

No. 25-1105

IN THE
Supreme Court of the United States

FRANK THOMPSON,
Petitioner,

v.

CARL WILSON, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER, MAINE DEPARTMENT OF
MARINE RESOURCES,
Respondent.

**On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The State of Maine, along with other member states of the Atlantic States Marine Fisheries Commission, require all federally permitted lobstermen to install an electronic device on their lobster fishing vessel that solely transmits the vessel's position when the vessel is in the water. Five lobstermen challenged Maine's vessel tracking requirement in the district court, claiming that it violates the Fourth Amendment. The Commissioner of the Maine Department of Marine Resources conceded that the vessel tracking requirement authorizes "searches" within the meaning of the Fourth Amendment, and the lobstermen conceded that it authorizes administrative searches of a "closely regulated industry." Based on the parties' concessions in the district court, the First Circuit applied this Court's three-part test from *New York v. Burger*, 482 U.S. 691 (1987), to assess the reasonableness of warrantless searches of a closely regulated industry and determined that the vessel tracking requirement does not violate the Fourth Amendment. In his petition to this Court, the single lobsterman petitioner focuses on an argument he never raised to the First Circuit, namely, that this Court's precedents concerning when a trespass constitutes a Fourth Amendment search may somehow displace or modify the *Burger* test for administrative searches of a closely regulated industry.

The Question Presented, therefore, is:

Whether the First Circuit erred in applying the *New York v. Burger* test for Fourth Amendment reasonableness to Maine's lobster vessel tracking regulation where, in the district court, Respondent conceded that the lobster vessel tracking regulation authorizes searches within the meaning of the Fourth Amendment and Petitioner conceded that the commercial lobster fishery is a closely regulated industry.

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RESPONDENT’S BRIEF IN OPPOSITION

Respondent Carl Wilson, Commissioner of the Maine Department of Marine Resources (“Commissioner”),¹ respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

STATEMENT OF THE CASE

A. Factual and Legal Background

Since 1942, Maine has been a party to the Atlantic States Marine Fisheries Compact (“Compact”), an agreement between every Atlantic coastal state (including the District of Columbia) to “exercise joint regulatory oversight of their fisheries.” *Medeiros v. Vincent*, 431 F.3d 25, 27 (1st Cir. 2005). Maine is thus a member of the Atlantic States Marine Fisheries Commission (“Commission”), the interstate organization that implements the Compact. *See* Me. Stat., tit. 12, §§ 4651-4656 (2025). The Commission establishes interstate fishery management plans setting minimum conservation standards that states conform to (or exceed) by adopting appropriate modifications to their state laws or regulations. *See R.I. Fishermen’s All., Inc. v. R.I. Dep’t of Env’t Mgmt.*, 585 F.3d 42, 46 (1st Cir. 2009); *Medeiros*, 431 F.3d at 27-28.

Through its American Lobster Management Board (“Board”), the Commission coordinates the management of the American lobster (*Homarus americanus*) fishery in its member states’ jurisdictional waters pursuant to Amendment 3 to the Commission’s Interstate Fishery Management Plan for American

¹ During the pendency of the proceedings in the lower courts, former Commissioner Patrick Keliher retired and was replaced by current Commissioner Wilson. *See* Pet. App. 7a n.7.

Lobster and subsequent Addenda adopted by the Board. See *R.I. Fishermen’s All.*, 585 F.3d at 46; *Medeiros*, 431 F.3d at 27-28. The Board initiated what became Addendum XXIX to address “the critical need for high-resolution spatial and temporal data to characterize effort”—that is, the location of fishing vessels and the location and density of fishing gear—in the American lobster fishery. Pet. App. 137a.

Specifically, the Board initiated Addendum XXIX in the context of four “challenges the fishery is currently facing [that] pose a critical need for electronic tracking data.” No. 25-1007, Appellee’s Br. at PageID # 61, § 2.1 (May 8, 2025).²

- *First*, the Board explained that currently available data is insufficiently detailed for management and scientific purposes, such as conducting stock assessments. See *id.* at PageID # 61, 62-63; §§ 2.1, 2.2.2.
- *Second*, the Board explained that “it is critical to gather and provide updated and enhanced spatial effort data” to better inform federal regulators, whose efforts to protect threatened marine species can have negative impacts on the lobster fishery. *Id.* at PageID #s 61, 63; §§ 2.1, 2.2.3.
- *Third*, the Board explained that “[i]t is critically important to record the footprint of the [U.S.] lobster fishery as spatial allocation discussions occur” around competing uses of the ocean, such

² Petitioner included only excerpts of Addendum XXIX in his Appendix. Accordingly, when citing to Addendum XXIX, Respondent cites to the complete Addendum XXIX attached to its brief submitted to the First Circuit.

as offshore oil and gas development. *Id.* at PageID #s 61, 63-64; §§ 2.1, 2.2.4.

