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INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Atlantic States Marine Fisheries Commission (“ASMFC” or “Commission”) respectfully submits this brief in response to Plaintiffs’ motion to preliminarily enjoin Maine regulations that are based upon (and, essentially, mandated by) Addendum XXIX to Amendment 3 to the Commission’s Interstate Fishery Management Plan for American Lobster.

Sound fishery management depends upon having adequate and accurate data about fish stocks and fishing effort. Plaintiffs’ constitutional attacks on the electronic vessel tracking requirements would, if sustained, stymie governments’ ability to manage fisheries effectively for the benefit of the public (including lobster harvesters themselves, who depend upon managers’ ability to ensure that stocks remain healthy and abundant over time). And if an imposition as limited as this one—gathering latitude/longitude data, subject to extensive confidentiality protections—is impermissible, then other well-settled, common tools like onboard (human) observers would also become suspect.

To obtain data necessary to characterize the fishery with the precision needed for essential management purposes, it is necessary to understand where, when and how much fishing effort is occurring. Managers need much more than information about fishing activity that may be *violating* statutes or regulations; in order to have usefully complete data, entirely lawful fishing activity (which surely constitutes the vast majority of fishing effort) must be monitored too, so that managers can protect stocks, establish effective regulations, prevent harmful interactions between fishing activity and other important uses of public marine resources, and assure that these uses do not encroach unduly on fishing activity.

The ASMFC acknowledges that the Addendum XXIX tracking program is new to many lobster permit-holders, and that it is an unwelcome development for some. But the program was

carefully developed through an inclusive public process with multiple opportunities for public comment;¹ a successful voluntary pilot program; a focus on avoiding costs for permit-holders; and extensive input from a wide variety of experts (including from the Department of Commerce’s National Oceanic and Atmospheric Administration (“NOAA”)-Fisheries (also called the National Marine Fisheries Service), which is represented on the ASMFC Lobster Management Board that issued Addendum XXIX). And the Commission is convinced that the program, when fully implemented, will benefit all who currently participate and rely on the vitally important American lobster fishery and who hope to do so in the future.

Plaintiffs’ Fourth Amendment arguments should be rejected. Commercial fishing, with public permission, for public resources on public marine waters is a quintessential highly regulated enterprise, implicating very limited “privacy” expectations. Electronic monitoring and (far more intrusive) human onboard observation are commonplace in fishery management (and have never required warrants). The Addendum XXIX electronic vessel tracking requirement is designed to serve vital public interests that prior, much more limited, data programs could not—ensuring that the ASMFC and member States better understand the growing, and fast-changing federal lobster fishery, so they can respond to the panoply of serious management challenges—from mediating “spatial conflicts” with other uses for public resources, such as other fisheries and new marine conservation areas; to protecting endangered whales from harm; to allowing for meaningful enforcement of fishery regulations, in more remote and expansive federal waters, by informing officers of where fishing effort is taking place. The program is designed to be

¹ ASMFC Lobster Board records, including transcripts of the four public meetings at which Addendum XXIX was deliberated on and adopted, may be found at <https://www.asafc.org/species/american-lobster>. ASMFC has searched for, but not found, any public comments from any of the present Plaintiffs.

reasonable, avoid unreasonable burdens, and to afford the same protections for confidential data that have been successfully applied for other fisheries data and sensitive federal information.

BACKGROUND

A. The Federal-State Fishery Management Framework. Marine species like lobster and the waters where they live are public resources; access and commercial use of these resources is subject to public oversight and management under laws that have been developed to respond to painful experience with resource depletion. Authority for fishery management in federal waters of the Exclusive Economic Zone (the “EEZ,” from three to 200 nautical miles from shore) is principally vested in NOAA-Fisheries pursuant to the Magnuson Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1883. Fishing in State jurisdictional waters—those within three miles from the shore—is principally the responsibility of the States under their police powers and the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101-5108 (“Atlantic Coastal Act”), which Congress enacted to “support and encourage the development, implementation, and enforcement of effective interstate conservation and management” of interjurisdictional fisheries *Id.* § 5101(a)(3), (b). Under the Atlantic Coastal Act and its own Compact and Charter, the ASMFC promulgates fishery management plans for interjurisdictional fisheries, which member States are committed to implement individually. See *Medeiros v. Vincent*, 431 F.3d 25, 27-28 (1st Cir. 2005). The Commission currently coordinates the management of 27 species/species complexes, including American lobster. Each of these plans depend crucially upon having access to adequate information about stocks and effort.

