerns and the Government's Necessity for the Information

As noted earlier, in *Burger*, the Supreme Court explained that warrantless inspections are permitted only as "necessary to further [the] regulatory scheme." *Burger*, 482 U.S. at 702. From the Court's perspective, the closer the data are to lobstering, the clearer the state justification for its collection, and conversely, the further the data are from lobstering, the more attenuated the necessity "to further [the] regulatory

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scheme.” *Id.* Conceding that the MDMR Rule would fit comfortably within *Burger* for the collection of information on actual lobstering, the justification for collecting data about where lobster boats are when they are not lobstering in federal water is more difficult to square with the *Burger* Court’s requirement of necessity.

What trips the MDMR Rule from unconstitutional to constitutional is that the MDMR has represented that the collection of data from lobster boats cannot be effective without collecting both personal and lobstering data. For example, the Commissioner stated at oral argument that the MDMR considered a system whereby a lobsterman could turn on the system when fishing and turn it off when not fishing. But because it is essential that the data be accurate, the fact that lobstermen could forget to turn on the device would skew the results. Similarly, there is no indication in this record that the system could be altered so that it begins to collect data once a lobster boat crosses the three-mile limit into federal waters and then stops collection when the vessel re-enters state waters.

In addition, the Plaintiffs have failed to allege that there are other available systems of data collection that would protect their personal privacy and satisfy the government’s legitimate interest in the collection of accurate lobstering data. At oral argument, the Plaintiffs asserted the Vessel Trip Reports lobstermen currently self-report are sufficient to provide the government with data on the lobster fishery while also intruding less into lobstermen’s individual privacy. The Government strenuously objects that the current data collection system captures sufficient data to meet the evolving needs of the lobster fishery. For the

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reasons discussed elsewhere in this order, the Court accepts the Government's statement and additionally concludes that the Plaintiffs have not argued there is another available system of data collection would protect lobstermen's privacy while satisfying the Government's interest.

Thus, the Court cannot conclude that the MDMR Rule is gratuitously invasive of lobstermen's personal privacy. The Court must instead conclude that the MDMR's data collection system cannot be designed without the overaccumulation of both relevant and irrelevant data. Furthermore, the Commissioner has represented that the current level of data accumulation is scientifically inadequate to the task of lobster preservation. As the lobstermen work in a closely regulated industry, the Court concludes that given the choice between the overaccumulation of data and the accumulation of inadequate data, the law favors preservation of the resource over the lobstermen's rights of privacy.

The Court understands Plaintiffs' frustration with this additional requirement of licensure. However, the First Circuit has explained that "when an entrepreneur embarks upon such a business [in a closely regulated industry], he has voluntarily chosen to subject himself to a full arsenal of government regulation,' and thus a warrantless search to enforce that regulatory regime is not unreasonable." *Rivera-Corraliza*, 794 F.3d at 216 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)). Commissioner Keliher points to the numerous regulatory regimes governing the federal lobster fishery, including mandates on licensure, trap limits and tags, limits on the size of lobsters that may be taken, requirements that certain lobsters be notched

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and thrown back, and requirements that licensees submit to inspection. *Mot. to Dismiss* at 14-15. (citing 16 U.S.C. §§ 5101-5108; 50 C.F.R. Part 697; 46 C.F.R. ch. 1; 12-619 M.R.S.; 13-188 C.M.R. ch. 25; 12 M.R.S. § 6306(1)). 12 M.R.S. § 6306(1) specifically provides that any person who “receives a [marine resource] license . . . has a duty to submit to inspection and search for violations related to the licensed activities by a marine patrol officer” and that “[w]atercraft or vehicles . . . used primarily in a trade or business requiring a license . . . maybe searched or inspected at any time.” *Mot. to Dismiss* at 14-15. In addition, Commissioner Keliher rightly reminds the Court that all people operating vessels at sea, independently of whether or not they are engaging in a commercial enterprise, “are subject to a network of regulations that allow officials to board and inspect vessel.” *Id.* at 15. “A vessel at sea, unlike a personal vehicle on a highway or a pedestrian on a public street, can be stopped for document checks and safety inspections at any time even without reasonable suspicion.” *Id.* (citing *Villamonte-Marquez*, 462 U.S. at 92-93; *United States v. Green*, 671 F.2d at 53; *Giles*, 669 A.2d at 193). These observations are instructive and accurate.

Consistent with this Supreme Court and First Circuit jurisprudence, the Court accordingly concludes that Plaintiffs in Count One have not pleaded “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its fact.’” *Iqbal*, 556 U.S. at 678. The Court believes this is an issue that should be presented to the First Circuit on review.

2. Count Two: Equal Protection

The crux of Plaintiffs' argument in their second count is that the MDMR Rule is void for vagueness "in that it is designed to enforce criminal and regulatory offenses without defining the contours of offenses with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."²² *Compl.* ¶ 91. They assert that the MDMR Rule specifically leaves unanswered the penalties for noncompliance, the offenses they might be prosecuted with based on the data collected, what penalties maybe imposed for unintentional violations, and whether non-compliance could affect their fishing licenses. *Id.* ¶¶ 92-93. Commissioner Keliher, in addition to reminding the Court that void for vagueness claims should be brought as due process violations rather than equal protection, argues that Plaintiffs' claim fails because they do not articulate what terms in the MDMR Rule

²² Plaintiffs bring Count Two, which they classify as an equal protection violation, pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, § 6-A of the Maine Constitution. *Compl.* ¶ 12. Section 6-A of the state constitution contains Maine's version of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; the state and federal clauses "provide co-extensive protection." *Bailey v. State*, 900 F. Supp. 2d 75, 87 n.20 (D. Me. 2012); *Town of Frye Island v. State*, 2008 ME 27, ¶ 14, 940 A.2d 1065 ("[T]he two clauses provide co-extensive protection"); see MARSHALL TRINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE at 38-40 (1992).

Given this precedent, and that Plaintiffs presented no argument distinguishing these clauses, the Court analyzes the Plaintiffs' claims pursuant to the U.S. Constitution and the Maine Constitution as identical.

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are so unconstitutionally vague that “a person of ordinary intelligence would not have fair notice of what conduct the Rule prohibits, or how the Rule is so standardless as to encourage seriously discriminatory enforcement.” *Mot. to Dismiss* at 22, 22 n.23. Plaintiffs’ response reasserts that “questions remain about how and to what extent MDMR will enforce the [MDMR] Rule.” *Pls.’ Opp’n* at 11.

As an initial matter, Commissioner Keliher is correct that void for vagueness claims are typically brought pursuant to the due process clause, not equal protection. At oral argument, the Plaintiffs explained the basis of their equal protection theory is that the MDMR Rule affects one group of lobstermen (those with federal permits) differently from another group of lobstermen (those with state permits).

The Equal Protection Clause of the Fourteenth Amendment “requires states to treat alike all persons similarly situated.” *Toledo v. Sanchez*, 454 F.3d 24, 33 (1st Cir. 2006) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). “To establish an equal protection claim, a plaintiff needs to allege facts showing that ‘(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.’” *Davis v. Coakley*, 802 F.3d 128, 132-33 (1st Cir. 2015) (quoting *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995)).

The Supreme Court has instructed that a heightened standard of review is proper for classifications based on characteristics “beyond the individual’s control and bearing no relation to the

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individual's ability to participate in and contribute to society," such as gender and illegitimacy. *City of Cleburne, Tex. V. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985). However, "[u]nless state action burdens a suspect class or impinges upon a fundamental right [the First Circuit] review[s] equal protection claims for rational relationship between the disparity of treatment and a legitimate government purpose." *Toledo*, 454 F.3d at 33. In other words, "[i]n order to state a claim for discrimination that violates equal protection, [a plaintiff] must allege that he was intentionally treated differently from others similarly situated and there was no rational basis for the difference in treatment." *Pope v. Bernard*, No. 10-1443, 2011 U.S. App. LEXIS 2764, at *6 (1st Cir. Feb. 10, 2011) (quoting *Toledo* at 34).

Here, the Plaintiffs' equal protection claim does not get out of the starting gate. The Plaintiffs have not argued, pleaded facts, or cited caselaw finding that federally permitted lobstermen are a suspect class or that the MDMR Rule impinges upon a fundamental right. Absent a suspect class, which the distinctions between these classes of lobstermen certainly are not, there is an obvious rational basis for the MDMR Rule to distinguish between lobstermen who fish close to shore in the waters of the state of Maine and those who fish in the territorial waters of the United States. The Court does not see an equal protection issue as the Plaintiffs have framed the lawsuit.

Nevertheless, viewing the complaint "in the light most favorable to the plaintiff," *Germanowski*, 854 F.3d at 71, the Court proceeds to analyze count two as a due process void-for-vagueness claim.

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As count two turns on the terms of the MDMR Rule, the Court considers the rule attached to the motion to dismiss by Commissioner Keliher, which he introduces as authentic and Plaintiffs do not challenge. *See Beddall*, 137 F.3d at 17. Chapter 25.98 is titled “Electronic Tracking Requirements for Federally-Permitted Lobster and Jonah Crab License Holders.” *MDMR Rule* at 3. The Rule says that “[e]ffective December 15, 2023, the following electronic tracking device requirements apply to all federally permitted lobster and crab license holders, as defined in Section A.” *Id.* Section A (Definitions) includes two definitions:

1. Approved Tracking Device means any electronic device that meets all the specifications outlined in Section 3.1 of the [ASMFC] Addendum XXIX to the American Lobster Fishery Management Plan
2. Federally permitted lobster ... license holder means an individual who is eligible for a commercial Maine state license or who is licensed to fish commercially for lobster ... under 12 MRS 6421 or 12 MRS 6302-A who also holds a federal lobster ... commercial trap gear permit for any of the Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, or the Outer Cape Cod on the vessel identified on their lobster ... fishing license.

Id.

The MDMR Rule proceeds to Section B (Electronic Tracking Device Requirements), which states that, “1. [p]rior to their first lobster . . . fishing trip following December 15, 2023, federally permitted lobster and crab fishing license holders are required to install an

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approved tracking device.” *Id.* Section B.2 informs federally permitted lobster . . . fishing license holders that they are required to certify to the MDMR when they have completed the installation of the approved tracking device; it also says that certification must be completed via an electronic form available through the MDMR’s publicly accessible website. *Id.* at 4.

Section C (Prohibitions) says that the following prohibitions apply “[u]nless a federally permitted lobster and crab fishing license holder has made modification to the Department as provided in (E).” *Id.* Section C proceeds to list 5 enumerated prohibitions:

1. It is unlawful for a federally permitted lobster . . . license holder to fish for, take, possess, or land lobster or Jonah crab taken with trap gear without having an approved tracking device installed aboard the permitted vessel listed on their license.
2. It is unlawful for a federally permitted lobster . . . license holder to remove or have removed the approved tracking device from the permitted vessel listed on their license without written approval from the [MDMR].
3. It is unlawful for a federally permitted lobster . . . license holder to allow the permitted vessel listed on their license to be operated in coastal waters of the State without the approved tracking device being powered by an external power source at all times; an exception to this requirement exists when the vessel is moored or docked at berth.
4. The approved tracking device must remain in an operational condition, minimally powered by an internal battery, when a permitted vessel is docked, moored, or removed from the water. The

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license holder shall notify the [MDMR] prior to an approved tracking device being rendered inoperative in instances where the permitted vessel is removed from the coastal waters for an extended period of time or for purposes of repairing or replacing an approved tracking device.

5. It is unlawful for a person to tamper with an approved tracking device or device signal; tampering includes any activity that may affect the unit's ability to operate or signal properly or to accurately compute or report the vessel's position. Tampering . . . is not considered to occur in circumstances where an approved tracking device is being repaired or replaced provided the license holder has written approval from the [MDMR].

Id.

The MDMR Rule then lists, under Section D (Exceptions), two specific groups of federally permitted lobster and crab fishing license holders who are exempt from the electronic tracking requirement.²³

²³ Section D exempts:

1. A federally permitted license holder who holds a federal commercial trap gear permit that has been placed in confirmation of permit history (CPH), a permit status for when a vessel with limited access permits has sunk, been destroyed, or has been sold to another person without its permit history.
2. A federally permitted license holder who holds a federal lobster commercial trap gear permit that does not fish trap gear at any point in the fishing year (i.e., only fishes other gear under a federal lobster commercial/non-trap

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Section E (Device Failure) says that “[i]n the event of an electronic tracking device failure, a violation of the prohibition in section (C) shall not exist when the federally permitted lobster . . . fishing license holder makes notification of the failure to the [MDMR] by phone, text message, or email prior to beginning a fishing trip with the inoperable device.” *MDMR Rule* at 5. Section E further states that the license holder must work with the MDMR “in good faith and in a timely manner to restore device operability as soon as possible.” *Id.* Section E also indicates that it is unlawful for a license holder to begin subsequent fishing trips with an inoperable device without written approval from MDMR. *Id.* In circumstances where a federally permitted lobster fishing license holder “has reported frequent or repeated tracking device failures aboard a permitted vessel, a Marine Patrol Officer, after having given notice to that license holder, may require that license holder to obtain written approval from the Department prior to beginning a fishing trip with an inoperable tracking device.” *Id.* The Court notes that Section E directly addresses Plaintiffs’ questions about how the MDMR Rule treats on “unintentional, as opposed to intentional, violations.” *Compl.* ¶ 93.

After reviewing the MDMR Rule, the Court concurs with Commissioner Keliher’s position that the Plaintiffs do not “identify what terms of the [M]DMR Rule are unconstitutionally vague, in what way a person of ordinary intelligence would not have fair notice of what conduct the Rule prohibits, or how the

permit, charter/party non-trap permit, and/or does not fish any trap gear at any point in the fishing year.

Certified MDMR Rule at 4.

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Rule is so standardless as to encourage seriously discriminatory enforcement.” *Mot. to Dismiss* at 22.

On the issue of vague penalties, the Court sides with Commissioner Keliher. While Plaintiffs correctly note that the MDMR Rule itself does not list a penalty or cross-reference a penalty provision, Commissioner Keliher provides the Court with the general statutory provisions governing the penalties for civil violations. First, he informs the Court that a violation of the MDMR Rule, like violations of the other rules promulgated by the MDMR, is a “civil violation for which a fine of not less than \$100 for each violation may be adjudged.” *Mot. to Dismiss*. at 7 n.12 (citing 12 M.R.S. § 6174(3)).