- *Fourth*, the Board explained that the “large geographic footprint and low density of lobster gear in the offshore federal management area” makes enforcement challenging, and that having more accurate data will help law enforcement identify where fishing gear is located for inspection purposes. *Id.* at PageID #s 61, 64; §§ 2.1, 2.2.5.

In developing Addendum XXIX, the Board assessed precisely what “ping” rate— how often a vessel’s electronic tracking device captures and transmits the vessel’s position—is necessary to capture the type of detailed data needed. No. 25-1007, Appellee’s Br. at PageID # 66, § 3.1.1. The Board ultimately determined that a rate of one ping per minute was required because that rate “is necessary to distinguish lobster fishing activity from transiting activity and can allow estimation of the number of traps per trawl.” *Id.*

After the Commission approved Addendum XXIX in March 2022, and to comply with Maine’s obligations under the Compact, the Maine Department of Marine Resources (“DMR”) promulgated Chapter 25.98 (“DMR Rule”). *See* Pet. App. 150a-155a. The DMR Rule requires lobstermen³ holding both a Maine commercial lobster license and a federal lobster permit to install an approved electronic tracking device on the permitted vessel listed on their license and maintain

³ “Lobstermen” is a gender-neutral term in the Maine lobster industry. *See* Maine Lobster Community Alliance, *A Lobsterman is a Lobsterman, Regardless of Gender* (July 7, 2023), available at <https://www.mlcalliance.org/post/a-lobsterman-is-a-lobsterman-regardless-of-gender> (last visited June 28, 2026).

the device in operational order while the vessel is in use. *Id.* 152a-154a (ch. 25.98(B)(1), (C)). There are several exceptions to that general requirement: (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 DMR while the situation is addressed. *See id.* 153a (ch. 25.98(C)(3)-(4), (E)).

DMR has provided each license holder with an approved tracking device, Pet. App. 6a-7a, but a license holder can choose to use a different device if it has been approved by the Commission, *id.* 151a-152a (ch. 25.98(A)(1)). The tracking device collects the position of the vessel once per minute when the vessel is moving and once every six hours when the vessel is moored or docked. *Id.* 74a; *Federal Permit Holder Vessel Tracking Requirements*, Dist. Ct. Doc. No. 1-3 at PageID # 1.⁴

Vessel location data from the electronic tracking devices is transmitted to the Atlantic Coastal

⁴ Petitioner repeats to this Court an allegation he made to the district court, that the device provided by DMR is compatible with Bluetooth and Wi-Fi and can collect audio information aboard a vessel. Petition 6; Pet. App. 181a. The district court properly concluded that this allegation was contradicted by the plaintiffs' own submissions, noting that the record makes clear that the tracking device provided by DMR only collects data on "the time and position of fishing vessels, not audio information . . . as [p]laintiffs feared." Pet. App. 120a (internal quotation marks and citations omitted).

Cooperative Statistics Program (“ACCSP”), which maintains the Standard Atlantic Fisheries Information System (“SAFIS”) database. Pet. App. 175a-176a. 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 NOAA Fisheries) and the SAFIS database, as described in Addendum XXIX. *See* No. 25-1007, Appellee’s Br. at PageID # 71, § 3.2.3. Further, Maine law requires that fisheries data be kept confidential and not be disclosed in a manner that permits identification of any person or vessel. Me. Stat., tit. 12, § 6173 (2025). DMR regulations also require that publicly released data not identify individual vessels or license holders. *See* 13-188 Me. Code R. ch. 5.

B. Procedural History

On January 2, 2024, five lobstermen filed a Complaint in the United States District Court for the District of Maine alleging, among other claims, that the DMR Rule violates the Fourth Amendment, incorporated against the states through the Fourteenth Amendment. Pet. App. 32a, 156a-189a. The district court granted the Commissioner’s Motion to Dismiss and dismissed the lobstermen’s Motion for Preliminary Injunction as moot. Pet. App. 31a-32a, 134a. The district court analyzed the lobstermen’s Fourth Amendment claim based on (i) the Commissioner’s concession that the DMR Rule authorizes “searches” within the meaning of the Fourth Amendment and (ii) the lobstermen’s concession that lobstering is a closely regulated industry for purposes of applying the three-part test from *New York v. Burger*, 482 U.S. 691 (1987), for assessing the Fourth Amendment reasonableness of administrative searches of closely regulated

industries. Pet. App. 102a n.18, 104a & n.19. After carefully applying this Court's precedents, the district court held that the lobstermen had failed to state a plausible claim for relief because the DMR Rule authorizes searches that satisfy the test for lawful administrative searches of closely regulated industries under *Burger* and its progeny. Pet. App. 105a, 115a-120a, 134a.