Because lobster move between State and federal waters, State and federal fishery management processes are closely coordinated. See *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 112-14 (1st Cir. 2002). Through two statutes enacted in the 1990s, Congress recognized a

central role for States in lobster management that is in key respects broader than what prevails for most other species. In the 1993 Atlantic Coastal Act, Congress enacted special provisions dealing with Maine’s American lobster fishery, 16 U.S.C. § 5107a(a) (authorizing holders of Maine fishing permits to fish in certain designated federal waters), and initiated a “Transition to management of American lobster fishery by [the ASMFC].” *Id.* § 5107(b); *see also id.* § 1854 note, § 1856(a)(3)(A). Lobster fishing in State jurisdictional waters is generally governed by State laws (including those implementing ASMFC’s lobster plan, and for the EEZ, federal regulations under the Atlantic Coastal Act, based on recommendations from the ASMFC “to support the provisions of the [ASMFC’s] coastal fishery management plan.” *Id.* § 1503(a)(1); *see also* 50 C.F.R. § 697.1.

B. The American Lobster Fishery. The lobster is, indisputably, one of New England’s “most famed resources,” *Campenale & Sons*, 311 F.3d at 110, and the fishery too is iconic.² In 2022, commercial landings were valued at more than half a billion dollars. Overall, the fishery “has seen incredible expansion in landings over the last 40 years, with coastwide landings rising from roughly 39 million pounds in 1981 to over 158 million pounds in 2016.” *Add.* XXVI 15 (Ex. B to Plaintiffs’ Motion). This increase is largely attributable to increases in landings in the State of Maine, which rose “over 500% from 22.6 million in 1981 to 131.9 million in 2016.” *Id.* Maine is now by far the largest producer of American lobster, accounting for nearly 90 percent of all landings. (Massachusetts is the second-largest). By contrast, to the south, landings have

² Fishermen deploy lobster traps, also known as “pots,” designed to allow lobsters to enter easily but make it difficult for them to escape. Fishermen typically deploy multiple lobster traps in a connected line (a “trawl,” typically ranging from 5 to 40 traps in federal waters), which is then anchored or attached to a buoy at one end or both ends to mark its location. This allows fishermen to easily locate and retrieve the traps when checking their catch. Traps are baited with fish or other bait. Fishermen place the traps on the ocean floor in areas known to be inhabited by lobsters. These areas might be determined by factors such as water depth, temperature, and proximity to rocky bottoms or other lobster habitats. Fishermen typically check their traps every day or every few days, depending on regulations and local practices. They use boats equipped with hydraulic winches or other equipment to retrieve the traps from the ocean floor. When the traps are brought aboard the boat, fishermen sort through the catch, removing lobsters of legal size and discarding undersized or illegal lobsters. After sorting the catch, fishermen rebait the traps and reset them in the water.

dramatically *decreased*. “In 1996, New York lobster landings were 9.4 million pounds, but in 2016, only 218,354 pounds were landed” there. These and similar declines in the southern New England States are “the result of several factors including warming waters, increased predation, and continued fishing pressure.” *Id.* The ASMFC considers the Southern New England stock “severely depleted.” *Id.*

The American lobster’s range is divided into seven management areas, each of which is subject to distinct regulations that include, among other things, size limits on harvest, gear restrictions, trap limits, and measures to protect egg-bearing females.³ Most American lobster fishing still occurs in State waters: the average density of lobster gear deployed in State waters is more than 30 times that in federal waters. (Federal waters cover a much larger area—over 90 percent of the total of the management areas.) But recent years have seen an expanded presence of American lobster into federal waters further from shore, and also a pronounced expansion of fishing effort into federal waters.⁴

C. The Development of Addendum XXIX. The AMSFC has long recognized that sound fishery management requires accurate, up-to-date information about fish stocks and fishing effort, consistent with its statutory obligation to ensure that its management plans are “based on the best scientific information available.” 16 U.S.C. § 5104(a)(2)(A). The ASMFC’s

³ See Management Stock Area Map, https://asmfc.org/uploads/file/58f8cd9aLobsterManagement_StockArea_Map_Nov2016.JPG; see also ASMFC, *American Lobster*, “Atlantic Coastal Management,” <https://www.asmfc.org/species/american-lobster#management>.

⁴ The ASMFC’s 2020 stock assessment indicated a shift of lobster stock and fishery from inshore toward offshore areas, in part as a result of warming waters. ASMFC, *2020 American Lobster Benchmark Stock Assessment and Peer Review Report 6* (Oct. 19, 2020), https://asmfc.org/uploads/file/63d417a12020AmLobsterBenchmarkStockAssmt_PeerReviewReport_reduced.pdf (“2020 Stock Assessment”) (noting that warming waters resulted in a “shift” of the fishery toward offshore areas); see also *id.* at 29, 80-81, 170.

management plan for American lobster has been in place since 1997 and has been subjected to repeated updates (via “addenda”), to account for changing conditions.⁵

For many years, the ASMFC’s plans have noted that American lobster fishing effort in offshore areas was poorly understood—i.e., the fishery was not well “characterized.” In 2016, the Commission convened a work group including ASMFC, State, and NOAA-Fisheries experts; it recommended, among other things, that the Commission require electronic vessel monitoring for lobster vessels. Add. XXVI at 14.