He further informs the Court that a civil violation of the M.R.S. “is subject to the due process provided through a court adjudication, and the [MDMR] may suspend a license after such adjudication,” *id.* (citing 12 M.R.S. § 6351(1)(D)); 12 M.R.S. § 6371(3)(A) alternatively provides that the MDMR may administratively suspend a license without a prior court adjudication based on the license holder’s commission of a marine resource violation, and this administrative suspension is subject to procedural requirements and judicial review on appeal. *Id.* (citing 12 M.R.S. §§ 6371(3)(A), 6374). Commissioner Keliher argues that “[i]t is simply not plausible that covered vessel owners,” who operate in a highly regulated industry, “are in the dark about the potential consequences of their conduct.” *Id.* (citing *Facteau*, 89 F.4th at 33).

The Court concludes the MDMR Rule states what conduct is proscribed and, further, concludes it is reasonable to believe that federally licensed

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lobstermen are sufficiently on notice that violations of the MDMR Rule will be punished in the same way as violations of MDMR's other regulations, as provided for in the general statutory penalty provisions listed by Commissioner Keliher. The Court thus concludes that the MDMR Rule states the "contours of offenses with sufficient definiteness such that ordinary people can understand what conduct is prohibited." *Compl.* ¶ 91.

The Court accordingly finds Count Two of Plaintiffs' Complaint has not pleaded "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" to survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

VI. CONCLUSION

The Court GRANTS Defendant Patrick Keliher's Motion to Dismiss (ECF No. 23) in its entirety and accordingly DISMISSES as moot Plaintiffs' Motion for Preliminary Injunction (ECF No. 7).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES
DISTRICT JUDGE

Dated this 21st day of November, 2024

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United States Constitution
Amendment IV.
Searches and Seizures; Warrants

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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Atlantic States Marine Fisheries Commission

**ADDENDUM XXIX TO AMENDMENT 3 TO THE
AMERICAN LOBSTER FISHERY
MANAGEMENT PLAN; ADDENDUM IV
TO THE JONAH CRAB FISHERY
MANAGEMENT PLAN**

*Electronic Vessel Tracking for
Federal Permit Holders*

March 2022

[Seal] *Sustainable and Cooperative
Management of Atlantic Coastal
Fisheries*

* * *

1.0 INTRODUCTION

The Atlantic States Marine Fisheries Commission (Commission) has coordinated the interstate management of American lobster (*Homarus americanus*) and Jonah crab (*Cancer borealis*) from 0-3 miles offshore since 1996 and 2015, respectively. American lobster is currently managed under Amendment 3 and Addenda I-XXVI to the Fishery Management Plan (FMP). Jonah crab is managed under the Interstate Fishery Management Plan and Addenda I-III. Management authority in the Exclusive Economic Zone (EEZ) from 3-200 miles from shore lies with NOAA Fisheries. The management unit for both species includes all coastal migratory stocks between Maine and Virginia. The management unit encompasses seven Lobster Conservation Management Areas (LCMAs) and two lobster stocks: the Gulf of Maine/Georges Bank (GOM/GBK) stock

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and the Southern New England (SNE) stock (Figure 1).

The American Lobster Management Board (Board) initiated Addendum XXIX to the American lobster FMP and Addendum IV to the Jonah crab FMP (here forth, the Addenda) to consider implementing electronic vessel tracking requirements for federally-permitted vessels in the lobster and Jonah crab fisheries to collect location and spatial effort data. For several years, the Board has recognized the critical need for high-resolution spatial and temporal data to characterize effort in the federal American lobster and Jonah crab fisheries. In February 2018, the Board approved Addendum XXVI to improve the spatial resolution of lobster and Jonah crab harvester data to address ongoing marine spatial planning activities and assessment challenges. At the same time, the Board approved a one-year pilot program to test electronic tracking devices in the lobster and Jonah crab fishery. The intent of this pilot program was to identify appropriate tracking devices for use in the fishery and inform a Board decision on whether electronic tracking should be pursued in part, or all, of the lobster and Jonah crab fishery. Simultaneously, the Board supported additional work focusing on data integration and hardware testing. These projects lay the groundwork for implementing electronic tracking in the fishing fleet.

Based on recommendations from a work group comprising representatives from NOAA Fisheries, state and federal law enforcement, and members of the Board, the Addenda were initiated to consider requirements for electronic vessel tracking for federally-permitted vessels in the lobster and Jonah crab fishery under the authority of the Atlantic

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Coastal Fishery Cooperative Management Act (ACFCMA). The goal of the addendum is to collect high-resolution spatial and temporal data to characterize effort in the federal American lobster and Jonah crab fisheries for management and enforcement needs. These data will improve stock assessment, inform discussions and management decisions related to protected species and marine spatial planning, and enhance offshore enforcement.

* * *

2.2.3 Fishery Interactions with Right Whales and Protected Resources

To meet the goals of the Marine Mammal Protection Act and the Endangered Species Act, NOAA Fisheries recently published a final rule to amend the regulations implementing the Atlantic Large Whale Take Reduction Plan (ALWTRP) to reduce the incidental mortality and serious injury to North Atlantic right whales (*Eubalaena glacialis*), fin whales (*Balaenoptera physalus*), and humpback whales (*Megaptera novaeangliae*) in commercial lobster and Jonah crab trap/pot fisheries in the Northeast Atlantic (86 FR 51970). This action is being taken to reduce the risks to endangered North Atlantic right whales and other large whales associated with the presence of fishing gear in waters where these animals occur. The ALWTRP includes a significant reduction in the number of vertical buoy lines in the fishery in order to reduce right whale encounters with buoy lines. Weak rope requirements are included to reduce mortalities and serious injuries when entanglements do occur by increasing the chance of right whales freeing themselves from gear. The ALWTRP also includes changes to seasonal

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restricted areas closed to pot/trap gear that uses stationary vertical buoy lines. Current and future requirements for gear modifications are expected to have a substantial economic impact on the fishing industry.

The required risk reductions included in the ALWTRP are informed by the co-occurrence model, which pairs information regarding the distribution of whales and commercial fishing gear to predict areas where whales may be prone to entanglement. Electronic vessel tracking data would significantly improve the models used to assess the location of vertical lines in the fishery and their associated risk to right whales in the ALWTRP. The Biological Opinion¹ released in May 2021 outlines a Conservation Framework that intends to reduce mortality and serious injury to North Atlantic Right Whales by 95% over ten years. Within this Framework, additional risk reductions could be required in the US lobster fishery starting in 2025. Therefore, it is critical to gather and provide updated and enhanced spatial effort data to improve the associated risk reduction models ahead of this timeline.

2.2.4 Marine Spatial Planning

It is critically important to record the footprint of the US lobster fishery as spatial allocation discussions occur as a result of emerging ocean uses such as aquaculture, marine protected areas, and offshore

¹ The Biological Opinion issued on May 27, 2021 can be found here:

https://www.greateratlantic.fisheries.noaa.gov/public/nema/PRD/Final%20Fisheries%20BiOp_05_28_21.pdf?fbclid=IwAR3ombXyORsm5o0aFYuoU84W-oUUIEMQUIK5_bqv2FnmVRuEBV3p_pFOenA

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energy development. For example, in 2016, the New England Fishery Management Council (NEFMC) took action on an Omnibus Deep-Sea Coral Amendment, which looked to provide protection to corals in the northwest Atlantic Ocean through the creation of discrete regions and/or broad depth zones. Given the harvest of lobster and Jonah crab occurs offshore, the Commission was asked to provide information on the magnitude of lobster and Jonah crab catch in specific regions in order to understand potential economic impacts. At the time, the lobster and Jonah crab fishery management plans required harvesters to report landings via NOAA statistical areas, regions much larger than those being considered for coral protection. As a result, the spatial resolution of catch and effort data for the lobster and Jonah crab fishery proved too coarse; without fine scale spatial information, impacts to the lobster and Jonah crab fishery had to be estimated by piecing together information from harvester reports, industry surveys, and fishermen interviews. Similar challenges occurred when the Northeast Canyons and Seamounts Marine National Monument was established in 2016, and it is expected that these challenges will continue given increased activity surrounding offshore wind, aquaculture, and oil and gas exploration. Additionally, in January 2021 President Biden issued an Executive Order on Tackling the Climate Crisis at Home and Abroad. Included in this Executive Order is a goal of protecting 30% of US waters by 2030. Given this goal, documentation of the US lobster fishery footprint is essential for consideration in future discussions and decisions regarding marine protected areas.

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2.2.5 Offshore Enforcement

A potential benefit of collecting electronic vessel tracking data is the ability to improve enforcement in the offshore area. It has long been recognized that enforcement efforts in the offshore federal lobster fishery need to be improved, a particular concern given the rapid increase in landings and value during the last decade. As a result, there are ongoing efforts to enhance enforcement capabilities, including discussions around an offshore enforcement vessel capable of hauling and re-setting long trawls.

Enforcement personnel have consistently noted that having the ability to differentiate when a boat is steaming versus hauling is critical to efforts to inspect gear and identify when fishermen are using illegal gear. Even if location data are not reported in real-time, once a fishing location can be identified from vessel tracking data, enforcement personnel would be able to go to that location to inspect gear for appropriate markings, buoys, escape vents, and ghost panels. Given finite enforcement resources, information on distinct fishing locations would improve the efficiency and capability of offshore enforcement efforts.

3.0 MANAGEMENT PROGRAM

This section adds to Section 3.1 of Addendum XXVI to American Lobster Amendment 3 and Section 3.4.1 of the FMP for Jonah Crab under the adaptive management procedures established in section 3.6 of the FMP for American Lobster and 4.4 of the FMP for Jonah Crab. The intent of the selected management program is to enhance harvester effort data collection.

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Addendum XXIX (American lobster) and IV (Jonah crab) implement electronic tracking requirements for federally-permitted lobster and Jonah crab vessels with commercial trap gear area permits.

Federal lobster and Jonah crab vessels issued commercial trap gear area permits are required to install an approved electronic tracking device to collect and transmit spatial data in order to participate in the trap gear fishery. This means any federally-permitted vessel without an approved electronic tracking device is prohibited from landing lobster or Jonah crab taken with trap gear. Federal permit holders are required to install and activate an approved device prior to beginning a lobster or Jonah crab fishing trip with trap gear. The device must remain on board the vessel and powered at all times when the vessel is in the water, unless the device is authorized to power down by the principal port state. Possible reasons for authorization to power down include but are not limited to vessel haul out/repairs and device failure reported to the principal port state. Tampering with an approved tracking device or signal is prohibited; tampering includes any activity that may affect the unit's ability to operate or signal properly, or to accurately compute or report the vessel's position. These requirements apply to all federal permit categories included in Table 1.

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Table 1. Applicable Federal Permit Categories*

Federal Permit Category Name	Federal Permit Category Abbr.	Description
Commercial Trap Gear Area 1	A1	May harvest lobster in Federal Lobster Management Area 1 using trap gear
Commercial Trap Gear Area 2	A2	May harvest lobster in Federal Lobster Management Area 2 using trap gear
Commercial Trap Gear Area 3	A3	May harvest lobster in Federal Lobster Management Area 3 using trap gear
Commercial Trap Gear Area 4	A4	May harvest lobster in Federal Lobster Management Area 4 using trap gear
Commercial Trap Gear Area 5	A5	May harvest lobster in Federal Lobster Management Area 5 using trap gear

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Commercial Trap Gear Outer Cape Area	AOC	May harvest lobster in Federal Lobster Management Outer Cape Area using trap gear
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Commercial Trap Gear Area 6 is excluded, as the area occurs in state waters and requires a valid CT or NY state lobster license to fish in this area. If a vessel is permitted for Commercial Trap Gear Area 6 only, these requirements do not apply. Additionally, these requirements do not apply to vessels that hold an Area 5 Waiver Permit² and no other lobster trap gear area permits.

For additional clarity on situations for which the electronic tracking requirements do not apply, several examples are provided below:

- A person with a state-only lobster permit and no federal commercial trap gear area permit
- A permit holder with federal commercial trap gear permit that has been placed in confirmation of permit history (CPH), a permit status for when a vessel with limited access permits has sunk, been destroyed, or has been sold to another person without its permit history

² The Area 5 Waiver is a permit category that may be selected by federal lobster permit holders with an Area 5 trap allocation who also hold a federal black sea bass permit. By opting into the Area 5 Waiver, permit holders are exempted from the more restrictive lobster trap gear specifications and trap tagging requirements to target black sea bass with unbaited traps. While in the Area 5 Waiver category, the vessel may retain the non-trap possession limit of 100 lobsters per day or up to 500 lobsters for a trip of 5 or more days.

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- A vessel with a federal lobster commercial trap gear permit listed in Table 1 that does not fish trap gear at any point in the fishing year (i.e., only fishes other gear under a federal lobster commercial/non-trap permit, charter/party non-trap permit, and/or does not fish any trap gear at any point in the fishing year)

Specifications required of tracking devices to be approved for use in the fishery are described in Section 3.1. Administrative processes for the tracking program are described in Section 3.2. A separate document will be developed that will include additional details and standard operating procedures to guide the management agencies in implementing the vessel tracking requirements.

3.1 Tracker Specifications and Approval

3.1.1 Required Components and Minimum Technological Standards

The minimum criteria that must be met by tracking devices and product vendors for approval for use in the fishery are summarized in Table 2. Additional details on these requirements is included in the subsequent sections.

Table 2. Required criteria for approval of vessel tracking devices and vendors

<i>Requirements of Tracking Devices and Vendors</i>
<ul style="list-style-type: none">• Collection of location data at a minimum rate of one ping per minute for at least 90% of the fishing trip• Data events must contain device's current datetime, latitude, longitude, device and vessel identifier

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- Minimum accuracy of 100 m (328.1 ft) accuracy and position fix precision to the decimal minute hundredths
- Ruggedness specifications allowing function in the marine environment
- Ability to PUSH location data to the ACCSP trip locations API
- Vendor customer service requirements
- Vendor must maintain the confidentiality of personally identifying information and other protected data in accordance with federal law

Data Collection Rates

A tracking device must collect location data at a minimum rate of one ping per minute for at least 90% of the fishing trip. A “ping” refers to a data event created by a tracking device containing the device’s current datetime, latitude, longitude, device/vessel identifier and other optional data fields. The above rate is necessary to distinguish lobster fishing activity from transiting activity and can allow estimation of the number of traps per trawl (See Appendix A). Data transmission from the tracking device to the vendor should be initiated as soon as possible but no more than 60 minutes from the time the fishing trip is completed.