One of the lobstermen plaintiffs, Frank Thompson, appealed the district court's dismissal of the Fourth Amendment claim to the United States Court of Appeals for the First Circuit. Pet. App. 7a n.6. On appeal, Thompson argued that (i) the DMR Rule violates the Fourth Amendment regardless of whether it satisfies the *Burger* test; and, in the alternative, (ii) subsequent case law has modified the *Burger* test with respect to when a search is necessary to further a regulatory scheme, and the DMR rule fails this modified test. Pet. App. 14a-30a. Thompson also attempted to reverse his concession in the district court and argue that lobster fishing is not a closely regulated industry, thus placing the DMR Rule outside *Burger's* ambit. Pet. App. 12a-14a.

The First Circuit affirmed. See Pet. App. 1a-30a. The First Circuit proceeded from the parties' concessions in the district court; the court declined to allow Thompson to reverse course on his concession that lobster fishing is a closely regulated industry for purposes of the relevant Fourth Amendment analysis. Pet. App. 8a, 12a-14a. The court therefore applied the *Burger* test for assessing the Fourth Amendment reasonableness of administrative searches of a closely regulated industry. Pet. App. 9a-11a, 20a-30a. The First Circuit concluded that the DMR Rule satisfies all three prongs of the *Burger* test because the parties

agreed that Maine has a substantial government interest at stake in the vessel tracking regulatory scheme (conserving the commercial lobster fishery), Pet. App. 20a; warrantless searches are necessary to further the regulatory scheme, Pet. App. 20a-26a; and the notice, timing, frequency, and scope of the searches provide a constitutionally adequate substitute for a warrant, Pet. App. 26a-29a. Therefore, the First Circuit held that the DMR Rule does not violate the Fourth Amendment. Pet. App. 30a.

REASONS FOR DENYING THE PETITION

I. Petitioner did not raise his arguments relating to trespass in the First Circuit.

Petitioner’s proposed questions presented and the arguments in his Petition focus on the First Circuit’s purported failure to apply Fourth Amendment “trespassory protections” under *United States v. Jones*, 565 U.S. 400 (2012) to its assessment of the vessel tracking requirement. See Pet. i, 2-4, 14-15, 16-29. Indeed, Petitioner asserts that the First Circuit “refused to apply the Fourth Amendment’s common-law trespass test” to the DMR Rule, implying that he had urged the First Circuit to apply such a test. Pet. 16. But Petitioner did not argue to the First Circuit that courts, when assessing an administrative search of a closely regulated industry, must apply a common-law trespass test derived from *Jones*, either as part of the *Burger* test or in addition to that analysis. In fact, the word “trespass” does not appear once in his 43-page opening brief or in his reply brief in the First Circuit.

As for *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985), and *Taylor v. City of Saginaw (Taylor II)*, 11 F.4th 483 (6th Cir. 2021), cases from other circuits that Petitioner now faults the First Circuit for failing to

apply, Petitioner did not cite *Rush* at all and cited *Taylor II* only once on a point unrelated to any trespass test. *See* No. 25-1007, Appellant’s Br. at PageID # 40 (Apr. 1, 2025). Although Petitioner did urge the First Circuit to reinterpret the word “necessary” in the *Burger* test based on this Court’s decision in *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), he did not argue that *Patel* incorporated a common-law trespass test from *Jones* into the *Burger* test. *See id.* at PageID # 33-36. Unsurprisingly, then, the First Circuit did not address these arguments and did not cite either *Rush* or *Taylor II* regarding a purported trespass test.

Petitioner’s arguments regarding application of a “*Jones* test” or a “common-law trespass test” to the *Burger* analysis, *see* Pet. i, 2-4, 14-29, 33, are therefore not properly before this Court. *See Kahler v. Kansas*, 589 U.S. 271, 279 n.4 (2020) (stating that a claim was “not properly before” the Court because petitioner “did not raise the argument below, and the [lower] courts therefore did not address it”). Because this Court is a “[C]ourt of review, not of first view,” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Commissioner respectfully requests that the Court deny Petitioner the opportunity to pursue new arguments that were neither raised nor addressed below.

II. The First Circuit’s decision is consistent with this Court’s precedents regarding administrative searches of closely regulated industries.