In February 2018, the Commission finalized Addendum XXVI, which identified “deficiencies in the data collection requirements for lobster.” Add. XXVI at 1. It explained that among the “foremost deficiencies” was that existing requirements yielded information “too coarse to respond to the increasing number of marine spatial planning efforts which require fine-scale data.” *Id.* For example, the Commission noted that inadequate information about the location of lobster fishing had “impeded the [Commission’s] ability to accurately assess impacts” to the lobster fishery of federal proposal to protect deep-sea corals found in the same offshore federal waters. *Id.* at 5. It also noted that poor information on lobster fishing had impeded management efforts because the Commission lacked adequate information regarding the depth of lobster harvesting efforts in offshore areas—an information gap that impaired the ability to design management actions “including the establishment of a national monument,” that depended upon depth. *Id.* at 4-5. To address these and other obstacles, the ASMFC undertook to “improv[e] the resolution and quality of data collected,” in part by using “the latest technology to improve reporting.” *Id.* at 1.

⁵ See <https://www.asmfc.org/species/american-lobster>.

Addendum XXVI established an “Electronic Tracking Pilot Program, which aimed to “test electronic tracking devices” to determine which worked best for the lobster fishery. Add. XXVI at 18. The addendum explained that the pilot program’s success would be evaluated in light of a number of factors, including ease of compliance, ability to distinguish trap hauls from steaming, industry feedback, cost per fisherman, and law enforcement feedback. *Id.* The results showed that “though the devices differed somewhat in features and performance, they all were able to deliver vessel positions and detect individual trap hauls.” Add. XXIX at 3. A work group composed of ASMFC, State, and NOAA-Fisheries representatives then recommended that the Commission require electronic vessel monitoring for the federal lobster fishery.⁶

In March 2022, after a public notice-and-comment process conducted pursuant to the Commission’s Charter, the Commission finalized Addendum XXIX.⁷ Its express “goal” 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.” Add. XXIX at 1. The data provided by the program is expected to “improve stock assessment, inform discussions and management decisions related to protected species and marine spatial planning, and enhance offshore enforcement,” and respond to “a number of challenges the fishery is currently facing [that] pose a critical need for electronic tracking data in the offshore fishery.” *Id.* at 1-2. It also explained that the information afforded by existing Vessel Trip Reports (self-reports prepared and submitted by fishermen after each trip) provided only “coarse spatial data” that was

⁶ See Memorandum from Caitlin Starks to American Lobster Board (July 28, 2021), https://asmfc.org/uploads/file/63d2f3b0LobsterWG_Report_VesselTracking_July2021.pdf.

⁷ Plaintiffs incorrectly charge that the ASMFC failed to consult with the New England Council or the Secretary of Commerce “before, during or after the drafting process,” see Motion 4-5. In fact, a representatives of NOAA-Fisheries voted as members of the ASMFC Lobster Management Board that adopted Addendum XXIX.; the ASMFC Lobster Plan Development Team Committee that helped develop the Addendum included NOAA-Fisheries data and policy experts. The New England Council has a voting seat on the ASMFC’s Lobster Board.

“insufficient for management and scientific purposes” and failed to “provide the precision to accurately apportion effort within the stock units.” *Id.* at 2. Existing methods did not allow managers to know enough about where, when and how lobster fishing was occurring – information gaps that harmed the industry itself, by impeding efforts to quantify and illustrate the costs of proposed alternative uses that could displace lobster fishing.⁸

For instance, the Addendum explained that the coarse data would, among other problems, impede implementation of measures to reduce risks to Northern Right Whales, noting that “significant risk reduction efforts” to protect these and other marine mammals in federal waters were forthcoming. *Id.* at 2. It noted that access to accurate, finer-grained information concerning the location of fishing effort would also be important when issues arose relating to other, potentially incompatible uses in federal waters – including expanding offshore renewable energy development and aquaculture. *Id.* (In such cases, the Commission would not be the proponent of the activity, but would rather be invited or expected to weigh in on the extent of conflicts and economic impacts.) Moreover, “the large geographic footprint and low density of lobster gear in the offshore federal management area makes it difficult to locate gear for compliance checks,” making enforcement of the agreed-to rules ensuring sustainability and fairness more costly and less effective. *Id.* at 2.