If the tracking device can determine when the vessel is in its berth, the device may automatically decrease the tracker ping rate. If the device is unable to automatically detect a berth location, the device must remain connected and pinging at one ping per minute at all times. This recommendation is designed to permit vendors’ efforts to minimize cellular data and power consumption while the vessel is in port. For

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example, if pinging at a slower rate in the port, the tracking device could run on an internal battery and sleep between pings to save power versus being hard-wired to the vessel's power system. Additionally, this feature would improve data quality and allow for validation of track data against self-reported VTR trip start and end times.

Precision and Accuracy Requirements

A tracking device must meet minimum precision and accuracy requirements, specifically a minimum of 100 m (328.1 ft) accuracy and position fix precision to the decimal minute hundredths. It is expected that most modern tracking devices will be capable of significantly higher accuracies than 100 m.

Tracking Hardware Considerations

A tracking device must have ruggedness specifications that allow it to function in the marine environment, which may depend on where the device is installed on the vessel.

No specific requirement is specified for how a device shall be powered, provided that the tracking device can satisfy the technical requirements set forth in this section. Devices will likely be powered by some combination of vessel power, internal battery, and/or solar. The Commission level work group will be responsible for determining whether a device satisfies hardware requirements.

Data Submission Requirements

Tracking vendors must be able to PUSH location data to the Atlantic Coastal Cooperative Statistics Program (ACCSP) trip locations API and meet all specifications of this interface ([https://accsp-software.github.io/spec-unified-apiproduct/#tag/eTrips/paths/~1trip locations/post](https://accsp-software.github.io/spec-unified-apiproduct/#tag/eTrips/paths/~1trip%20locations/post)). In addition to the

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device identifier, datetime, latitude, and longitude, vendors must also include a vessel identifier (Coast Guard number or state registration number) in the API submission. This data element is necessary to identify the vessel the device is tracking at the time of the ping. Data transmission from the vendor to the ACCSP trip locations API should occur in near real time upon receipt.

Tracking vendors must send test data to the ACCSP trip locations API as proof of the ability to satisfy the data submission requirements. The vendor is expected to have a mechanism for setting the vessel identifier in the administrative web interface to their tracking system.

Customer Service Requirements

Device vendors serve as the primary contact for the vessel tracking devices distributed by their company. This includes technical support related to hardware and any device-specific software. Vendors should provide diagnostic and troubleshooting support to permit holders, state agencies, and ACCSP, which is available seven days per week and year-round. Response times for customer service shall not exceed 24 hours. Detailed installation instructions must be provided to permit holders or their designated agents by vendors. Procedures must be established that assist permit holders to properly maintain their device. In the event of tracker malfunction, vendors must be available to troubleshoot, repair, or replace the device. Vendors must have the capability to diagnose and resolve communication anomalies with permit holders or state agencies. Upon request of ACCSP, state partners, or NOAA Fisheries, vendors must be available to assist with vessel tracking

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system operation, resolving technical issues, and related data analyses.

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DEPARTMENT OF MARINE RESOURCES

**Chapter 25: LOBSTER AND CRAB
REGULATIONS**

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- 25.02 Definitions
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- 25.98 Electronic Tracking Requirements for Federally-Permitted Lobster and Jonah Crab License Holders

* * *

25.98 Electronic Tracking Requirements for Federally-Permitted Lobster and Jonah Crab License Holders

Effective December 15, 2023, the following electronic tracking device requirements apply to all federally permitted lobster and crab license holders, as defined in section A.

A. Definitions

1. Approved Tracking Device means an electronic device that meets all the specifications outlined in Section 3.1 of the

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Atlantic States Marine Fisheries Commission Addendum XXIX to the American Lobster Fishery Management Plan and which has been approved for use by the Atlantic States Marine Fisheries Commission.

2. Federally permitted lobster and crab fishing license holder means an individual who is eligible for a commercial Maine state license or who is licensed to fish commercially for lobster and crab under 12 MRS 6421 or 12 MRS 6302-A who also holds a federal lobster and crab commercial trap gear permit for any of the Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, or the Outer Cape Cod on the vessel identified on their lobster and crab fishing license.

B. Electronic Tracking Device Requirements

1. Prior to their first lobster and crab fishing trip following December 15, 2023, federally permitted lobster and crab fishing license holders are required to install an approved tracking device.
2. Federally permitted lobster and crab fishing license holders are required to certify to the Department of Marine Resources when they have completed the installation of the approved tracking device. To submit their certification, federally permitted lobster and crab fishing license holders must complete an electronic form available through the Department of Marine Resources publicly accessible website.

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C. Prohibitions

Unless a federally permitted lobster and crab fishing license holder has made notification to the Department as provided in (E.) the following prohibitions apply.

1. It is unlawful for a federally permitted lobster and crab fishing license holder to fish for, take, possess, or land lobster or Jonah crab taken with trap gear without having an approved tracking device installed aboard the permitted vessel listed on their license.
2. It is unlawful for a federally permitted lobster and crab fishing license holder to remove or have removed the approved tracking device from the permitted vessel listed on their license without written approval from the Department of Marine Resources.
3. It is unlawful for a federally permitted lobster and crab fishing license holder to allow the permitted vessel listed on their license to be operated in the coastal waters of the State without the approved tracking device being powered by an external power source at all times; an exception to this requirement exists when the vessel is moored or docked at berth.
4. The approved tracking device must remain in an operational condition, minimally powered by an internal battery, when a permitted vessel is docked, moored, or removed from the water. The license holder shall notify the Department of Marine

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Resources prior to an approved tracking device being rendered inoperative in instances where the permitted vessel is removed from the coastal waters for an extended period of time or for purposes of repairing or replacing an approved tracking device.

5. It is unlawful for a person to tamper with an approved tracking device or device signal; tampering includes any activity that may affect the unit's ability to operate or signal properly or to accurately compute or report the vessel's position. Tampering with an approved tracking device is not considered to occur in circumstances where an approved tracking device is being repaired or replaced provided the license holder has written approval from the Department of Marine Resources.

D. Exemptions

The following federally permitted lobster and crab fishing license holders are exempt from the electronic tracking requirements.

1. A federally permitted license holder who holds a federal commercial trap gear permit that has been placed in confirmation of permit history (CPH), a permit status for when a vessel with limited access permits has sunk, been destroyed, or has been sold to another person without its permit history.
2. A federally permitted license holder who holds a federal lobster commercial trap gear permit that does not fish trap gear at any

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point in the fishing year (i.e., only fishes other gear under a federal lobster commercial/non-trap permit, charter/party non-trap permit, and/or does not fish any trap gear at any point in the fishing year).

E. Device Failure

In the event of an electronic tracking device failure, a violation of the prohibitions in section (C) shall not exist when the federally permitted lobster and crab fishing license holder makes notification of the failure to the Department by phone, text message, or email prior to beginning a fishing trip with the inoperable device. The license holder must work with the Department in good faith and in a timely manner to restore device operability as soon as possible. It is unlawful for a license holder to begin subsequent fishing trips with an inoperable device without written approval from the Department.

In circumstances where a federally permitted lobster and crab fishing license holder has reported frequent or repeated tracking device failures aboard a permitted vessel, a Marine Patrol Officer, after having given notice to that license holder, may require that license holder to obtain written approval from the Department prior to beginning a fishing trip with an inoperable tracking device.

Filed 01/02/24

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRANK THOMPSON,)	
JOEL STROUT, JASON)	
LORD, CHRISTOPHER)	
SMITH, and JACK)	Docket No.
CUNNINGHAM,)	
Plaintiffs,)	<u>Emergency</u>
v.)	<u>Injunctive</u>
PATRICK KELIHER, in)	<u>Relief</u>
his official capacity as)	<u>Requested</u>
COMMISSIONER, MAINE)	
DEPARTMENT [OF])	
MARINE RESOURCES,)	
Defendant.)	

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

NOW COME, the Plaintiffs Frank Thompson, Joel Strout, Jason Lord, Christopher Smith, and Jack Cunningham (the “Plaintiffs”), by and through their undersigned attorneys, and in support of this Complaint for Declaratory and Injunctive Relief against Patrick Keliher, in his official capacity as Commissioner of the Maine Department of Marine Resources, state as follows:

INTRODUCTION

1. The American Lobster fishery is one of the nation’s most valuable fisheries. In 2016 alone, approximately 159 million pounds of lobster were landed within the fishery, over 97% of which were

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landed in the Gulf of Maine and Georges Bank (far offshore between Massachusetts and Nova Scotia).

2. In addition to the roughly 4,800 lobster license holders in the State of Maine and 1,100 student license holders, a great number of lobster dealers, processors, sternmen, bait dealers, trap builders, boat mechanics, shipyards, and local coastal merchants all depend on the Maine lobster fishery for their very survival. Maine's lobster supply chain contributes \$1 billion to the State's economy each year, in addition to the value of its actual lobster landings.

3. By virtue of custom and practice over generations of lobstering men and women, the placement of lobster traps and trip routes are coveted as individual trade secrets used by lobstermen to optimize their harvest. Accordingly, these trade secrets have substantial economic value to each lobster fisherman.

4. The regulation of Atlantic coast fisheries is shared by federal and state regulators. Waters within three nautical miles of shore are regulated by the individual states, while waters extending 200 nautical miles from the inner boundary of state waters (known as the "EEZ") are federal waters regulated by the National Marine Fisheries Service ("NMFS"), a sub-agency of the National Oceanic and Atmospheric Administration ("NOAA"). Both the federal and state governments regulate lobster fishing in U.S. waters through the Atlantic States Marine Fisheries Commission ("ASMFC"). The ASMFC is comprised of members from the 15 Atlantic Coast states who are tasked with the management of fisheries along the Atlantic coast.

5. The ASMFC is a multi-state collaborative organization through which Atlantic Coast states

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coordinate their conservation efforts and share the management of migratory fisheries within their state waters. The Atlantic Coastal Fisheries Cooperative Management Act (“ACA”) encourages this shared responsibility by requiring the Atlantic States Commission to draft interstate “fisheries management plans” (“FMPs”), pursuant to which each of the member-states regulates that portion of the migratory fishery falling within their individual waters. 16 U.S.C. § 5104(a). The ACA further requires states to adopt and enforce fishery plans promulgated by the ASMFC. The Maine Department of Marine Resources (“MDMR” or the “Defendant”) regulates lobster fishing in Maine’s state waters pursuant to an FMP. *See* 12 M.R.S. §§ 6421-6482; 13 C.M.R. 188, ch. 25. FMPs are not subject to federal judicial review.

6. Once the ASMFC drafts FMPs containing regulations and enforcement guidelines, it specifies the requirements for state compliance. The states then draft their own rules, which in the case of the State of Maine are drafted by MDMR. Should a member state fail to timely enact rules adopting the ASMFC’s fishery plan, the Secretary of Commerce is authorized to order a moratorium on fishing by the offending state. 16 U.S.C.A. § 5106.

7. Meanwhile, fishing within the EEZ is governed by the Magnuson-Stevens Act (“MSA”). The MSA authorizes the NMFS to regulate fishing in federal waters by approving or disapproving of species-specific FMPs developed by regional councils. *See* 16 U.S.C. § 1854. These federal FMPs may include complementary measures recommended by state FMPs. 16 U.S.C. § 5103(b). Lobster fishing in federal waters is governed by 50 C.F.R Part 697.

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8. In March 2022, the ASMFC published an addendum to an existing fishery management plan entitled “*Addendum XXIX to Amendment 3 to the American Lobster Fishery Plan; Addendum IV to the Jonah Crab Fishery Management Plan*” (the “Addendum” or “Addendum XXIX”), attached hereto as Exhibit A. The primary purpose of the Addendum is to support risk reduction efforts promulgated in NMFS’s 2021 Atlantic Large Whale Take Reduction Plan, which is designed to reduce the risk to North Atlantic right whales of entanglement in fishing lines. NMFS’s 2021 Atlantic Large Whale Take Reduction Plan does not contain a vessel tracking requirement.

9. In addition to protecting the North Atlantic right whale, the Addendum identifies three secondary objectives for its “24/7” tracking requirement: 1) to improve information available to fishery managers and stock assessment scientists; 2) to support the development of offshore renewable energy and the conservation of U.S. waters; and 3) to promote improved fishery management and offshore enforcement of federal lobster fisheries in the EEZ.

10. The Addendum requires states to issue rules requiring federally permitted lobster vessels to install an electronic tracking device on board the vessel that will transmit their spatial data using a Global Positioning System (“GPS”). According to the Addendum, the “vessel tracker must remain powered and transmitting when the vessel is in the water regardless of landing state, trip type, location fished or target species.” The device may be deactivated only with prior notice to and permission from MDMR. The Addendum mandated compliance with the tracking program by December 15, 2023.

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11. Pursuant to the ACA, MDMR enforced the Addendum by publishing a final rule entitled “Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders” (the “MDMR Rule”) on September 13, 2023 that mirrored the ASMFC Addendum’s requirement that the tracking device stay minimally powered and transmitting at all times. *See* 13 C.M.R. 188, ch. 25, § 98. The MDMR Rule applies to all Maine lobster fishermen who hold federal lobster permits.

12. By and through this Complaint, the Plaintiffs now challenge the MDMR Rule adopting and enforcing the Addendum on three grounds:

A) The MDMR Rule’s requirement of a twenty-four hour a day vessel tracker is an unreasonable search and seizure and a violation of due process under the Fourth and Fourteenth Amendments to the United States Constitution.

B) The MDMR Rule, as currently constructed, is a violation of the Plaintiffs’ equal protection rights as guaranteed by Articles V and XIV of the United States Constitution and by Article I, § 6-A of the Maine Constitution, which apply to the conduct and actions of the Defendant and his officials and employees, in that the Rule is void for vagueness by failing to describe any of the conditions under which it will be enforced and the penalties for noncompliance.