A. *New York v. Burger* has not been undermined or altered by this Court’s subsequent decisions regarding “trespass.”

To recognize why the First Circuit’s decision does not conflict with this Court’s precedents or with other circuit court decisions (*see* Part III *infra*), it is important to understand the operation of the three-part test for assessing Fourth Amendment reasonableness from *New York v. Burger*. In *Burger*, the Court explained that a warrantless search of a closely regulated industry (sometimes referred to as a “pervasively regulated industry”) is “reasonable,” and therefore does not violate the Fourth Amendment, if (1) there is a substantial government interest behind the regulatory framework pursuant to which the search is made; (2) the search is “necessary to further [the] regulatory scheme”; and (3) the regulatory framework “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.” 482 U.S. at 702-03 (internal quotation marks omitted). In 2015, the Court affirmed the continuing viability of the so-called *Burger* test. *See Patel*, 576 U.S. at 426. Although courts, including this Court in *Patel*, have questioned what types of businesses may constitute “closely regulated industries” for purposes of the *Burger* analysis, *see id.* at 424-25, the *Burger* test

continues to guide judicial review of warrantless searches in such industries.

Several aspects of *Burger* bear emphasizing in light of Petitioner’s arguments to this Court. *First*, the *Burger* test applies to warrantless *searches*—that is, the test only comes into use when there is a “search” within the meaning of the Fourth Amendment. *See* 482 U.S. at 702. Case law about what constitutes a “search” is, therefore, not relevant to the *Burger* analysis.

Second, when the *Burger* test applies, it is determinative of Fourth Amendment reasonableness—in other words, an administrative search of a closely regulated industry is reasonable under the Fourth Amendment when it satisfies the *Burger* test. *See Burger*, 482 U.S. at 702 (“[W]arrantless inspection . . . even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as [the] three criteria are met.”); *Patel*, 576 U.S. at 426 (“Even if we were to find that hotels are pervasively regulated, [the challenged regulation] would need to satisfy three additional criteria *to be reasonable under the Fourth Amendment*.” (emphasis added)). A court analyzing an administrative search of a closely regulated industry under *Burger* need not also determine whether the search is reasonable under a separate, undefined standard.

Third, although this Court in *Burger* noted the reduced expectation of privacy in “commercial property employed in ‘closely regulated’ industries” as a general rationale supporting the development of administrative search law, 482 U.S. at 700, the *Burger* test itself does not turn on the commercial property owner’s expectations of privacy. Rather, the ultimate determination of reasonableness under *Burger* depends on whether the search satisfies the basic functions of

a warrant. *See id.* at 703. The *Burger* analysis, then, can and does apply equally to actions that constitute “searches” within the meaning of the Fourth Amendment because they involve a physical intrusion, *see, e.g., Jones*, 565 U.S. at 404-05, and actions that constitute “searches” because they infringe upon a reasonable expectation of privacy in the absence of any physical intrusion, *see, e.g., Katz v. United States*, 389 U.S. 347, 352-53 (1967).

With this background in mind, and contrary to Petitioner’s arguments, this Court’s decisions in *Jones* and in *Carpenter v. United States*, 585 U.S. 296 (2018), did not abrogate or fundamentally change the *Burger* analysis. In *Jones*, the Court concluded that a physical intrusion on private property to obtain information constitutes a search within the meaning of the Fourth Amendment regardless of the property owner’s expectation of privacy in that property. 565 U.S. at 406-07. The Court therefore clarified that the “reasonable expectation of privacy”-based conception of a search articulated in *Katz* “has been added to, not substituted for, the common-law trespassory test” for identifying a search. *Id.* at 409 (emphasis omitted). *Jones* is a seminal case in understanding what constitutes a search under the Fourth Amendment, but *Jones* does not fundamentally affect how courts analyze administrative searches of closely regulated industries under *Burger* and its progeny. In *Carpenter*, the Court considered a person’s privacy interests “in the record of his physical movements,” as captured through detailed cell-site location information gathered as part of a criminal investigation, to determine whether the gathering of such information implicates the Fourth Amendment. 585 U.S. at 310-12. The Court’s holding that the government’s acquisition of location information from cell service carriers constituted a search

elaborates on what constitutes a search under the Fourth Amendment but, like *Jones*, does not affect the *Burger* analysis of administrative searches of closely regulated industries. *Id.* at 310.

B. The First Circuit did not err in applying the *Burger* test to determine whether the DMR Rule is consistent with the Fourth Amendment.

The First Circuit correctly applied this Court's precedents on administrative searches of closely regulated industries considering the operation of the DMR Rule and the parties' concessions. As noted above, the Commissioner conceded in the district court that the DMR Rule authorizes "searches" within the meaning of the Fourth Amendment in part because it effects a physical intrusion (by the tracking devices) on the lobstering vessels. *See* Pet. App. 8a. For his part, Petitioner (and the other plaintiffs) conceded in the district court that lobster fishing is a "closely regulated industry" for purposes of applying the administrative search analysis. *See id.* 8a, 12a-14a, 104a & n.19. In light of these concessions, the First Circuit properly concluded that it should apply the *Burger* test to determine whether the tracking requirement is reasonable under the Fourth Amendment. *See id.* 10a-11a, 15a-16a, 20a-30a.