The fact that the lobster stocks span the many boundaries of the respective management areas and travel routes to fishing grounds from different ports, the Commission explained, made it “critically important to record the footprint of the U.S. lobster fishing,” particularly given “spatial allocation” issues likely to arise “as a result of emerging ocean uses such as aquaculture,

⁸ See August 2021 Board Proceedings at 18 (ASMFC Commissioner and lobster industry representative David Borden of Rhode Island, discussing offshore wind development and stating: “We need to know the spatial and temporal footprint of the fishery, so that we can document it and try to minimize the impacts on the industry.”); Add. XXVI at 5-6.

marine protected areas, and offshore energy development.”⁹ Furthermore, the Commission noted that it had “long been recognized that enforcement efforts in the offshore federal lobster fishery need to be improved.” *Id.* at 5. Such “acute need[s] for high-resolution data” were of “particular concern,” the Commission explained, given the upturn in effort in federal waters and “the rapid increase in landings and value during the last decade.” *Id.* at 2.

To obtain the more detailed data, the Addendum requires that vessels issued federal commercial lobster trap gear permits “install an approved electronic tracking device to collect and transmit spatial data” and specifies that “[t]he 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.”¹⁰ The devices must “collect location data at a minimum rate of one ping per minute for at least 90% of the fishing trip,”—a minimum rate “necessary to distinguish lobster fishing activity from transiting activity and []... allow estimation of the number of traps per trawl.” Add. XXIX at 7.

The Addendum provides for careful management of data obtained through the devices. The Atlantic Coastal Cooperative Statistics Program—an intergovernmental organization that has long been charged with administering (and maintaining the confidentiality of) fishery data for the federal and State fishery management agencies—would administer the trip and location

⁹ Add. XXIX at 2. For one example, lobster fishing was phased out in 2023 in the Northeast Canyons and Seamounts Marine National Monument. See NOAA-Fisheries, *Northeast Canyons and Seamounts Marine National Monument*, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/habitat-conservation/northeast-canyons-and-seamounts-marine-national>. For another, the New England Council is considering opening an area currently closed to scallop fisherman, but not lobster trap fisherman, which if opened could result in gear conflicts. The tracking data can provide evidence of lobster fishing effort specific to the closed area, where harvester reports are not robust enough to provide such evidence. ASMFC January 2024 Lobster Management Board Meeting, Audio Recording at 6:30-8:46, 11:19-12:30, 14:35-15:54; 30:26-20:35 (Jan. 23, 2024), <https://www.youtube.com/watch?v=uY5Ng54Vcw4>.

¹⁰ Add. XXIX at 6. “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.” *Id.*

data gathered by the devices and have responsibility to provide “the appropriate state or federal entities with confidential data access.”¹¹

Consistent with its obligations as an ASMFC member, Maine adopted the challenged regulations to implement Addendum XXIX. The regulations make compliance with a tracking requirement a condition for federal permittees to land lobster in the State.¹²

ARGUMENT

I. THE FOURTH AMENDMENT’S PROHIBITION ON UNREASONABLE SEARCHES DOES NOT PROHIBIT REGULATORS FROM REQUIRING COMMERCIAL FISHING PERMITTEES TO SHARE CRITICALLY NEEDED LOCATION INFORMATION

Plaintiffs’ constitutional challenges to the Maine Department of Marine Resources (“MDMR”) vessel tracking regulations lack merit; because a showing of likelihood of success on the merits is the “‘sine qua non’ of preliminary injunctive relief,” their motion should be denied. *See Ryan v. U.S. Immigr. & Customs Enf’t*, 974 F.3d 9, 18 (1st Cir. 2020) (citations omitted).

A. Any Legitimate Expectation of Privacy Regarding the Location of Commercially Licensed Fishing Vessels is Extremely Modest

Fishing regulation exists to ensure that public resources are managed for the common good, sustainably and equitably. That is why there are permits which entail acceptance of substantial restrictions on when, where, and how permittees can harvest these resources. These

¹¹ In addition to adopting the federal permittee tracking requirement for State plans, the ASMFC recommended that “the federal government promulgate all necessary regulations” to implement the Addendum XXIX management measures pursuant to 16 U.S.C. § 5103(b), and that it do so by December 15, 2023. NOAA-Fisheries has not met the recommended timeline, but a planned rulemaking to adopt regulations responding to ASMFC’s recommendations is listed on the Department of Commerce’s “agenda of regulations under development or review over the next 12 months,” 89 Fed. Reg. 9548, 9548 (Feb. 9, 2024), which characterizes the Addendum XXIX measures as “critical to improving stock assessments, informing discussions and management decisions related to protected species and marine spatial planning, and enhancing offshore enforcement,” *id.* at 9553.