C) The MDMR Rule is both arbitrary and capricious under the Maine Administrative Procedure Act, 5 M.R.S. §§ 8001 *et seq.* (the “Maine APA”) and contrary to law, in that the Rule violates the Consolidated Appropriations Act, 2023. Pub. L. No. 117-328, Div. JJ, 136 Stat. 4459,

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6089-92 (2022) (the “CAA”), which includes a provision that specifies that NMFS’s Atlantic Large Whale Take Reduction Plan is “sufficient to ensure that the continued Federal and State authorizations of the American Lobster and Jonah Crab fisheries are in full compliance with” both the Marine Mammal Protection Act and the Endangered Species Act until December 31, 2028.

PARTIES

13. Plaintiff Frank Thompson is an individual residing in Vinalhaven, Maine and, together with his spouse Jean Thompson, is the co-owner of Fox Island Lobster Company LLC (FILCO). Mr. Thompson is a federally permitted fisherman who fishes 800 traps in federal waters and has received a vessel tracker from MDMR that he was required to install on his vessel by December 15, 2023.

14. Plaintiff Joel Strout is an individual residing in Harrington, Maine and the President of the District 4 Lodge of the International Association of Machinist and Aerospace Workers, Local Lodge 207, *f/k/a* IAMAW Maine Lobstering Union – Local 207 (the “MLU”), whose members all hold active Maine commercial lobster and crab fishing licenses. Mr. Strout is a federally permitted lobster fisherman who fishes 800 traps in federal waters and has received a vessel tracker from MDMR that he was required to install on his vessel by December 15, 2023.

15. Plaintiff Jason Lord is an individual residing in Pemaquid, Maine. Mr. Lord is a federally permitted lobster fisherman who fishes 800 traps in federal waters and has received a vessel tracker from MDMR that he was required to install on his vessel by December 15, 2023.

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16. Plaintiff Christopher Smith is an individual residing in Jonesport, Maine. Mr. Smith is a federally permitted lobster fisherman who fishes 800 traps in federal waters and has received a vessel tracker from MDMR that he was required to install on his vessel by December 15, 2023.

17. Plaintiff Jack Cunningham is an individual residing in Bar Harbor, Maine. Mr. Cunningham is a federally permitted lobster fisherman who fishes 800 traps in federal waters and has received a vessel tracker from MDMR that he was required to install on his vessel by December 15, 2023.

18. Defendant Patrick Keliher is the Commissioner of the Maine Department of Marine resources and is named as a Defendant in his official capacity. Commissioner Keliher is also a member of the ASMFC. In his official role, Commissioner Keliher supervises and directs all business conducted by the MDMR and is responsible for ensuring that the actions, decisions, and rules of that agency comply with all applicable laws and regulations.

JURISDICTION AND VENUE

19. The United States District Court for the District of Maine has jurisdiction over this matter under 28 U.S.C. § 1331 because this case presents a federal question under the laws of the United States, specifically Articles V and XIV and the Fourth and Fourteenth Amendments to the United States Constitution, as well as the CAA. This Court has supplemental jurisdiction over the Plaintiffs' claims under the Maine APA pursuant to 28 U.S.C. § 1367(a) because the Plaintiffs' state law claims are so related to their federal claims in this action that they form part of the same case or controversy. An actual,

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justiciable controversy exists between the Plaintiffs and the Defendant, and the requested relief is proper under 28 U.S.C. §§ 2201-2202.

20. Venue in this Court is proper pursuant to 28 U.S.C. § 1391 because the Plaintiffs' principal places of business are in this District, the MDMR Rule is to be implemented in this District, and a substantial part of the events or omissions giving rise to the Plaintiffs' claim occurred, or a substantial part of property that is the subject of the action is situated, in this District.

LEGAL BACKGROUND

The United States Constitution

21. The Fourth Amendment to the United States Constitution protects people from unreasonable search and seizures. U.S. Const. amend. IV. An unreasonable search and seizure occurs when the government trespasses into personal property, without a warrant, in violation of a reasonable expectation of privacy. U.S. Const. amend. IV.

22. The Fourteenth Amendment to the United States Constitution protects people from deprivations of life, liberty, and property without due process of law. U.S. Const. amend. XIV. Use of information or evidence obtained through an unconstitutional search and seizure is a violation of due process under the Fourteenth Amendment.

23. The Supreme Court has recognized a reasonable expectation of privacy in physical movements captured by GPS monitoring. "Whether the Government employs its own surveillance technology ... or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate

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expectation of privacy in the record of his physical movements.” *Carpenter v. United States*, 138 S. Ct. 2206, 2217, 201 L. Ed. 2d 507 (2018). For example, long-term “GPS monitoring of even a vehicle traveling on public streets constitutes a search” by the Government. *Id.*

24. The protections of the Fourth and Fourteenth Amendments also extend to an individual’s right to conduct a business free from government incursion. Businesspeople “ha[ve] a constitutional right to go about [their] business free from unreasonable official entries upon [their] private commercial property.” *See, e.g., Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 487–88 (S.D.N.Y. 2019). To be constitutional, an administrative search of a business must have a limited scope, a relevant purpose, specificity in its demands, and a neutral arbiter.

The Atlantic Coastal Fisheries Co-Operative Management Act

25. The ACA authorizes the states to regulate commercial fisheries in state waters. “The responsibility for managing Atlantic Coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the Atlantic States Marine Fisheries Commission. It is the responsibility of the Federal Government to support such cooperative interstate management of coastal fishery resources.” 16 U.S.C.A. § 5101.

26. With respect to federal waters, the ACA empowers the Secretary of the ASMFC to “implement regulations to govern fishing in the exclusive economic zone (EEZ) that are (A) compatible with the effective implementation of a coastal fishery

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management plan; and (B) consistent with the national standards set forth in section 301 of the Magnuson-Stevens Fishery Conservation and Management Act.” 16 U.S.C.A. § 5103.

27. However, if a fishery “is located in both State waters and the exclusive economic zone (“EEZ”), the Commission shall consult with appropriate Councils to determine areas where such coastal fishery management plan may complement Council fishery management plans.” 16 U.S.C.A. § 5104(a)(1).

The Magnuson-Stevens Act

28. Recognizing the economic importance of commercial and recreational fishing, the MSA was adopted to protect, manage, and grow the United States’ fishery resources. To achieve these goals, the MSA delineates scientific and conservation-based statutory obligations to sustainably manage fishery resources for the benefit of the fishing industry and the environment. *See* 16 U.S.C. §§ 1801 *et seq.*

29. The MSA grants the Department of Commerce the ability to exercise “sovereign rights” to conserve and manage fisheries resources “for the purposes of exploring, exploiting, conserving, and managing all fish” in the EEZ. *See* 16 U.S.C. §§ 1801(b)(1), 1811(a). Generally, the EEZ extends from the seaward boundary of each of the coastal States to 200 nautical miles offshore. *See* 16 U.S.C. § 1802(11).

30. The MSA created eight Regional Fishery Management Councils. The Council relevant to Maine is the New England Council, which consists of representatives from Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. The New England Council collectively has authority over fisheries in the Atlantic Ocean seaward from those

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states. 16 U.S.C.A. § 1852(a)(1). The MSA empowers both the regional councils and the Secretary of Commerce to prepare FMPs. Those plans must be “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” 16 U.S.C.A. § 1853.

31. FMPs implemented by any of the NOAA councils, or the Secretary of Commerce under the MSA, supersede any conflicting regulation issued by the ASMFC. 16 U.S.C.A. § 5103.

32. The MSA does not authorize or permit any collection of information on vessel movements when the vessel is not fishing under its permit. To the contrary, the MSA only permits the collection of information that is beneficial for developing, implementing, or revising FMPs. *See* 18 U.S.C. § 1881a(a)(1). If a Regional Fishery Management Council determines information collection is necessary in order to prepare an FMP, it may request that the Secretary implement such collection. *See* 18 U.S.C. § 1881a(a)(1). Only where the Secretary has determined that the collection is justified does he or she have a duty to promulgate regulations implementing the collection program. *Id.* If deemed necessary, the Secretary may also initiate an information collection program. *See* 18 U.S.C. § 1881a(a)(2).

33. Section 301 of the MSA lists 10 “National Standards” that all FMPs are required to follow, including NOAA council and ASMFC plans. At least six standards are implicated by the Addendum:

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A) National Standard One, which requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.” 16 U.S.C. § 1851(a)(1).

B) National Standard Two, which requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

C) National Standard Four, which requires that all agency measures that “allocate or assign fishing privileges among various . . . fisherman” should be “fair and equitable” and “reasonably calculated to promote conservation.” 16 U.S.C. § 1851(a)(4). Furthermore, “[n]o particular individual, corporation, or other entity [should] acquire[] an excessive share of such privileges.” *Id.*

D) National Standard Six, which requires that “[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.” 16 U.S.C. § 1851(a)(6).

E) National Standard Seven, which requires that “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” 16 U.S.C. § 1851(a)(7).

F) National Standard Eight, which requires that “[c]onservation and management measures shall, consistent with the conservation requirements . . . , take into account the importance of fishery resources to fishing communities by utilizing economic and social data that [are based upon the best scientific information available], in

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order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.” 16 U.S.C. § 1851(a)(8).

34. The MSA does not require lobster boats to have a vessel tracker nor does it mention or contemplate 24-hour location and movement surveillance of any vessel, whether by GPS or otherwise, regardless of whether that vessel is being used to fish in federal waters under a federal permit or is being used for other unregulated purposes.

35. The Secretary of Commerce, NOAA, NMFS, ASMFC, the Regional Fishery Management Councils, and the individual state marine agencies all work in conjunction with one another in the drafting, rulemaking, and enforcement of FMPs. Authority to supersede a particular rule lies first with NOAA and the Secretary of Commerce’s regulatory authority over the ASMFC and the individual states.

36. While the ASMFC is empowered by the ACA to draft regulations that govern the EEZ (provided that they are compatible with the standards set out in the MSA), it cannot supplant regulations issued by NOAA, NMFS or the Secretary of Commerce.

The Consolidated Appropriations Act

37. In 2021, NMFS promulgated a Biological Opinion (“2021 BiOp”) pursuant to the Endangered Species Act and Marine Mammal Protection Act, along with amendments to the 2021 Atlantic Large Whale Take Reduction Plan (“ALWTRP”), ostensibly designed to protect the North Atlantic right whale.

38. That 2021 BiOp and the ALWTRP amendments were challenged in *Maine Lobstermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, 626 F. Supp. 3d 46

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(D.D.C. 2022), rev'd and remanded sub nom., *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582 (D.C. Cir. 2023), with the United States Court for the District of Columbia ultimately ruling in favor of NMFS.

39. This decision was ultimately reversed and remanded by the D.C. Circuit in *Maine Lobstermen's Assn v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582 (D.C. Cir. 2023), which found the 2021 BiOp to be in violation of the federal Administrative Procedures Act ("APA") for, *inter alia*, failure to use the best science and apply the same to outcomes reasonably likely to occur. The D.C. Circuit then vacated the 2021 BiOp and remanded the 2021 ALWTRP amendments to NMFS.

40. Prior to the D.C. Circuit's opinion, however, Congress passed the CAA in response to the District of D.C.'s ruling in *Maine Lobstermen's Association*.

41. Section § 101 of the CAA included a mandate that the 2021 amendments to the ALWTRP "shall be deemed sufficient to ensure that the continued Federal and State authorizations of the American lobster and Jonah crab fisheries are in full compliance with" both the Marine Mammal Protection Act and the Endangered Species Act until December 31, 2028.

42. Section 101(a)(1) of the CAA also requires NMFS to "promulgate new regulations for the American lobster and Jonah crab fisheries consistent with the [MMPA] and the [ESA] that take effect by December 31, 2028, utilizing existing and innovative gear technologies, as appropriate."

43. However, Section 101(b) of the CAA provides that the provisions of subsection (a) "shall not apply to an existing emergency rule, or any action taken to

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extend or make final an emergency rule that is in place on the date of enactment of this Act, affecting lobster and Jonah crab.”

44. There was no emergency rule in place requiring the installation of any electronic vessel tracker at the time of the CAA’s enactment.

The Maine Administrative Procedure Act

45. The Maine APA sets forth the process for Maine administrative agency rulemaking and specifies areas appropriate for judicial review. *See* 5 M.R.S. § 8052.

46. The Maine APA requires that, “[a]t the time that an agency is preparing a rule, the agency shall consider the goals and objectives for which the rule is being proposed, possible alternatives to achieve the goals and objectives and the estimated impact of the rule. The agency's estimation of the impact of the rule must be based on the information available to the agency and any analyses conducted by the agency or at the request of the agency. The agency shall establish a fact sheet that provides the citation of the statutory authority of the rule.” 5 M.R.S. § 8057-A(1).

47. Under Section 8057-A(1) of the Maine APA, “the agency, to the best of its ability, shall also include in the fact sheet a) [t]he principal reasons for the rule; b) [a] comprehensive but concise description of the rule that accurately reflects the purposes and operation of the rule; c) [a]n estimate of the fiscal impact of the rule; and d) [a] brief summary of the relevant information considered during the development of the rule.”

48. The Maine APA also requires a written statement by agencies engaged in rulemaking that explains the factual and policy basis for proposed rules and identifies persons commenting on proposed

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rules, as well as the organizations they represent and summaries of their comments. Agencies are also obligated to publish their rationale for adopting, or failing to adopt, any changes to proposed rules, or when they draw findings and recommendations different from those expressed by commentators. 5 M.R.S. § 8052(5).

49. Rules promulgated by a Maine administrative agency can be challenged on procedural and substantive grounds and are subject to judicial review. 5 M.R.S. § 8058(1). A court's substantive review of agency rulemaking is to "to determine whether the rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.*

50. Federal review of state administrative actions or rules is generally inappropriate when a federal court is asked to answer questions specific to state law concerns and administration. This determination is subject to a two-pronged analysis based on (1) whether there exist "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 29 (1st Cir. 2011).

51. This so-called *Burford* abstention doctrine, however, is narrowly tailored to situations where deference to state administrative processes is appropriate because the rule or action involved pertains only to state-law issues that serve a

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significant local interest. *Chico Serv. Station, Inc.*, 633 F.3d at 29. Accordingly, “*Burford* abstention must only apply in unusual circumstances, when federal review risks having the district court become the regulatory decision-making center.” *Id.* at 30 (internal quotation marks omitted) (quoting *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 473 (1st Cir. 2009)).