In applying the third *Burger* test criterion—assessing whether the challenged regulation performs the basic functions of a warrant—the First Circuit first concluded that the DMR Rule "provides notice of the tracking requirement and the surrounding regulatory scheme." Pet. App. 27a. The First Circuit then considered whether the DMR Rule also sufficiently "limit[s] an inspecting officer's discretion in terms of

time, place, and scope.”⁵ *Id.* 26a. In this context, the First Circuit expressly considered Petitioner’s contention that the DMR Rule operates to impermissibly capture the location of his lobstering vessel when he is using it for non-lobstering purposes, such as fishing for other species or assisting in an emergency sea rescue.⁶ *Id.* 27a-29a. The court ultimately determined that the DMR Rule is sufficiently restricted based on the “limited and specific type of data” collected—“the location of licensed commercial fishing vessels”—and other fact-specific aspects of the DMR Rule’s operation and the lobster fishing industry. *Id.*

For example, the First Circuit noted that alternative methods of collecting the necessary vessel data would not be effective given the nature of lobster fishing: lobster fishing vessels, unlike other types of commercial premises, do not have regular and strictly delineated business hours because there are few temporal limitations on when lobster fishing can occur. Pet. App. 29a. The First Circuit further cited longstanding precedent that “warrantless searches on the high seas are unique.” Pet. App. 25a-26a; see *United States v. Villamonte-Marquez*, 462 U.S. 579, 592 (1983) (noting that “the First Congress clearly authorized the suspicionless boarding of vessels, reflecting its view

⁵ Petitioner conceded in the district court that the DMR Rule satisfies the first prong of the *Burger* test. See Pet. App. 105a-106a. Although he raised arguments regarding the second prong before the First Circuit, he focuses on *Burger*’s third prong in his Petition.

⁶ The lower courts did not consider the allegation that Petitioner used his vessel to transport his daughter-in-law from an island to the mainland to give birth because it appears for the first time in the Petition; it is found nowhere in the record below. See Pet. 7; Pet App. 49a, 180a, 191a.

that such boardings are not contrary to the Fourth Amendment”); *see also State v. Giles*, 669 A.2d 192, 193 (Me. 1996) (“The special exigencies of sea travel, including easy access to international waters and movement not limited to fixed highways, and the historical fact that seagoing vessels have always been subject to boarding by government officials, distinguish vessel stops from vehicle stops.”).⁷

The First Circuit did not, as Petitioner contends, “only appl[y] the *Katz* test.” Pet. 28. In fact, the First Circuit did not apply the “*Katz* test” at all because it did not need to do so. The “*Katz* test” is a test for determining whether a search has occurred in the first place, not whether a search is reasonable. *See Katz*, 389 U.S. at 353 (“The Government’s activities . . . violated the privacy upon which [petitioner] justifiably relied . . . and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”); *Jones*, 565 U.S. at 406 (“Our later cases have applied the analysis of Justice Harlan’s concurrence in [*Katz*], which said that a [search] occurs when government officers violate a person’s ‘reasonable expectation of privacy.’” (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring))); *see also* Orin S. Kerr, *The Two Tests of Search Law: What Is the Jones Test, and What Does That Say About Katz?*, 103 Wash. U. L. Rev. 309, 310 (2025) (explaining that “the *Jones* test” and the “*Katz* test” are “two search tests” that provide “separate ground[s] for *identifying a search*” (emphasis added)). As has now been noted several times, the Commissioner

⁷ Maine law also expressly 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.” Me. Stat., tit. 12, § 6133(1) (2025).

conceded that the DMR Rule authorizes “searches” within the meaning the Fourth Amendment.⁸ More generally, the First Circuit never cited *Katz* and manifestly did not ground its analysis of the DMR Rule on Petitioner’s expectation of privacy (or lack thereof).

Nor did the First Circuit conclude, as Petitioner claims, that “Fourth Amendment trespassory protections under [*Jones*] apply to criminal cases only.” Pet. i. The First Circuit did not cite *Jones* in its opinion, which is unsurprising considering that the Commissioner conceded the existence of a search within the meaning of the Fourth Amendment. In considering the scope and intrusiveness of the DMR Rule under the third *Burger* test criterion, the First Circuit rejected any “direct comparison” to criminal surveillance cases such as *Carpenter* and Petitioner’s suggestion that any government use of tracking technology is per se unreasonable under the Fourth Amendment. See Pet. App. 28a n.18. But the First Circuit did not purport to articulate any general legal rule regarding the application of “trespassory protections” to non-criminal searches.