¹² Maine is the second State to implement Addendum XXIX. Last year, Massachusetts adopted regulations implementing the tracking requirements effective May 1, 2023. *See* 322 Mass. Code Regs. 7.11; Mass. Div. Marine Fisheries, *Electronic Tracking of Federal Lobster Vessels* (2024), <https://www.mass.gov/info-details/electronic-tracking-of-federal-lobster-vessels>. New Hampshire did so on February 15, 2024.

restrictions include intrusions on privacy that are much more extensive than the minimal one here, which is particularly far removed from the protection of privacy of persons, homes, and effects that is the Fourth Amendment's concern.

Even with respect to full-blown searches, “the circumstances and exigencies of the maritime setting afford people on a vessel a lesser expectation of privacy than in their homes, obviating the usual fourth amendment requirements.” *United States v. Green*, 671 F.2d 46, 53 (1st Cir. 1982); *see also United States v. Hayes*, 653 F.2d 8, 12 (1st Cir. 1981) (finding “no fourth amendment violation” where search was “within the scope of Coast Guard authority”); *U.S. v. Cardona-Sandoval*, 6 F.3d 15, 23 (1st Cir. 1993) (“Because of the special circumstances implicated by searches and seizures of vessels while at sea, we have recognized a diminished expectation of privacy.”); *accord United States v. Reeh*, 780 F.2d 1541, 1546 (11th Cir. 1986) (noting that “American officials may constitutionally board an American ship at any time” and that “seafarers can have only a limited expectation of privacy on their vessels”).

Any expectation of privacy implicated by locational tracking of commercial lobster vessels is extremely modest. Electronic signaling indicating the location of a licensed commercial lobster fishing vessel does not implicate the Fourth Amendment's core concern with unreasonable intrusions upon “persons, houses, papers, and effects.” *See United States v. Dillon*, 701 F.2d 6, 6-7 (1st Cir. 1983) (rejecting analogy between law enforcement search of vessel and searches of homes and automobiles).¹³ Commercial fishing in general, and lobster fishing in particular, has long been a paradigmatic closely regulated industry, in which persons and firms holding valuable governmental licenses to harvest public resources from public waters know that

¹³ An early Congress still populated with constitutional framers authorized warrantless searches of licensed vessels. *See Enrollment and Licensing Act of Feb. 18, 1793*, ch. 8, § 27, 1 Stat. 305, 315 (“it shall be lawful for any officer of the revenue, to go on board of any ship or vessel ... to inspect, search, and examine”).

they are subject to monitoring of all aspects of their work—without a warrant or any quantum of individualized suspicion of wrongdoing. Indeed, “comprehensive federal regulation of ... fishing vessels was established in the earliest days of the Nation,” *Douglas v. Seacoast Prods.*, 431 U.S. 265, 273 (1977), and “the fishing industry has been the subject of pervasive governmental regulation” ever since. *Lovgren v. Byrne*, 787 F.2d 857, 865 & n.8 (3d Cir. 1986); *see also* 16 U.S.C. § 1861(b)(1)(A)(ii), (vi) (authorizing Coast Guard officers to board, search, and inspect fishing vessels and to access certain data relevant to regulatory enforcement).

Those engaged in commercial lobster fishing enjoy a special entitlement to public resources conditioned on substantial restrictions and regulations intended to preserve those resources. Among other things, permit conditions and regulations restrict fishing seasons; sizes and reproductive status of lobsters that may be landed, and prescribe the nature and technical features of lobster gear. These requirements, moreover, differ in different areas that may be contiguous to each other, making location a pivotal concern in lobster harvest. These conditions entail significant limitations on freedom from seizure and search: Law enforcement officers not only may stop and board vessels at any time; they also may and do haul up trawls and traps (which must be identified and linked to the permittee) to inspect for compliance with regulatory requirements.

The compelling need for accurate, verifiable information concerning fish stocks and fishing effort is reflected in well-established (and warrantless) monitoring practices. Many fishery management regimes require vessels—without any requirement of reasonable suspicion or any other quantum of vessel-specific cause—to provide access to onboard observers to monitor compliance with applicable regulations, to assess catch and bycatch, to inspect records

and more.¹⁴ These human monitors—who may be government personnel or private persons authorized by law—by definition are aware of the vessel location at all times and obtain vastly more information (at much higher cost) than do the simple positional devices authorized under Addendum XXIX. And yet these observer programs are commonplace and legal, because it is recognized that obtaining full, independently verified information about commercial fishing activities (and not relying solely upon self-reporting) is vital to effective fishing management.