52. Accordingly, federal court abstention policy in the context of state rulemaking “is limited to narrowly circumscribed situations where deference to a state’s administrative processes for the determination of complex, policy-laden, state-law issues would serve a significant local interest and would render federal-court review inappropriate.” *Chico Serv. Station, Inc.*, 633 F.3d at 30 (internal quotation marks omitted) (quoting *Fragoso v. Lopez*, 991 F.2d 878, 882 (1st Cir. 1993)). “[T]he *Burford* doctrine does not require abstention merely because the federal action may impair operation of a state administrative scheme or overturn state policy.” *Id.*

STATEMENT OF FACTS

The Addendum In Historic Perspective

53. When the ASMFC published the Addendum to the existing American Lobster and Jonah Crab FMP in March of 2022, it gave no indication that it had consulted with any Regional Fishery Management Council during the drafting process.

54. The Addendum was initiated from what the American Lobster Management Board characterized as a “critical need for high resolution spatial and temporal data.” The Board’s reference to a need for more spatial data, however, was previously addressed

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in a prior addendum published in February of 2018 (“Addendum XXVI”). Addendum XXVI, which is attached hereto as Exhibit B, initiated a pilot program for electronic tracking of vessels that required all federally permitted vessels to self-report harvester data either electronically or manually. These measures were also meant to address a “lack of spatial information.”

55. Addendum XXVI called for mandatory self-reporting of the following data points: a) a unique trip identification number; b) a vessel identification number; c) the trip start date; d) the location (by NMFS Statistical Area) of the trip; e) the lobster management area; f) a 10-minute square level; g) the number of traps hauled on the trip; h) the number of traps set on the trip; i) the species harvested; j) the quantity (in pounds) of the harvest; k) the length of the trip; l) the number of traps employed per trawl; m) the number of buoy lines employed; and n) the soak time of the traps.

56. At the end of Addendum XXVI’s 1-year pilot program, the ASMFC was to assess the effectiveness of different tracking technologies and consider whether the adoption of an electronic vessel tracking requirement was appropriate.

The Addendum At Issue

57. The ASMFC formally adopted the vessel tracking program that was piloted under Addendum XXVI when it issued the Addendum now at issue. The Addendum requires federally permitted lobster Maine fishermen to install and activate an electronic tracking device on their vessels by December 15, 2023. The device must be installed directly on the vessel and remain activated so that it can continually transmit

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location data at all times, even when the vessel is not in use (i.e., when it is docked) or is not fishing in federal waters (i.e., when the vessel is being operated by a fisherman for personal use). The electronic tracking data is in addition to data that lobster fishermen are already required to self-report about their location.

58. The Addendum requires the electronic tracker to have a “ping rate” of once per minute, meaning that the device will “ping” or collect the device’s longitude, latitude, corresponding vessel identifier and date once per minute. The device must also be accurate up to 100 meters of the vessel’s location.

59. According to the Addendum, “[t]o date, the majority of spatial analyses of lobster and Jonah crab fishery data have been constrained to NOAA statistical areas and state management areas, hindering the ability to quantify effort in specific regions or identify important transit routes and fishing grounds. The application of electronic vessel tracking to this fishery could significantly improve the information available to fishery managers and stock assessment scientists. In particular, a number of challenges the fishery is currently facing pose a critical need for electronic tracking data in the offshore fishery.”

60. The Addendum then lists four goals of the electronic tracking requirement:

A) To improve spatial information data concerning the location of where the majority of fishing effort occurs by collecting spatial data more frequently and with more accurate precision;

B) To improve risk reduction efforts under the Atlantic Large Whale Take Reduction Plan that

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are based on models that estimate the location of vertical buoy lines using effort data of a similarly coarse resolution;

C) To promote and prioritize the development of offshore renewable energy and the conservation of federal waters, including wind energy, aquaculture, and marine protected areas that may all create marine spatial planning challenges for the lobster and Jonah crab fisheries; and

D) To combat difficulties associated with locating gear for compliance checks and to increase the efficiency and efficacy of enforcement efforts in offshore federal management areas.

61. The Addendum further addresses the ASMFC's offshore enforcement goals by enabling the ASMFC to use this newly available data to identify subjects for investigations into potential illegal fishing practices. To that end, the Addendum states, in part, that:

Enforcement personnel have consistently noted that having the ability to differentiate when a boat is steaming versus hauling is critical to efforts to inspect gear and identify when fishermen are using illegal gear. Even if location data are not reported in real-time, once a fishing location can be identified from vessel tracking data, enforcement personnel would be able to go to that location to inspect gear for appropriate markings, buoys, escape vents, and ghost panels. Given finite enforcement resources, information on distinct fishing locations would improve the efficiency and capability of offshore enforcement efforts.

62. After the data is collected from the electronic tracking devices, it then will be shared and managed

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by the Atlantic Coastal Cooperative Statistics Program (“ACCSP”). The ACCSP maintains a database referred to as the Standard Atlantic Fisheries Information System (“SAFIS”). SAFIS currently holds self-reported data from lobster fishermen as required by Addendum XXVI in the form of so-called “SAFIS reports” or “trip tickets.” SAFIS will be the repository of both self-reported trip data (known as “eVTR data”) and the new electronic monitoring data collected by the vessel trackers.

63. ACCSP is responsible for data quality and matching the two sources of trip data. The Addendum states that the two sources of data will then be matched by ACCSP by means of trip identification numbers and other vessel registration information.

64. The Addendum contains little to no information on how this data will be protected from unauthorized use and disclosure. There are no references to encryption, and there is no data governance policy detailing what the specific intended use of the data is. Indeed, the Addendum as written gives the ASMFC and MDMR broad discretion on how they can use the data collected, without assurances that the data will be immune from third party subpoena or how access by third parties will be limited, even though ACCSP data has been subject to subpoenas in the past.

65. Importantly, and unlike electronic devices or tracking applications available in the private marketplace, the Addendum provides fishermen with no ability to view the reporting dashboards associated with the trackers or to agree to terms of service that describe how the data from the tracking device on their vessels will be collected, transmitted, stored and used.

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66. The Addendum provides no limits regarding how and in what format the data can be used. It also does not place any upward limits on how sophisticated the data collection can be, i.e., whether the data collected is limited to spatial data or whether other types of data such as voice, speed, and other data categories can be collected.

67. The Addendum only lists two exceptions to the tracking requirement. The requirement does not apply to vessels in Trap Area 6, which covers state waters off the coast of New York and Connecticut, because a federal permit is not required to lobster in that area. Similarly, the Addendum also exempts holders of state-only lobster permits without a federal commercial trap gear area permit.

68. The Addendum further provides that “[t]he Atlantic States Marine Fisheries Commission recommends that the federal government promulgate all necessary regulations in Section 3.0 to implement complementary measures to those approved in this addendum. The Commission requests that NOAA Fisheries publish the final rule on vessel tracking by May 1, 2023, with implementation no later than December 15, 2023.” To date, no such final federal rule has been published by NOAA fisheries, much less implemented.

The MDMR Rule

69. MDMR is responsible for enforcing ASMFC’s amendments in the state of Maine. On September 13, 2023, MDMR published a rule entitled “Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders.” See 13 C.M.R. 188, ch. 25, § 98. The MDMR Rule

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adopts the Addendum XXIX and lists five new actions that MDMR declares to be unlawful:

A) It is unlawful for a federally permitted lobster and crab fishing license holder to fish for, take, possess, or land lobster or Jonah crab taken with trap gear without having an approved tracking device installed aboard the permitted vessel listed on their license.

B) It is unlawful for a federally permitted lobster and crab fishing license holder to remove or have removed the approved tracking device from the permitted vessel listed on their license without written approval from the Department of Marine Resources.

C) It is unlawful for a federally permitted lobster and crab fishing license holder to allow the permitted vessel listed on their license to be operated in the coastal waters of the State without the approved tracking device being powered by an external power source at all times; an exception to this requirement exists when the vessel is moored or docked at berth.

D) The approved tracking device must remain in an operational condition, minimally powered by an internal battery, when a permitted vessel is docked, moored, or removed from the water. The license holder shall notify the Department of Marine Resources prior to an approved tracking device being rendered inoperative in instances where the permitted vessel is removed from the coastal waters for an extended period of time or for purposes of repairing or replacing an approved tracking device.

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E) It is unlawful for a person to tamper with an approved tracking device or device signal; tampering includes any activity that may affect the unit's ability to operate or signal properly or to accurately compute or report the vessel's position. Tampering with an approved tracking device is not considered to occur in circumstances where an approved tracking device is being repaired or replaced provided the license holder has written approval from the Department of Marine Resources.

70. The MDMR Rule mirrors Addendum XXIX and requires all federally permitted lobster license holders to have an approved tracking device installed on their boats prior to December 15, 2023.

71. The MDMR does not list specific punishments for failure to comply with the MDMR Rule. Rather, the MDMR Rule simply states that individuals will not be punished for a device malfunction if the fisherman notifies MDMR of the issue and makes efforts to restore it to operation in an unspecified "timely manner." Because the Rule does not specify how enforcement will be handled in any other exigent circumstances, it remains unclear what responsibilities and repercussions will be applied to fishermen unaware of a malfunction of their electronic tracking device, a particular concern given that fishermen are not given access to the settings on the device itself, or if the fisherman is unable to repair the device. Additionally, it is unclear if fishermen are entitled to appeal any fines, penalties, or other enforcement actions levied against them regarding the MDMR Rule.

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72. As with the Addendum, the MDMR Rule requires continuous tracking and monitoring of lobster fishermen even when they are not fishing in federal waters, despite the fact that lobster fishermen use their vessels in other commercial capacities (such as scallop, tuna and menhaden fishing) as well as recreationally. Their movements will be tracked on a minute-by-minute basis even during emergency search and rescue operations.

73. Upon information and belief, the scope of potential privacy and security intrusions associated with the MDMR Rule far exceed those of any other vessel (or motor vehicle) tracking requirement ever implemented in this State. The existing scallop tracking requirement, for example, mandates that a tracker be active only when the vessel is entering the federal scallop fishery. The scallop tracker also only “pings” at a rate of once per hour instead of the once-per-minute that the MDMR Rule requires. Moreover, scallop fishing is distinguishable from lobster fishing in that the scallop fishery operates a quota fulfillment system.

The Particle TrackerOne Device

74. In November of 2023, MDMR began sending federally permitted lobster fishermen the electronic trackers required by the MDMR Rule. MDMR received funding for the electronic trackers, and the associated data plans, through a NOAA and National Fish and Wildlife Grant, which was funded in part by the Shell Oil Company. MDMR represents that it will pay for the associated data plans for the first three years of the program. It is unclear who will fund the data plan beyond that period.

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75. MDMR used the grant funds to select and purchase one of the many available electronic trackers meeting the specifications called for by the Addendum. The tracking device selected is the “TrackerOne,” an electronic tracker distributed by Particle, a U.S. based company. Particle intends to store the data on their U.S. based servers and offers so-called “dashboards” that allow users visibility into the data being collected by the TrackerOne device in real time. The TrackerOne is manufactured in China based on Particle’s design.

76. In the materials that accompany each device, which are attached hereto as Exhibit C, MDMR demands that the TrackerOne be installed directly on fishing vessel either via a USB port or by hardwiring the tracker to the vessel itself. The fisherman is then responsible for ensuring that the tracker remains activated at all times, either by running a generator or by using the vessel’s house batteries.

77. MDMR did not provide fishermen with any of the manufacturer’s specifications, privacy agreements, dashboard access, or other information associated with the tracker. As a result, fishermen are unaware of what data will be collected, how that data will be used, or the circumstances under which that data can be shared. This is particularly worrisome given that, in addition to determining a user’s GPS coordinates, the TrackerOne appears to be Bluetooth compatible, may be adapted in order to collect audio information, and employs a predictive algorithm that can anticipate vessel movements.

The Sustainable Maine Fishing Foundation

78. In the fall of 2023, the Plaintiffs voiced their concerns to the Sustainable Maine Fishing

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Foundation (“SMFF”). SMFF is a non-profit entity established to support efforts to sustain the lobster fishery and protect the rights of the fishing communities that depend on the lobster industry.

79. In response to the confidentiality, privacy, and enforcement concerns voiced by many affected fishermen, SMFF corresponded with Defendant MDMR Commissioner Keliher on December 13, 2023 to detail their concerns and request further information on the TrackerOne and how its data would be collected, stored, maintained, and protected. *See Dec. 13, 2023 Correspondence*, attached hereto as Exhibit D. SMFF also requested an extension of the December 15, 2023 implementation date. As of its filing of this Complaint, SMFF has not received a formal response to its correspondence. However, Commissioner Keliher has informed a member of the MLU that the tracking requirement was “out of his hands.”

Count I

Violation of Right to Privacy and Due Process (U.S. Const. amend. IV; U.S. Const. amend. XIV)

80. The Plaintiffs reallege and incorporate by reference their allegations in Paragraphs 1 through 79 above.

81. The Plaintiffs have a reasonable expectation of privacy in the movements of their fishing vessels and the precise location of their lobster traps such that they have the constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.

82. Through their responsibility for installing, activating, and maintaining the TrackerOne device,

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the Plaintiffs also have a reasonable expectation of privacy in the data produced by the tracker itself.

83. The Plaintiffs also have a right to be free from unreasonable official entries upon private commercial property when acting in a business capacity.

84. The electronic vessel tracking requirement set forth in the Addendum and the MDMR Rule constitutes a search within the meaning and contemplation of the Fourth Amendment to the United States Constitution, insofar as the Defendant, without a warrant, is tracking the Plaintiffs' movements while conducting business activities within federally regulated waters, as well as their personal movements while in state-controlled waters.

85. Additionally, neither the ASMC nor MDMR have articulated the limited scope, relevant purpose, and specificity required to otherwise obtain this satellite tracking data through a constitutional administrative search.

86. Because ASMFC and MDMR intend to use the tracker's surveillance data in connection with offshore enforcement efforts, the information being collected without warrant from the Plaintiffs, and potentially used punitively against them, violates their right to be free from the deprivation of life, liberty, and property without due process of law under the Fourteenth Amendment to the United States Constitution.

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Count II
Violation of Equal Protection
(U.S. Const. Art. V and XIV, Me. Const. Art. I,
Section 6-A)

87. The Plaintiffs reallege and incorporate by reference their allegations in Paragraphs 1 through 86 above.

88. The guarantee of equal protection under the law as provided by Articles V and XIV of the United States Constitution and by Article I, § 6-A of the Maine Constitution applies to the conduct and action of the Defendant and its officials and employees.