In sum, the First Circuit correctly applied this Court’s *Burger* precedent to determine whether the DMR Rule is consistent with the Fourth Amendment.

⁸ One of the amici argues that the DMR Rule should be analyzed as effecting a seizure, but this argument was never raised below.

III. The First Circuit's decision does not conflict with other circuit court decisions.

A. The First Circuit's decision does not conflict with decisions of the Ninth and Sixth Circuits with respect to the scope of administrative searches of closely regulated industries.

Petitioner attempts to identify a circuit split on the question of how courts should assess administrative searches of commercial premises that may also incidentally reach some non-commercial activity. Pet. 16-22. He asserts that the Ninth and Sixth Circuits, unlike the First and Tenth Circuits, “apply the Fourth Amendment’s common-law trespass test when the government trespasses on private property outside of commercial areas and hours.” *Id.* 17. The decisions that he cites, however, do not support this statement and the claimed circuit split.

For the Ninth Circuit, Petitioner cites *Rush*, which pre-dates *Burger*. In *Rush*, the Ninth Circuit considered the constitutionality of state regulations allowing unannounced, in-person inspections of home day cares at any time of the day or night. Although the court noted that “the warrantless inspection of family day care homes does not necessarily violate the Fourth Amendment” because family day cares are pervasively regulated, the court concluded that the regulations at issue were “overbroad.” *Rush*, 756 F.2d at 721. The court reached this conclusion based on (1) the nature of the regulations, which authorized “unannounced visits to family day care homes at any time”; and (2) “the peculiar nature of family day care homes,” which do not host children at all hours and in all areas of the home. *Id.* This approach and holding are entirely consistent with courts’ subsequent

application of the *Burger* test, specifically the third *Burger* test criterion that assesses whether the regulation performs the basic functions of a warrant. The third *Burger* test criterion acknowledges that a regulation authorizing administrative searches of a closely regulated industry may be overbroad on its particular facts and thus violate the Fourth Amendment. *See Burger*, 482 U.S. at 703. Contrary to Petitioner’s assertion, *Rush* did not apply some doctrinally distinct “common-law trespass test” that meaningfully conflicts with the *Burger* analysis.

The First Circuit reached its conclusion that the DMR Rule does not violate the Fourth Amendment based on its own specific analysis of what the *Rush* court might have called “the peculiar nature of the lobstering industry.” For example, the First Circuit noted that there are few temporal limitations on when lobster fishing can occur. Pet. App. 29a. This lack of temporal limitation contrasts with the licensed home day cares in *Rush*, which had regular and strictly delineated business hours. *See Rush*, 756 F.2d at 721-22. The First Circuit also based its decision on the fact that the electronic tracking devices “relay time and position data only, and the Rule does not authorize the search of any vessels more broadly.” Pet. App. 29a. In contrast, *Rush* invalidated the regulatory scheme to the extent that it permitted general searches of the entire residence, including areas never used for the day care business. *See Rush*, 756 F.2d at 721-22. Petitioner claims that a private residence is “like [his] fishing boat” and is “shielded from a warrantless trespass” when not being used for lobster fishing. Pet. 17. But a vessel at sea, unlike a home, a personal vehicle on a highway, or a pedestrian on a public street, can be stopped and boarded by federal and state officials for document checks and safety inspections at

any time, even without reasonable suspicion. *See* Part II.B *supra*. Any differences between the outcome in this case and in *Rush*, then, are the result of different courts assessing different facts, not an indication of a circuit split on Fourth Amendment law.

For the Sixth Circuit, Petitioner cites *Taylor II*. In that case, however, the Sixth Circuit addressed “trespass” only in the context of determining that tire chalking of cars parked on a public street constitutes a “search” within the meaning of the Fourth Amendment. *Taylor II*, 11 F.4th at 487. The *Taylor II* court then declined to apply *Burger* because it concluded that municipal parking is not a closely regulated industry. *Id.* at 488. *Taylor II* provides no support for the existence of a “common-law trespass test” that modifies or conflicts with the *Burger* test.⁹

Further, as previously noted, the First Circuit’s decision did not discuss either *Rush* or *Taylor II* in relation to a purported trespass test, likely because Petitioner did not argue that the First Circuit should follow either case and did not make any trespass-specific argument to that court. It is evident from the court’s opinion that the First Circuit did not consider itself to be grappling with any issue that had been addressed by the Ninth or the Sixth Circuit.