Like other commercial fishing vessels accessing scarce public resources in waters subject to other public uses, commercial fishing permittees know that they—and their traps—are subject to continual observation and inspection by law enforcement. Indeed, constant visibility is itself a regulatory requirement; vessels and fishing gear must be prominently marked.¹⁵

Faced with extensive precedent pushing against the proposition that fishery managers must obtain a warrant before securing low-cost monitoring in order to inform themselves about where, when, and to what degree commercial fishing is happening, Plaintiffs’ constitutional argument relies heavily—almost exclusively—on dicta in an out-of-Circuit opinion that avowedly “*did not address the merits*” of the Fourth Amendment issue, *Mexican Gulf Fishing Co. v. U.S. Dep’t of Com.*, 60 F.4th 956, 971 (5th Cir. 2023) (emphasis added). Among the many

¹⁴ See, e.g., 16 U.S.C. § 1853(b)(8) (under Magnuson-Stevens Act, a fishery management plan may “require that one or more observers be carried on board” any domestic vessel “engaged in fishing for species that are subject to the plan”); *id.* § 1383a(e)(1) (Marine Mammal Protection Act provision requiring Secretary of Commerce to place observers on board vessels with potential interactions with marine mammals for 20-35 percent of fishing operations “to obtain statistically reliable information” on such interactions); 50 C.F.R. § 648.111 (“the Regional Administrator [of NOAA-Fisheries] may require any vessel holding a permit for Atlantic sea scallops, Northeast multispecies, monkfish, skates, Atlantic mackerel, squid, butterfish, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, tilefish, Atlantic surfclam, ocean quahog, or Atlantic deep-sea red crab; or a moratorium permit for summer flounder; to carry a fisheries observer”); NOAA Fisheries, *Fisheries Monitor and Analysis Division History* (Mar. 2, 2022), <https://www.fisheries.noaa.gov/alaska/fisheries-observers/fisheries-monitoring-and-analysis-division-history#:~:text=1973,by%20invitation%20from%20host%20countries> (listing multiple programs requiring that commercial fishing vessels carry observers).

¹⁵ See, e.g., 50 C.F.R. § 697.7(a)(2) (requiring every lobster fishing vessel of 25 feet or more to have its “official number displayed on the port and starboard sides of the deckhouse or hull, and on an appropriate weather deck so as to be clearly visible from enforcement vessels and aircraft”).

reasons why *Mexican Gulf Fishing* does not aid Plaintiffs' claim here, the most important is that the court in that case underscored that there was "no evidence whatsoever" that the type of fishing ventures at issue—"charter boats," which took people out for brief recreational trips—were "closely regulated." *Id.* at 970. Here, the opposite is the case: Plaintiffs expressly acknowledge, as they must, that commercial lobster fishing is a "closely regulated industry." Mot. 4 (quoting *United States v. Raub*, 637 F.2d 1205, 1209 (9th Cir. 1980)).

B. The Tracking Requirement Serves Vitally Important Public Purposes

The MDMR regulations implementing Addendum XXIX will provide managers with vitally needed information that will allow the lobster fishery to remain robust even as it confronts complex and looming economic and environmental challenges.

Plaintiffs fundamentally misunderstand Addendum XXIX, describing it as if it was itself a substantive measure to promote various objectives that might compete or conflict with lobster fishing—such as offshore wind energy development, or the protection of whales. *See, e.g.*, Mot. 4, 5. That is incorrect. The ASMFC's identification of examples of management challenges (such as the various spatial conflicts) does *not* mean that the purpose of *collecting information* on lobster fishing effort is to promote policy initiatives such as offshore wind development or aquaculture. Rather, those and other management challenges have arisen and inevitably will continue to arise when *other* decision-makers consider and pursue these potentially competing ocean uses. Such challenges cannot be met if managers lack accurate information on the fishery.

Noting that fishing effort in the large and more remote federal areas of the lobster fishery was poorly characterized, the ASMFC and State and federal partners, for nearly a decade worked, collectively and deliberately to improve that program, to identify and rectify "deficiencies in the data collection requirements for lobster." Add. XXVI at 1. The Commission

identified a variety of developments in the Northwest Atlantic—“protection of deep sea corals,” “declaration of a national monument,” and “expansion of offshore wind,” and “reduc[ing] the risk of serious injury and death of endangered North Atlantic right whales” which “highlighted the fact that current harvester reporting requirements” failed to provide managers with the “level of information needed to respond.” Add. XXVI at 2.¹⁶ The Commission further found that the “coarse spatial scale of available harvest data for American lobster” had limited the Commission’s stock assessment for the fishery. Add. XXIX at 2. Having better data on where, when, and how lobster fishing is occurring is beneficial to harvesters themselves: by providing concrete evidence that alternative uses would interfere unduly with existing fishing grounds or routes and by eliminating uncertainty that (particularly in the context of protecting endangered species) could give rise to more stringent restriction of lobster fishing activity than the facts would warrant. And enhancing the “efficiency and efficacy of offshore enforcement efforts” by making it easier to “locate gear for compliance checks,” *id.*, is likewise in the interest of all: No one has a legitimate interest in violating applicable regulations or driving up enforcement costs. Obtaining better information about the lobster fishery so that such challenges may be dealt with in ways most conducive to a sustainable fishery is the Commission’s core mandate under its Compact and the Atlantic Coastal Act.