89. Plaintiffs have a constitutionally protected right to equal protection under the law when the government regulates their private property, movements, and business activities.

90. Accordingly, lobster fishermen are entitled to equal protection under policies and rules that regulate their fishing licenses and commercial fishing operations.

91. The MDMR Rule does not provide this constitutionally required protection and is void for vagueness in that it is designed to enforce criminal and regulatory offenses without defining the contours of offenses with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

92. By way of example, the MDMR Rule does not list the penalties for noncompliance, indicate what offenses can be prosecuted based on the data that is collected, what enforcement efforts can be used in connection with the tracking device, or whether any

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non-compliance has implications on their fishing licensure.

93. The MDMR Rule also does not state what penalties, if any, may be imposed for unintentional, as opposed to intentional, violations of the Rule or what appellate rights the Plaintiffs have to challenge allegations of any such violations. Nor does the MDMR Rule state whether fishermen will be subject to the same penalties applicable to an intentional violation where a fisherman is simply unaware of a malfunction of his or her tracker. The Rule also does not state whether MDMR will make efforts to distinguish server-side errors from fisherman error.

94. Given the lack of clarity on how MDMR intends to incorporate the “offshore enforcement” efforts called for by the Addendum, and the fact that there are no detailed penalties in the MDMR rule for noncompliance, the MDMR Rule is void for vagueness in that it violates the equal protection guarantees provided by both the United States and Maine constitutions.

Count III

Violation of the Maine Administrative Procedure Act (5 M.R.S. § 8058)

95. The Plaintiffs reallege and incorporate by reference their allegations in Paragraphs 1 through 94 above.

96. Pursuant to Section 8058 of the Maine APA, the Court must set aside an agency rule that 1) does not contain the written statement required by Section 8057-A; 2) involves a procedural error that is substantial and related to matters of such central relevance to the rule that there is a substantial

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likelihood that the rule would have been significantly changed if the error had not occurred; or 3) is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

97. The MDMR Rule fails to satisfy the Maine APA's requirement of a written statement in that it does not specify the operation, fiscal impact, or information considered by MDMR in its promulgation of the Rule, including without limitation 1) specification of the Rule's enforcement provisions or a data governance policy, 2) specification of the fiscal implications to fisherman once the grant funding for the trackers expires, or 3) specification as to how MDMR arrived at a required ping rate or determined a need for the tracking of licensees beyond the scope of their lobster fishing activities.

98. The MDMR Rule is arbitrary and capricious in that the Rule is inconsistent with the goals of the MSA because the Rule:

A) Does not contain an adequate explanation for why minute-by-minute surveillance (as opposed to the hourly surveillance called for by the scallop tracking program) of federally permitted lobster fishing vessels is required to protect, conserve, grow or manage the American lobster fishery;

B) Authorizes the tracking of lobster vessels in state waters, when the vessel is being used for other commercial purposes unrelated to lobster fishing, and/or when the vessel is being used recreationally;

C) Calls for a substantial increase in surveillance without an explanation as to why the self-reported spatial information that fishermen

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have gathered since 2018 under Addendum XXVI is insufficient information for purposes of MSA compliance and/or does not violate National Standard 7, which specifically states that any fishery plan shall “avoid unnecessary duplication”;

D) Risks exposing the Plaintiffs’ trade secrets to third-parties without any explanation of what efforts, if any, are being taken to encrypt and protect that information from such third-parties, including whether third parties will be able to subpoena this information or whether this information will be available as part of the administrative record in challenges to other agency actions;

E) States that the information collected will be shared with “appropriate state or federal agencies” without defining those agencies that MDMR deems to be appropriate, limit what these agencies can subsequently do with that information, or state whether this information will be available to other agencies or private parties interested in developing wind energy projects in lobster fishing grounds;

F) Has a stated purpose of furthering renewable energy projects, including wind energy, that is well beyond the goals of FMPs authorized by the MSA;

G) Requires a tracker that can be Bluetooth enabled and is capable of collecting nonspatial data; and

H) Is more expensive and intrusive than necessary to achieve the Addendum’s stated goals.

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99. The MDMR Rule is contrary to law in that:

A) The Rule violates the CAA because it is not an extension of an emergency rule existing at the time of the CAA's passage, but rather is a new regulation or administrative action designed to bring the lobster industry into compliance with the Endangered Species and Marine Mammal Protection Act in violation of the CAA's express provision that the existing amendments to the ALWTRP are to be deemed sufficient for compliance until December of 2028;

B) Section § 101 creates field preemption over regulations of federally licensed lobster and Jonah Crab fisheries such that MDMR has no authority to create state regulations affecting them; and

C) Although the ACA expressly states that any rules promulgated by the ASMFC must be consistent with the National Standards articulated in the MSA, the Addendum and the MDMR Rule adopting the Addendum are inconsistent with those National Standards.

100. A challenge to the MDMR Rule does not involve questions specific to Maine state law because the MDMR Rule adopts the federal policy contained in the ASMFC Addendum that MDMR is required to adopt under federal law. At bottom, MDMR is tasked with implementing rules that are consistent with the MSA's national standards.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Frank Thompson, Joel Strout, Christopher Smith, Jason Lord and Jack Cunningham respectfully request that the Court:

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A) Declare that the MDMR Rule violates the Fourth and Fourteenth Amendment to the United States Constitution;

B) Declare that the MDMR Rule is void for vagueness and violates due process under Articles V and XIV of the United States Constitution and Article I, § 6-A of the Maine Constitution;

C) Declare that the MDMR Rule is arbitrary and capricious and contrary to law under the Maine Administrative Procedures Act;

D) Restrain the Defendant from enforcing the MDMR Rule as presently formulated;

E) Award the Plaintiffs their costs of litigation, including reasonable attorneys' fees; and

F) Such other relief as the Court deems just and proper.

Dated at Portland, Maine this 2nd day of January, 2024.

/s/ Thimi R. Mina

Thimi R. Mina

/s/ Alfred C. Frawley IV

Alfred C. Frawley IV

MCCLOSKEY, MINA, CUNIFF &

FRAWLEY, LLC

12 City Center

Portland, Maine 04101

207.772.6805

207.879.9375

tmina@lawmmc.com

afrawley@lawmmc.com

*Attorneys for Plaintiffs Frank
Thompson, Joel Strout, Jason
Lord, Chris Smith and Jack
Cunningham*

Filed 1/12/24

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRANK THOMPSON,)	
JOEL STOUT, JASON)	
LORD, CHRISTOPHER)	
SMITH, and JACK)	
CUNNINGHAM,)	
Plaintiffs,)	Docket No.
v.)	1:24-cv-
PATRICK KELIHER, in his)	00001-JAW
official capacity as)	
COMMISSIONER, MAINE)	
DEPARTMENT [OF])	
MARINE RESOURCES,)	
Defendant.)	

DECLARATION OF FRANK THOMPSON

I, **Frank Thompson**, hereby depose and state as follows:

1. My name is Frank Thompson. I am a resident of Vinalhaven, Maine, I am over 18 years of age, and I am a Plaintiff in the above-captioned civil action. I make this Declaration in support of the Plaintiffs' *Motion for Preliminary Injunction*, which seeks to enjoin the enforcement of a rule issued by the Maine Department of Marine Resources' ("MDMR") that compels federally permitted Maine lobstermen to install a Particle TrackerOne device on their vessels.

2. I am a lobster fisherman that possesses both State of Maine and federal lobster fishing permits. I have been lobstering in the waters off the coast of

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Vinalhaven for over 55 years. I presently fish 800 number of traps in federal waters known as the so-called “Exclusive Economic Zone.”

3. I am also the co-owner with my wife, Jean Thompson, of Fox Island Lobster Company, LLC (“FILCO”), a wholesale lobster dealer. FILCO purchases lobsters from other Vinalhaven fishermen and then transports these lobsters (a process known as “smacking”) to Rockland for sale to processors and other wholesale buyers. I often use my lobster fishing vessel to smack these lobsters. I also use my vessel for activities unrelated to lobster fishing, including but not limited to day trips with my family, tuna fishing, menhaden fishing, and scallop fishing. Additionally, I need to travel on my vessel when equipment repairs become necessary.

4. By virtue of my status as both a lobster fisherman and a lobster dealer, I closely follow and am familiar with regulations governing the American lobster fishery in the Gulf of Maine, including plans, guidelines and recommendations issued by the Atlantic States Marine Fishery Commission (“ASMFC”), as well as rules and regulations issued by MDMR. Accordingly, I have read and am familiar with the ASMFC’s “Addendum XXIX to Amendment 3 to The American Lobster Fishery Management Plan; Addendum IV to The Jonah Crab Fishery Management Plan” (the “Addendum”) as well as the MDMR rule entitled “Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders” (the “MDMR Rule”). I have received a Particle TrackerOne tracking device, as well as installation instructions for the tracker provided by MDMR. The written materials accompanying the TrackerOne informed me

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that I was required to install the device on my fishing vessel by December 15, 2023 in order to maintain my federal lobstering permit.

5. MDMR requires that my vessel be monitored by the TrackerOne device 24 hours a day, 7 days a week while my vessel is operational and every 6 hours when it is not. MDMR has informed me that I will need to have my tracking device powered on at all times, even when I am fishing in state waters, when I am engaged in other fishing-related activities such as scalloping or smacking, or even when it is being used for exclusively recreational activities. I was also informed that I am responsible for diligently checking that the TrackerOne is actively reporting my vessel's location on a minute-by-minute basis while my vessel is operating. I understand that my vessel will be tracked at all times, even when I am using it for exclusively personal purposes and not fishing in federal lobster areas. Specifically, MDMR has informed me that the "vessel tracker must remain powered and transmitting when the vessel is in the water regardless of landing state, trip type, location fished or target species." I further understand that the tracker will monitor my vessel's movements at a "ping" rate of once per minute even when the vessel is not fishing in federal waters or is not fishing for lobster.

6. This tracking requirement stands in stark contrast to the tracking requirement for scallop fishing vessels, which also must have a tracker installed on board. My understanding is that the scallop vessel operator, however, is only required to activate the tracker once the vessel leaves port for federal scallop waters, and once activated, the tracker only "pings" once every hour. By requiring tracking

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only to the extent necessary, the scallop tracker allows for monitoring and enforcement of the scallop fishery (which, unlike the lobster fishery, has specific quotas) without infringing on the vessel operator's rights to privacy when they are not scallop fishing. Nor does the tracking program for scallop fishermen reveal the precise location of their fishing efforts, information that is proprietary to each fisherman, only the general location of the vessel.

7. Although I understand that if I do not comply with the tracking requirement, I face potential sanctions or adverse impacts to my federal lobster fishing license, I am unclear as to penalties that can be imposed or how the tracking requirement will be enforced. MDMR has simply informed fishermen such as myself that if a device malfunctions, the license holder must notify MDMR and work to restore the device to operability in a timely manner before embarking on any subsequent fishing trips. Otherwise, failure to maintain the device in operating condition is "unlawful." Based on that minimal guidance, I am unclear as to whether the penalty provisions applicable to the scallop tracking program will apply with equal force to the lobster vessel tracker or whether there are new penalties for the "unlawful" conduct described by the MDMR Rule. I am also unclear as to whether there are any warnings that will be issued to first time violators, or whether the consequences of an intentional violation will be different from an unintentional violation where, for example, a fisherman is unaware his device is malfunctioning and therefore fails to notify MDMR. I am also unclear as to how MDMR will handle situations where the tracking device malfunctions before leaving port and a fisherman is unable to repair

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it in advance of a planned fishing trip. To my knowledge, MDMR does not identify any specific penalties for non-compliance or suggest how non-compliance will be handled by the department when a fisherman fails to follow those instructions or is unable to restore operation of their tracking device despite best efforts. I also have not received information on any rights I may have to appeal a perceived violation of the electronic tracking policy.

8. I have serious concerns that the mandated data collection and accompanying enforcement actions will negatively affect my business operations. For example, I have received no privacy agreement or user access information that would enable me to see what data will be collected, how that data will be used, or the circumstances under which that data can be shared. Without user access, I am unable to view this information or understand what data the tracker is collecting. I have learned through my online research and into the TrackerOne device and review of the TrackerOne data sheet that is available on Particle's website that, in addition to determining a user's GPS coordinates, the device is capable of collecting audio information and appears to have a predictive algorithm that can anticipate vessel movements. I also understand that it is Bluetooth and Wifi compatible. I am concerned about how my trip information is being protected by MDMR, if at all.

9. I am a fifth-generation lobster fisherman. Decisions concerning the placement of my traps are the result of hard work and knowledge that has been passed down to my family over decades. In the context of the lobster industry, this knowledge is, in every sense of the term, the equivalent of a trade secret having great monetary value. It is essential that my

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trip information remain confidential so that I can retain an important business advantage. To date, I have not been told how long data of my commercial fishing trips will be retained by MDMR, what agencies will have this data accessible, whether the data can be used to enforce other lobstering regulations, whether it can be subpoenaed by third parties or other law enforcement agencies, the manner in which the data is being stored, or any of the other information one would typically expect to be informed of in a customary privacy and security disclosure statement or agreement.

Dated at Vinalhaven, Maine this 10th day of January, 2024.

/s/ Frank Thompson
Frank Thompson

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**NOTICE OF AGENCY RULE-MAKING
ADOPTION**

AGENCY: Department of Marine Resources

CHAPTER NUMBER AND TITLE: Chapter 25.98
Electronic Tracking Requirements for Federally
Permitted Lobster and Jonah Crab License Holders

ADOPTED RULE NUMBER:

(LEAVE BLANK-ASSIGNED BY SECRETARY OF
STATE)

CONCISE SUMMARY:

This rule-making incorporates the requirements in Addendum XXIX (American Lobster) and Addendum IV (Jonah crab) that were approved by the Atlantic States Marine Fisheries Commission (ASMFC) in March 2022. Specifically, for compliance with the Interstate Fisheries Management Plans, this regulation requires all federally-permitted lobster and Jonah crab license holders with commercial trap gear area permits to have approved electronic tracking devices. This requirement applies to all federally-permitted lobster and crab license holders with commercial trap gear for Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, and the Outer Cape Cod.