Finally, contrary to Petitioner’s assertion, neither the First Circuit in this case nor the Tenth Circuit

⁹ *Taylor II*’s distinction between a car parked in a junkyard and a car parked on a public street only illustrated that the close regulation of a junkyard does not extend to any car, whether or not it is part of a junkyard operation. The DMR Rule expressly requires the tracking device to be “installed aboard the permitted vessel listed on [the lobsterman’s] license.” Pet. App. 153a (ch. 25.98(C)(1)).

have held that “the administrative search doctrine displaces the Fourth Amendment’s protection from trespass.” Pet. 3. In *Johnson v. Smith*, 104 F.4th 153 (10th Cir. 2024), the Tenth Circuit merely noted that once a “search” within the meaning of the Fourth Amendment has been identified, whether under the *Jones* or *Katz* conception of a search, and once it has been established that the premises searched are part of a closely regulated industry, the *Burger* test must be applied to determine whether that search is reasonable and thus consistent with the Fourth Amendment. See *Johnson*, 104 F.4th at 167. As explained above, this is a correct statement of Fourth Amendment law, not an indication of a circuit split.

In short, none of the decisions cited by Petitioner demonstrate a circuit split or show that the First Circuit’s application of *Burger* in this case was inconsistent with the decisions of other circuits.

B. The First Circuit’s decision does not conflict with decisions of the Ninth and Sixth Circuits with respect to the reasonableness of administrative searches of closely regulated industries.

Petitioner also attempts to identify a circuit split regarding “whether the reasonableness of a warrantless administrative search under the *Burger* test depends in part on trespass to property protections or solely on reasonable expectations of privacy.” Pet. 22. He asserts that some courts “apply *Jones*’s trespass to property protections to administrative searches in closely[] regulated industries” and some do not. Pet. 25. This assertion, however, is rooted in a misconception of this Court’s *Burger* precedent and governing Fourth Amendment law. Although this Court in *Burger*, and other courts later applying the

Burger framework, have noted that there is a reduced expectation of privacy in commercial premises in closely regulated industries, courts do not apply the “*Katz* test” or the “*Jones* test,” as Petitioner contends, when assessing the reasonableness of a search. Rather, courts apply the *Burger* test, including the consideration of whether the search regime “perform[s] the two basic functions of a warrant.” *Burger*, 482 U.S. at 703.

As noted above, the First Circuit in this case did not apply the “*Katz* test” or ground its conclusion that the DMR Rule is consistent with the Fourth Amendment solely on Petitioner’s expectation of privacy in his commercial lobstering vessel. It also did not, as Petitioner claims, “decide[] [that] the common-law trespassory protections from case like *Carpenter* and *Jones* apply only in criminal cases.” Pet. 22. Petitioner’s argument to the First Circuit regarding *Carpenter* and *Jones* did not mention “common-law trespassory protections” and focused instead on the nature of the technology used in location tracking, claiming that searches using such technology require a warrant. No. 25-1007, Appellant’s Br. at PageID # 27-29. The First Circuit accordingly said nothing about common-law trespass and simply noted that Petitioner’s attempts to draw a direct analogy between government searches for evidence of criminal activity and the DMR Rule were not persuasive. Pet. App. 28a n.18.

None of the Ninth Circuit decisions cited by Petitioner apply *Jones* and *Katz* to the *Burger* analysis of whether an administrative search of a closely regulated industry is reasonable, as Petitioner suggests. Pet. 25-27. Rather, they all discuss *Jones* and *Katz* in the context of deciding whether a Fourth

Amendment search occurred in the first place. In *Patel v. City of Los Angeles (Patel I)*, 738 F.3d 1058 (9th Cir. 2013) (en banc), *aff'd*, 576 U.S. 409 (2015), the court discussed *Jones* and *Katz* in determining that the challenged action constituted a search. 738 F.3d at 1061-63. Because the court rejected the idea that the industry in question was closely regulated, it had no reason to explore the applicability of *Jones* and *Katz* to the *Burger* test. *Id.* at 1064 n.2. *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), involved a warrantless search by police looking for criminal suspects; the case did not involve administrative searches, and the court discussed *Jones* and *Katz* only in response to the government’s argument that no search had occurred. *See* 807 F.3d at 1185-86. Similarly, the concurring opinion in *Hotop v. City of San Jose*, 982 F.3d 710 (9th Cir. 2020), cited *Patel I*, *Jones*, and *Katz* solely to explain why the concurring judge would have held that the “City ha[d] conducted no Fourth Amendment search.” *Hotop*, 982 F.3d at 719, 721-22 (Bennett, J., concurring in part and concurring in the result).