One of the most high-profile management challenges has related to potential harm to marine mammals—particularly endangered Right Whales—from entanglement with lobster gear, an issue that arises predominantly in federal waters. *See* Add. XXIX at 4. Plaintiffs are wrong to claim support in the Consolidated Appropriations Act of 2023, which prescribed that the

¹⁶ “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 and Jonah crab fisheries.” Add. XXVI at 2.

measures set out in the Atlantic Large Whale Take Reduction Plan, 86 Fed. Reg. 51970 (Sep. 17, 2021), are deemed to comply with the Endangered Species Act and the Marine Mammal Protection Act until NOAA-Fisheries promulgates new regulations required in 2028. First, the American lobster fishery is *currently* subject to robust whale-protection measures in the Take Reduction Plan that Congress expressly affirmed in 2023, *see* 50 C.F.R. § 229.32; and responding to those requirements—and being prepared to respond effectively to new measures that may be imposed in four years—requires obtaining the very data Plaintiffs ask the Court to deny to regulators. *See* Add. XXIX at 4 (noting that electronic tracking data “would significantly improve” models used to assess location of vertical fishing lines and their risk right whales under the Take Reduction Plan). In any event, nothing in the 2023 statute in any way restrains State or federal fishery managers from seeking to improve fisheries information that, as the ASMFC has consistently found, is needed for a wide array of management challenges.

Addendum XXIX is not some idiosyncratic effort by the ASMFC to promote wind energy, coral reef protection, or other objectives distinct from fishery management. Rather, it is an informational tool designed to ensure that managers have the best information available about the lobster fishery—including, critically, patterns and locations of fishing effort—as the fishery faces difficult, complex and unprecedented challenges. This void of information can be harmful to those engaged in commercial lobster fishing—as when uncertainty about the extent or location of American lobster fishing effort hampers effort to evaluate potential conflicts with competing uses, or requires limitations on lobster fishing that are more conservative than would be needed.

Gaps and deficiencies in information concerning the commercial lobster fishery in federal waters impedes that whole panoply of management activities. There are reasons that fishery management requires the “best scientific information available,” 16 U.S.C. § 5104(a)(2)(A)—

because management that is not based upon the best information is more likely to be ineffective (under-protective or overprotective), to miss emerging hazards, or to fail take into account impacts on particular stakeholders or resources. MDMR’s rule—and Addendum XXIX—are entirely appropriate efforts to remedy these long-recognized problems.

C. Addendum XXIX is Reasonably Designed to Serve its Important Public Purposes

Addendum XXIX is also carefully limited to address the significant public purposes the ASMFC identified—including providing more accurate information to support the panoply of existing and likely impending lobster fishery management challenges. The program is limited to federal lobster gear permittees, who fish commercially in the federal waters where the existing data gaps are most problematic.

Plaintiffs also attack the requirement that monitoring devices achieve one “ping” per minute, asserting there was “no rational factual or legal basis” for that requirement. In fact, the selected ping rate was found to be essential to the program’s central goal of getting sufficiently accurate and precise (“granular”) data. Less frequent rates would not allow for the fine-grained data necessary to serve the multiple substantial management needs the Commission identified. For example, a one-minute ping rate can do what slower ping rates cannot: allow for the detection of setting of gear. Sufficiently rapid ping rates are therefore “essential to estimating trawl size.”¹⁷ The resolution or “granularity” of data matters greatly to the effectiveness of fishery management—and is all the more imperative as challenges presented by scarcity, spatial conflicts, changing climate and fish stocks continue to accumulate.

Plaintiffs also express various concerns about the possibility that information collected by the program could be improperly disclosed. But even assuming that information about the

¹⁷ Addendum XXIX: Lobster Vessel Tracking Ping Rate Analysis 17, https://asmfc.org/uploads/file/65b7d396AmLobsterAddendumXXIX_JonahCrabAddendumIV_March2022_1.pdf.

geographic position of subject commercial lobster vessels is confidential in a sense relevant to Plaintiffs’ constitutional claims, the Addendum XXIX program is in fact designed to carefully confine access to information, with measures to protect the identity of individual fishermen similar to ones long used for other tracking information gathered in other fisheries. Plaintiffs offer no good reason to expect problems with data confidentiality, let alone problems sufficient to establish a likely constitutional violation (or irreparable harm).