EFFECTIVE DATE:

(LEAVE BLANK-ASSIGNED BY SECRETARY OF
STATE)

AGENCY CONTACT PERSON: Deirdre Gilbert

AGENCY NAME: Department of Marine Resources

ADDRESS: 21 State House Station
Augusta, Maine 04333

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WEB SITE: <http://www.maine.gov/dmr/rulemaking/>

E-MAIL: dmr.rulemaking@maine.gov

TELEPHONE: (207) 624-6553

FAX: (207) 624-6024

TTY: 207-624-6500

(Deaf/Hard of Hearing)

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DEPARTMENT OF MARINE RESOURCES

**Chapter 25: LOBSTER AND CRAB
REGULATIONS**

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25.98 Electronic Tracking Requirements for Federally-Permitted Lobster and Jonah Crab License Holders

Effective December 15, 2023, the following electronic tracking device requirements apply to all federally permitted lobster and crab license holders, as defined in section A.

A. Definitions

1. Approved Tracking Device means an electronic device that meets all the specifications outlined in Section 3.1 of the Atlantic States Marine Fisheries Commission Addendum XXIX to the American Lobster Fishery Management Plan and which has been approved for use by the Atlantic States Marine Fisheries Commission.
2. Federally permitted lobster and crab fishing license holder means an individual who is eligible for a commercial Maine state license or who is licensed to fish commercially for lobster and crab under 12 MRS 6421 or 12 MRS 6302-A who also holds a federal lobster and crab commercial trap gear permit for any of the Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, or the Outer Cape Cod on the vessel identified on their lobster and crab fishing license.

B. Electronic Tracking Device Requirements

1. Prior to their first lobster and crab fishing trip following December 15, 2023, federally permitted lobster and crab fishing license holders are required to install an approved tracking device.

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2. Federally permitted lobster and crab fishing license holders are required to certify to the Department of Marine Resources when they have completed the installation of the approved tracking device. To submit their certification, federally permitted lobster and crab fishing license holders must complete an electronic form available through the Department of Marine Resources publicly accessible website.

C. Prohibitions

Unless a federally permitted lobster and crab fishing license holder has made notification to the Department as provided in (E.) the following prohibitions apply.

1. It is unlawful for a federally permitted lobster and crab fishing license holder to fish for, take, possess, or land lobster or Jonah crab taken with trap gear without having an approved tracking device installed aboard the permitted vessel listed on their license.
2. It is unlawful for a federally permitted lobster and crab fishing license holder to remove or have removed the approved tracking device from the permitted vessel listed on their license without written approval from the Department of Marine Resources.
3. It is unlawful for a federally permitted lobster and crab fishing license holder to allow the permitted vessel listed on their license to be operated in the coastal waters of the State without the approved tracking

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device being powered by an external power source at all times; an exception to this requirement exists when the vessel is moored or docked at berth.

4. The approved tracking device must remain in an operational condition, minimally powered by an internal battery, when a permitted vessel is docked, moored, or removed from the water. The license holder shall notify the Department of Marine Resources prior to an approved tracking device being rendered inoperative in instances where the permitted vessel is removed from the coastal waters for an extended period of time or for purposes of repairing or replacing an approved tracking device.
5. It is unlawful for a person to tamper with an approved tracking device or device signal; tampering includes any activity that may affect the unit's ability to operate or signal properly or to accurately compute or report the vessel's position. Tampering with an approved tracking device is not considered to occur in circumstances where an approved tracking device is being repaired or replaced provided the license holder has written approval from the Department of Marine Resources.

D. Exemptions

The following federally permitted lobster and crab fishing license holders are exempt from the electronic tracking requirements.

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1. A federally permitted license holder who holds a federal commercial trap gear permit that has been placed in confirmation of permit history (CPH), a permit status for when a vessel with limited access permits has sunk, been destroyed, or has been sold to another person without its permit history.
2. A federally permitted license holder who holds a federal lobster commercial trap gear permit that does not fish trap gear at any point in the fishing year (i.e., only fishes other gear under a federal lobster commercial/non-trap permit, charter/party non-trap permit, and/or does not fish any trap gear at any point in the fishing year).

E. Device Failure

In the event of an electronic tracking device failure, a violation of the prohibitions in section (C) shall not exist when the federally permitted lobster and crab fishing license holder makes notification of the failure to the Department by phone, text message, or email prior to beginning a fishing trip with the inoperable device. The license holder must work with the Department in good faith and in a timely manner to restore device operability as soon as possible. It is unlawful for a license holder to begin subsequent fishing trips with an inoperable device without written approval from the Department.

In circumstances where a federally permitted lobster and crab fishing license holder has reported frequent or repeated tracking device failures aboard a permitted vessel, a Marine Patrol Officer,

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after having given notice to that license holder, may require that license holder to obtain written approval from the Department prior to beginning a fishing trip with an inoperable tracking device.

Basis Statement:

This rule-making incorporates the requirements in Addendum XXIX (American Lobster) and Addendum IV (Jonah crab) that were approved by the Atlantic States Marine Fisheries Commission (ASMFC) in March 2022. Specifically, for compliance with the Interstate Fisheries Management Plans, this regulation requires all federally-permitted lobster and Jonah crab license holders with commercial trap gear area permits to have approved electronic tracking devices. This requirement applies to all federally-permitted lobster and crab license holders with commercial trap gear for Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, and the Outer Cape Cod. The regulation identifies the specific requirements, as well as prohibitions and exemptions to the requirement. The regulation was amended from the original proposal in the following ways:

- It was amended in response to a comment requesting greater clarity regarding the ability of a federally permitted license holder to proceed with a fishing trip in the event of a device failure, and that this will not result in a violation;
- The definition of a “federally permitted lobster and crab fishing license holder” was amended to include a person who is eligible to purchase a commercial license, so that an individual who has not yet purchased their license for the year remains subject to the requirements;

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- The definition of a “federally permitted lobster and crab fishing license holder” was amended to specify a commercial license, so that individuals with a federal permit but only a noncommercial lobster license would not be subject to the requirement to have an electronic tracking device.

Summary of Comments:

Notice of this proposed rulemaking appeared on September 13, 2023 in the 5 major daily newspapers as published by the Secretary of State. Also on September 13, 2023 the rule was posted on the DMR website, and electronic messages were sent to individuals who subscribe to DMR notices. The public hearing was held on October 5, 2023 at 5:00 pm in person at the DMR offices at the Marquardt Building, 32 Blossom Lane, Augusta, Maine and remotely via Microsoft Teams. The comment period closed October 16, 2023.

Attendance at the Public Hearing:

Members of the Public	DMR Staff
Virginia Olsen, Matthew Gilley, Alan Poland, Nick Morley, Patrice McCarron, Rebecca Nuzzi, Amalia Harrington, Chris Cash, Ashley, Joseph Fessenden, Anonymous <i>Note: The names listed above reflect the information the</i>	Commissioner Patrick Keliher, Deputy Commissioner Meredith Mendelson, Deirdre Gilbert, Megan Ware, Jeff Nichols, William DeVoe, Lorraine Morris

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<i>participant provided when they signed into the remote proceeding. Some participants did not provide a last name or other identifying information.</i>	
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Thomas Boudin, submitted via email, September 14, 2023

This requirement will be very costly and put additional burdens on the industry.

Without evidence that rope entanglement is a severe threat to the Whale population I feel this requirement is overkill and very harmful to the Lobster industry that is already being threatened by global warming and other issues.

Is there any research information about the effect of prop strikes on whales?

Andrew Taylor, submitted via email, September 14, 2023

This rule is completely ridiculous, there is really nothing to be gained by this and is yet another great inconvenience to fisherman and senseless cost to the government. I have been fishing for over 40 years and with each of these new rules I'm closer to the end. There is also nothing to be gained by the mandatory reporting that isn't already known also. Seems marine patrol is out there and can tell you where everyone is fishing, it's not a big secret. We also already report landings to dealers. Just redundant info and great inconvenience to fisherman. NO NEED FOR ANY OF THIS!!!!!!

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Myles Bierman, submitted via email, September 14, 2023

Good afternoon, as a gulf of maine federal lobsterman I would like to let it be known that I am FIRMLY against any sort of vessel tracking, I believe it to be a serious invasion of privacy. We as fisherman in the state already have daily harvester reporting that show fishing effort and location of said efforts. I am not entirely sure what vessel tracking would accomplish besides be a complete invasion of privacy. Please consider these points, Have a good day

Thank you

Walter Willey, submitted via email, September 14, 2023

Tracking I am not goin to buy a tracking device, I have had my permit since Early 80, you are asking too much from the fishermen !!!!!!!!!!! If you can see what you have done to our fishing bottom out side side of Crie heaven

Wade Faulkingham, submitted via email, September 15, 2023

No black box tracking system. We don't need big brothers help period.

cocoandjace@aol.com, submitted via email, October 2, 2023

I'm a third generation fisherman from Cushing Maine. I have 5 sons who are planning to be lobsterman one who is 3 yrs old w a play boat and a trap in the yard trying to be like his family. I ask when does this end? You first start w whale regulations we comply w then and still have been zero fault proven yet we are continued to comply w new regulations why? Zero data against us. You then make us report

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our catch daily when the buyer already does this again why? There is a new ceiling in effect if we see a reduction in catch out of ventless traps we will have a measure increase again why? Those traps also are no deeper then 35 fathom to my knowledge we all know the waters are warming n the stock is deeper again why? This to me seems like more regulation and more government control on our industry while I think some people may over fish this to me seems no more then days to be used by the government to be put against us. I am opposed to a tracker because every other fishery that has complied w this is now a dying industry. We have complied w everything asked n this is not something we need to do. Why? Because as I stated above my five boys hope to have a living at sea as our whole family has we already report our dealers report DMR can track boats already w no warrant so I see zero advantage for fisherman in this proposal. I hope the Maine lobsterman have a bite on what happens to Maine lobsterman but I'm sure we won't. For you bureaucrats I say this if you keep allowing them to restrict us guess what you'll be the next profession w no job. Maine lobstering will regulate itself it always has if there's no profit we won't go stop regulating us this is more unnecessary regulation

**Wade Faulkingham, submitted via email,
October 2, 2023**

Big brother doesn't need to know every move we make. I would say this garbage we are getting shoved down our throats is due to future closures in the lobster/ crab fisheries. Leave us alone.

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Roger Chipman, submitted via email, October 3, 2023

We do not need anything like this we are doing a lot now that another

Kate O, submitted via email, October 5, 2023

I just want to say for one it says I can log on remotely to see the meeting, but it will not give me a link. And you absolutely do not need to have a tracker in anybody's votes. It's not a law it's a rule nobody needs to do it. If it's not a law and nobody will do it. It's absolutely ridiculous.

Virginia Olsen (Stonington), Public Hearing, October 5, 2023

I guess my comment is fishermen are frustrated with looking at gear modifications. Three years later, we've got to pay again. Everything that we catch is costing us more money and we're not able to get it on the other end. So it's a lot of frustration in, you know, looking at gauge changes and vent changes, adding a cell program or a satellite program after the three years which from what I hear it's about three years, they seem to get out of the gear, the unit.

So we would then need to buy a unit on our own and pay for that time. The information that we hold dear is how we fish and where we fish. So just the idea of giving that to somebody else is very difficult to do, especially when we feel like it's going to be used for siting offshore wind and none of us approve of offshore wind. It's just sad that we've come to this point, that we have to go down this route when for hundreds of years Maine has been harvesting sustainably. I feel like we're the gold standard of sustainability, but now doing reports everything we have to do if it takes time,

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it costs money and we're like we just can't get that out of the other end.

Thank you.

Matthew Gilley, Public Hearing, October 5, 2023

I wanted to echo some of what Ginny said. This is, I've spent my entire life figuring out what I figured out out there. I still don't even have it all figured out. You guys are just asking to hand over a multimillion-dollar business. There's this, there's no way that this can be. I wish we had more money because if we did, we'd sue you in court. This can't be constitutionally legal. I mean, we're being treated like we're criminals at this point. The only people I know that are tracker people are people that have broken the law. We haven't broken any law. And we're gonna be followed everywhere we go now. I mean, I've already doubled it with the reporting, you know, I know I'm gonna deal with it with the vessel tracker thing when I decide to go out there tuna fishing. And then I get a phone call because I don't have a report for that day because I wasn't lobstering out there, I was tuna fishing. It's, like Ginny said. That's more time out of my thing. Out of my day, that's time out of my business. I spend more time at these hearings, and just, we just wanna go fishing and be left alone.

We leave the whales alone. We don't like, it's just so redundant at this point. It's becoming sickening.

I can go on and on, but I'm sure there's others that echo the same sentiments. Thank you.

Alan Poland (Cushing), Public Hearing, October 5, 2023

There's one word I keep hearing that just aggravates me every day. When I do that report online,

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compliance. I gotta keep compliant. Compliant. Where are we? China, Russia? What is this?

Compliant - always got be compliant. It's frustrating. I don't tell nobody what to do, but I get told what to do all the time. Do this. Do this. Do this. Do this. Getting old. Well, that's all I got to say, yeah. I've said what I need to say earlier. Good.

Nicholas Morley (Boothbay), Public Hearing, October 5, 2023

I guess my like big thing from all of this is just like if we start getting this data and it's enough, then lets get rid of the harvesting data just if we can make it as easy on us as possible at this point, it seems like everything like exactly he said would comply, comply, comply if the tracking device gets me out of having to report at the end of the day. It's not great, but it's better than where we're at now.

Virginia Olsen, Public Hearing, October 5, 2023

Follow up with one more thing. A lot of us live in island communities and have you know, we go to Vinal Haven. We go to Isle Au Haut, we go to Matinicus, we do that with our families. It just feels like such an invasion of my privacy to know every time I start up that boat that I pay the payments on every month someone else knows what I'm doing. It just feels wrong.

Anonymous, Public Hearing (remote individual who did not provide name), October 5, 2023

I think you guys are going to regret doing this because you have so much bad data with one minute pings. I mean, your lines are going to be squiggly and there's, you know, like that guy says set and drift. I mean, there's all kinds of things going on out there, but that one question I had is, is this actually a law? Because I

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keep hearing rule, mandate. Those aren't laws, like is this actually a law? And it is it gonna be a law by December 15?

Jeff Putnam, submitted via email, October 8, 2023

Dear Deirdre Gilbert,

I am writing to comment on the proposed rule Chapter 25.98, electronic tracking. I am in favor of electronic tracking for federally permitted lobster boats , but I feel that there has been an omission in the proposed language in regards to the inevitable equipment malfunctions.