For the Sixth Circuit, Petitioner turns again to *Taylor II*. Pet. 27-28. The court in *Taylor II*, however, side-stepped the argument that it should consider only trespass concepts and not expectations of privacy for “property[] based” Fourth Amendment searches after *Jones*. *See* 11 F.4th at 487 n.2, 488. The court “decline[d] to resolve this argument” and, instead, concluded that the industry in question (municipal parking) was not a closely regulated industry, so *Burger* did not apply. *See id.* Therefore, contrary to Petitioner’s contention, *Taylor II* does not demonstrate that the Sixth Circuit applies *Jones* and *Katz* to determine whether an administrative search of a closely regulated industry is reasonable.

The other district court and circuit court cases cited by Petitioner similarly address whether a “search” under the Fourth Amendment occurred, not the application of *Jones* or *Katz* to administrative searches of closely regulated industries. See *Taylor v. San Francisco Sheriff’s Dep’t*, No. 23-CV-04121-DMR, 2024 WL 2808650, at *3 (N.D. Cal. May 31, 2024) (“To assert that her Fourth Amendment rights were violated, [p]laintiff must show that her ‘persons, houses, papers, [or] effects’ were subject to an ‘unreasonable search[] and seizure[].’”) (citing the Ninth Circuit’s quotation of the Fourth Amendment in *Patel I*, 738 F.3d at 1061); *United States v. Sayonkon*, No. 16-CR-0265, 2017 WL 11426870, at *8 (D. Minn. Jan. 24, 2017) (citing *Patel I*’s discussion of what constitutes a Fourth Amendment search); *Newman v. Moore*, 743 F. Supp. 3d 62, 68 & n.1 (D.D.C. 2024), *aff’d*, 151 F.4th 472 (D.C. Cir. 2025) (same). Petitioner’s contention that “[o]ther circuits [have] updated the *Burger* test on their own” to consider trespass principles, Pet. 28, is not borne out by the cited case law.

In sum, Petitioner has not shown that the First Circuit’s decision in this case conflicts with other circuits’ decisions regarding application of the *Burger* test to administrative searches of closely regulated industries.

IV. This case is a poor vehicle for reviewing the Question Presented.

Contrary to Petitioner’s suggestion, this case is neither procedurally “clean” nor a vehicle for resolving any issue of nationwide importance advanced by Petitioner and amici. Pet. 30-33. Petitioner’s arguments regarding application of a “common-law trespass test” to administrative searches of closely regulated industries are unpreserved; they were not

raised below and therefore were not addressed by the lower courts. *See* Part I *supra*. What is more, Petitioner fails to articulate what a “common-law trespass test” would look like in the context of assessing the reasonableness of already identified searches in a closely regulated industry. It is entirely unclear what it would mean for a court to apply such a test to the *Burger* analysis, how doing so would materially change the outcome in this case, or how it would clarify existing Fourth Amendment jurisprudence for future cases. Petitioner invites confusion, not resolution.

Petitioner argues that the Court should be concerned by “a larger trend of oversight agencies trying to force boat owners to install GPS trackers.” Pet. 30-31. As Petitioner correctly notes, other Commission member states have adopted lobster vessel tracking regulations similar to the DMR Rule, consistent with Addendum XXIX. *Id.* Besides these similar regulations, however, Petitioner identifies only one other instance of a vessel tracking regulation, a dissimilar rule concerning private boats that occasionally offer chartered recreational fishing services. *Id.*; *see Mexican Gulf Fishing Co. v. United States Dep’t of Com.*, 60 F.4th 956, 960-61, 970 (5th Cir. 2023). These few instances hardly show a larger pattern of government agencies requiring boat owners to install tracking devices.

Petitioner also suggests that the Court should grant his Petition to address what industries may be deemed “closely regulated” for purposes of Fourth Amendment analysis. Pet. 32-33. In this case, however, Petitioner conceded in the district court that commercial lobster fishing is a closely regulated industry for purposes of applying the *Burger* test. Pet. App. 104a & n.19.

Neither the district court nor the First Circuit, therefore, ever considered the scope of what constitutes a “closely regulated industry” or the factual nature of commercial lobster fishing regulation. *Id.* 8a, 12a-14a. To the extent Petitioner contends that courts in other cases may have overly expanded the scope of the “closely regulated industry” category, this case is not a clean vehicle for addressing that legally and factually complex question.

Amici, for their part, raise several hypothetical questions about the application of *Burger* that were either not argued below or are not implicated by this case. The question of how *Burger* should be applied to family farms, for example, would not be clarified by this Court’s consideration of the factually distinct and factually specific application of *Burger* to commercial lobster fishing vessels at sea.

In sum, the Petition presents a variety of reasons that weigh against granting it: unpreserved issues not addressed below; hypothetical questions that would not affect the case at hand; and arguments grounded in fundamental misconceptions of applicable precedent. The Court should decline Petitioner’s invitation to confuse, not clarify, its long-standing Fourth Amendment jurisprudence.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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