On the contrary, information collected pursuant to Addendum XXIX, like many other kinds of federal and State-collected fisheries data, is maintained by the Atlantic Coastal Cooperative Statistics Program (“ACCSP”; <https://www.accsp.org>), an entity created in 1995 by agreement between 23 coastal resource agencies, including the fishery management agencies of each of the 15 Atlantic coastal States and federal agencies.¹⁸ The ACCSP has decades of experience adhering to federal and State-law restrictions on the public release of information. Since the establishment of ACCSP, the organization has not had a single breach in data security or released any confidential data. (And indeed, Plaintiffs cite no prior instance of ACCSP mismanaging data, let alone point to any data from the pilot lobster program that preceded Addendum XXIX—or from the first year of compliance in the Massachusetts fishery).¹⁹

¹⁸ ACCSP complies with the data security requirements of the Federal Information Security Management Act, 44 U.S.C. §§ 3541, *et seq.* which sets data security standards for organizations that handle federal information. To be compliant, an organization must satisfy standards and guidelines established by the National Institute of Standards and Technology, including a comprehensive set of security controls.

¹⁹ Plaintiffs also object (Mot. 9-10) that the MDMR regulations (like the Addendum) require that vessel tracking devices generally remain operative when a vessel is not actively engaged in lobster fishing at a particular time—although the ping rate reduces to once every 6 hours when the vessel is docked/at berth (with the ability to shut down when the vessel is not engaged fishing for long periods). Allowing permittees to determine their own ping rate or shut down monitoring when then wished would reduce the reliability of the data, and is not feasible with the tracking devices best suited to the program. March 2022 Board Minutes at 9-10, 13-14 (discussion of how the effective, lost-cost cellular tracking devices in program do not have on/off switches that would readily allow for them to be turned on and off for different trips).

II. THE RULE DOES NOT VIOLATE EQUAL PROTECTION

The Plaintiffs are also unlikely to succeed on their claim that the MDMR's rule violates the equal protection guarantees of Amendments V and XIV of the U.S. Constitution because the rule allegedly treats some fishermen in State waters differently than others, based on whether a fisherman also has a permit to fish in *federal* waters.

Plaintiffs do not and cannot say that Addendum XXIX's distinction between federal permittees (who are subject to the tracking requirement) and State permittees (who are not, unless they also have a federal permit) trigger heightened scrutiny as would, for example, distinctions based on race or national origin. Instead, the "rational basis" test applies and requires Plaintiffs to show that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *Medeiros*, 431 F.3d at 29 (citation omitted).

Plaintiffs cannot meet that standard. The greatest uncertainty about existing fishing effort, and most of the serious spatial conflicts with other uses, are occurring in federal waters, which overall have conditions that differ significantly from the State waters closer to shore. As noted above, recent years have seen pronounced shifts into federal waters of both lobster stock and fishing activity—also supporting the need for better understanding of lobster fishing in those comparatively vast, far-flung waters. The ASMFC can hardly be faulted for limiting Addendum XXIX to the permittees who are entitled to fish in the very areas for which the additional data is most needed. An agency may choose to regulate "in an incremental manner," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009); the Constitution does not require it to

regulate totally or not at all. And the decision to limit the requirements of Addendum XXIX to federal permit holders is eminently rational.²⁰

III. A PRELIMINARY INJUNCTION WOULD CAUSE SERIOUS HARM TO THE PUBLIC INTERESTS SERVED BY EFFECTIVE, FULLY INFORMED FISHERY MANAGEMENT

A preliminary injunction would seriously harm the substantial public interests that Congress identified by statute and that the Commission sought to effectuate through Addendum XXIX. As noted above, Addendum XXIX is meant to allow fishery managers to fulfill their core responsibilities and respond effectively to an array of real-world spatial conflicts, problems and hazards that affect the fishery. An injunction would stop this carefully developed information program in its tracks—impeding management decisions that necessarily require “the best scientific information available.” 16 U.S.C. § 5104(a)(2)(A).

The longer implementation of the Addendum is delayed, the longer management decisions will not be fully informed, with increased risk of harm to a wide range of significant affected interests (be they lobster fishermen, those permitted in other fisheries or in marine conservation, or otherwise). While the Maine lobster fishery is thriving now, experience (including the collapse of the Southern New England stocks and fisheries) shows there is no guarantee that will continue. It is in the public interest that fishery managers must be as prepared as possible to manage challenges as they occur.

CONCLUSION

The motion for a preliminary injunction should be denied.

²⁰ Plaintiffs’ void-for-vagueness objection likewise appears unlikely to succeed; Maine’s rules are subject to general State-law administrative penalties and may be challenged as-applied under Maine law. We do not address arguments under the Maine Administrative Procedures Act, and question the Court’s jurisdiction to entertain them. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 106, 120-21 (1984).

Respectfully submitted,

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Commission

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2024, I electronically filed the foregoing AMICUS CURIAE ATLANTIC STATES MARINE FISHERIES COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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