My reason for supporting the tracking is that the spatial data benefit lobstermen in the long term ocean planning conversation. We have long stated that the islands and coastal towns maritime heritage depend on access to the waters of the gulf of Maine, this is where we make our living. Offshore wind and conservation groups have used the lack of lobstering data to their advantage in the ocean planning process. Accurate data will be a tool to better our case that we cannot have fishing exclusion areas. I have trialed a tracker for the past year and a half and have found that it is not a burden.

My concern is the rigidity of the language under C: Prohibitions number 3. Tracking has been discussed many times at the various lobster zone and advisory councils over the past few years. At every opportunity, lobstermen have stated that we cannot be prohibited from going lobstering if there is a malfunction with the equipment. Every time this was brought up DMR has agreed and ensured us that we would still be able to fish if the tracker was not operational. I have personally seen boats that are required to have VMS

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for NGOM or groundfish permits not be able to go out when their federally required boxes stopped working. That is unacceptable for this Maine rule. It is unfortunate that given all of the time DMR has had to plan for this implementation, this was not covered in the language.

Most lobsterman have extensive electronics that we depend on daily, and most of us have had failures in one piece or another. It is no fun to go out when the autopilot stops working, or the chart plotter doesn't turn on, but in general if the fishing is hot we can get by and get the day in. It is inevitable that there will be power failures or hardware failures with the trackers, but we cannot be prohibited from fishing because of it.

The department could have an internal policy that states that if a tracker malfunctions and the Captain emails or leaves a voicemail then there won't be a violation if they do go fishing, but I don't believe that is a strong enough assurance for lobstermen. I think there has to be language included in the rule that allows for a certain number of days per year that we can haul if the tracker is not operational. My recommendation is to include language under D exemptions that states; up to once per quarter, federally permitted lobster and crab fishing license holders may fish for, take, possess, or land lobster without an operational tracking device if they have notified the Department in writing or by phone that the tracker or power supply has malfunctioned. In this instance the license holder will have two business days to have the unit replaced or the power issue fixed.

Thank you for considering this recommendation.

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Sincerely yours,
Jeff Putnam

Carl Guyton, submitted via email, October 10, 2023

hi there im writing in regards to the “trackers” you are trying to mandate me to have on my vessel. Firstly this mandate is completely 100% unconstitutional!!!!!!! second mandating me to give up my business proprietary information to a government authority without a warrant is unprecedented third other than figuring out exactly where i go and where i place my traps what will you gain from this i am already required to report daily where i fish. This is an absolute intrusion into my privacy on the flip side i firmly believe all government employees should be required to have an ankle monitor on at all times so that the public can have some accountability from rouge gov employees

Michael Gagnon, submitted via email, October 12, 2023

Here we go again. The government complains of massive deficits and they go out of the way to waist more money. I'm a 72 year lobsterman with a federal permit attached to my boat. I don't lobster in federal waters federal waters I don't even lobster outside of the exemption zone. I have very few years of lobstering left in me. I kept the permit in order to enhance the value of my boat. You well know that with all the failed ideas that have been presented to us in the last few have done nothing to change the mortality of Right whales considering there hasn't been any in the Gulf of Maine. We have just started to report every trip location, landings, buoy, end lines, old shell, new shell , even soak times its absolutely ridiculous. You

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have succeeded to devalue our permits and our lobster boat values by more than fifty percent. We thank you for that. If you are so concerned about putting us out of business why don't you just buy us out. The Biden administration not long ago just released six billion dollars to Iran. go figure and look what there using it for now. I'm only trying to supplement my retirement income and big brother just keeps on taking. I'm positive that I'm far from the only Maine lobsterman in my predicament. In closing why put so much burden on our ability to keep our heads above water financially when you are inventing a cure for a non existent malady. What a waist time, money, and effort.

Michael A. Gagnon

Chip Johnson, submitted via email, October 13, 2023

Hello.

I do not think tracking data given to gov officials at all times is anywhere near appropriate, or legal for that matter. The line has been crossed with this one. This is the United States of America. This type of thing is over reach, too much has already slipped by to date. This data will be used for driving agendas contrary to fishing and feeding Americans, and keeping a local economy alive. Yes I have heard all the excuses. This communist move lines right up with all the rest of the Anti Capitalist and Anti Independent agendas of late. Read the Constitution and you will understand.

Chip Johnson

Jarod Bray, submitted via email, October 14, 2023

You should allow lobsterman to call into state or federal departments and declare "not fishing" if they

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are not using their permit. That would stop them from having to use the tracker if they don't intend to be offshore for the year. The lobsterman should be allowed to reverse that decision given an appropriate amount of time.

I hope the tracker doesn't need to be on 24/7 and only needs to be powered up when the boat is on. I have several friends with VMS who end up with dead batteries in the winter when they don't use their boat for weeks.

-Jarod Bray

Bob Jr., submitted via email, October 14, 2023

These tracking devices are totally unnecessary! A violation of privacy. It's government overreach. Would they like it if we put trackers on their cars or on their persons to make sure they're going to work at their federal job on our tax dollars? They might hit an endangered owl with their car on their way to work ! Haha totally ignorant. It's not good for a Maine !!! It's more government control on Maine fisherman to try and shut us down like they've been doing. I strongly protest against it ! Not good for a Maine!

Thomas Bell, submitted via email, October 14, 2023

I am writing in opposition to the proposed rule, making federal lobster/crab fishing vessels required to have a tracking device.

This rule feels completely unnecessary considering the same information on vessel activity is available now via 100% reporting requirements.

This seems like regulation redundancy that is unwarranted for a fishery that is already being battered from every angle.

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I know this is basically a done deal, but I hope this is taken into consideration.

Thank you

Sincerely,

Thomas W. Bell

B.S. Maine Maritime Academy '14

Vessel Operations & Technology

454 South Gouldsboro Road

Gouldsboro, ME 04607

(207) 479-1720

thomas.bell1280@gmail.com

Darren Turner, submitted via email, October 14, 2023

Dear Deirdre,

Please add these comments to the public hearing for Chapter 25.98, Tracking of Federally Permitted Lobster and Jonah Crab License Holders:

This proposal is unnecessary. It will not save whales. It is another expensive program for tax payers. And is most likely a violation of privacy and unconstitutional.

There is no justification for tracking vessels in the lobster fishery. The recent court case ruling (MLA/State of Maine vs NMFS), stated that the NMFS used data that was not in line with reality. Why should we give them more information to twist and use against us. The judicial system is a check and balance on your power and has already ruled the agency can and will abuse power by manipulating data to support their agenda. The NMFS did not even follow the law (ESA) when developing right whale regulations. ASMFC and Maine should back off this issue and not pass this tracking rule.

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I have dealt with tracking systems before and they are a nuisance. I'm a sure all of you bureaucrats would not like to deal with checking in and being tracked every day you go to work.

Darren Turner

**badpenny.ew@gmail.com, submitted via email,
October 15, 2023**

I'm actually in disbelief that lobstering has actually come down being watched by the government all the time you're on your boat. I can't believe that this is even legal since I do more than just lobster outside of 3 miles in MY boat that I worked and paid for. Makes me sick that I will be watched while scalloping, tuna fishing, pogying fishing and recreational fishing. How is any of that anybody else's business? Especially the state and federal government? This is the biggest pile of b.s. I have heard yet. Best way I can think of to make people feel like criminals is to treat them as such. What is next? Ankle bracelets? Chips for I.d.? How about some serial numbers tattooed on the forearm? If at all possible I will be consulting a lawyer to seek compensation for the loss of my rights as a u.s. citizen. Congratulations on making me hate a job I used to love.

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DMR Response to Comments

Concerns on Cost of the Device and Data Plan:

Several commenters stated their concerns on the cost of the electronic tracking device and data plan. In March 2022, the Department was allocated \$4 million through a congressional appropriation to assist with the expenses related to the use of trackers. The Department used these funds to purchase Particle TrackerOne vessel tracking devices, and three years of cellular data service for all federally permitted lobster and crab fishing license holders. It is possible there could be additional funds available in the future, but at this time a minimum of three years of costs associated with this requirement will be covered for permit holders. Costs are relatively modest for this type of system, with the tracking unit currently costing approximately \$150 and the annual data plan costing ~\$130 per participant. Requirements to allow for monitoring of vessel movements (e.g. VMS) is very common in other federally managed species, and it is typically the responsibility of the permit holder to cover those costs.

Unnecessary Data Collection:

Several commenters stated that these data are not necessary, and the requirement to provide it represents government overreach. This requirement was established in the Atlantic States Marine Fisheries Commission (ASMFC) Addendum XXIX to the Lobster Fishery Management Plan (FMP). States are required to maintain compliance with the FMP. A finding of non-compliance jeopardizes a state's ability to engage in interstate commerce for that species. In addition, there will be a federal regulation

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establishing this same requirement for federal permit holders.

The reason for this requirement is to collect high resolution spatial and temporal data to characterize effort in the federal American lobster and Jonah crab fisheries for management and enforcement needs. These data will improve stock assessment, inform discussions and management decisions related to protected species and marine spatial planning, and enhance offshore enforcement. Several commenters expressed that the fishery is not impacting whales, and should not have to submit to this requirement. The data collected is intended to help the Department better represent the industry in management discussions and ensure that any management measures are appropriately targeted. The lack of spatial data for this fishery is currently a challenge in representing the industry in management discussions.

These data are better resolution than the spatial data currently provided through harvester reports, so are not duplicative of data that the Department is already receiving. As this system is implemented, the Department will be looking for opportunities to streamline harvester reporting in consideration of the spatial data provided through the trackers, as suggested in one comment.

Invasion of Privacy and Confidentiality:

Several commenters stated that where and how they fish is proprietary data. The Department understands this position, but it is a common requirement of federal fisheries permitting to provide spatial data associated with the vessel activities for management and enforcement purposes. The Atlantic Coastal

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Cooperative Statistics Program (ACCSP) maintains the confidentiality of trip and location data that have been submitted to ACCSP via APL Data is accessible to the appropriate state or federal entities with confidential data access. The spatial information collected through the electronic tracking devices is designated as confidential through Maine law and regulation.

Lobster Fishing vs. Other Activities/Fishing:

Several commenters stated their concern of having the electronic tracking device continuing to collect data during times they are fishing for other species, or activities not related to lobstering. The ping rate of the electronic tracking device while the vessel is underway (1 ping per minute) allows the ability to distinguish between different activities such as a vessel steaming or setting/hauling traps. While the vessel is at berth and no longer moving, the ping rate will switch to one ping every six hours. In addition, there are reporting requirements for other fisheries. The harvester reports will allow the Department to determine days at sea and which fishery was targeted. It is important to note that given the volume of data produced by this requirement, these data will typically be used in aggregate analyses, and the Department would use harvester reports to exclude tracking data from non-fishing days.

Tracking Device Technical Concerns:

Several commenters stated concerns that they will be prohibited from fishing if their electronic tracking device malfunctions. In preparation to meet this requirement, the Department began a pilot program to test the functionality of these types of trackers in the Maine lobster fishery in 2019. To date, we have

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worked with 25 fishermen to test devices and learn what problems can occur. Based on that work, we believe that the trackers should generally be reliable, provided they are consistently connected to the external power source.

In addition, the Department has established a hotline and email that will be monitored daily. In the event there are technical difficulties with the electronic tracking device, a fisherman can call, text or email this hotline to notify Department staff of their device's issue. It has never been the Department's intent that a fisherman be prohibited from fishing if their device malfunctions through no fault of their own. The rule has been amended from the original proposal to clearly specify that this situation will not result in a violation for the permit holder, provided they notify the Department and work in good faith with Department staff to have the device restored to operability.

If a fisherman expects the tracking device to be powered down due to not fishing and or the vessel needs to be removed from the water for maintenance, the Department has developed a form for fisherman to fill out that will be provided on the Department's website. "Powered down" is defined as the electronic tracking device not receiving external power from the vessel for longer than 1 month.

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Rule-Making Fact Sheet

(5 M.R.S., §8057-A)

AGENCY: Department of Marine Resources

NAME, ADDRESS, PHONE NUMBER OF AGENCY

CONTACT PERSON:

Deirdre Gilbert, Department of Marine Resources, 21 State House Station, Augusta, Maine 04333-0021
Telephone: (207) 624-6553; web address: <http://www.maine.gov/dmr/rulemaking/>

CHAPTER NUMBER AND RULE: Chapter 25.98
Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders

STATUTORY AUTHORITY: 12 MRS 6171

DATE AND PLACE OF PUBLIC HEARING(S):
October 5, 2023: 5:00 pm in person at the DMR offices at the Marquardt Building, 32 Blossom Lane, Augusta, Maine and remotely via Microsoft Teams. Remote Access information is posted to the DMR's website under "Meetings"

COMMENT DEADLINE: October 16, 2023

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: [see §8057-A(l)(A)&(C)]

This rule is proposed to ensure compliance with Addendum XXIX (American Lobster) and Addendum IV (Jonah crab) that were approved by the Atlantic States Marine Fisheries Commission (ASMFC) in March 2022. Specifically, for compliance with the Interstate Fisheries Management Plans, this regulation would require all federally-permitted lobster and Jonah crab license holders with commercial trap gear area permits to have electronic tracking devices. This requirement extends to all federally-permitted license holders with commercial

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trap gear for Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, and the Outer Cape Cod.
IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? YES ~~X~~ NO [§8056(l)(B)]

ANALYSIS AND EXPECTED OPERATION OF THE RULE: [see §8057-A(l)(B)&(D)] Maine lobster and crab fishing license holders who also hold a federal permit to fish for lobster and Jonah crab with trap gear will be required to install and keep operational an approved tracking device.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (including up to 3 primary sources relied upon) [see §§8057-A(l)(E) & 8063-B]: ADDENDUM XXIX TO AMENDMENT 3 TO THE AMERICAN LOBSTER FISHERY MANAGEMENT PLAN; ADDENDUM IV TO THE JONAH CRAB FISHERY MANAGEMENT PLAN and input from Maine Marine Patrol.

ESTIMATED FISCAL IMPACT OF THE RULE: [see §8057-A(l)(C)]

Enforcement of these proposed amendments will not require additional activity in this agency. Existing enforcement personnel will monitor compliance during their routine patrols.