09-1594-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE STATE OF NEW YORK, ALEXANDER B. GRANNIS,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Plaintiffs,

UNITED BOATMEN OF NEW YORK, INC., NEW YORK FISHING TACKLE
TRADE ASSOCIATION, INC., FISHERMEN'S CONSERVATION ASSOCIATION,

Intervenor-Plaintiff-Appellees,

—against—

ATLANTIC STATES MARINE FISHERIES COMMISSION,

Defendant-Appellant,

GARY LOCKE, THE UNITED STATES DEPARTMENT OF COMMERCE,
CONRAD C. LAUTENBACHER, THE NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRAT, JAMES W. BALSIGER,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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DISCLOSURE STATEMENT

Appellant Atlantic States Marine Fisheries Commission is a public commission formed by a congressionally approved interstate compact among the 15 Atlantic coastal states. The Commission has no parent corporation and no publicly held company owns an interest in it.

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STATEMENT OF JURISDICTION

The district court's subject-matter jurisdiction was based on 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291, 1292(b).

STATEMENT OF THE CASE

This interlocutory appeal presents the question whether Congress has provided private parties with a cause of action to seek judicial review of decisions of appellant Atlantic States Marine Fisheries Commission (ASMFC or Commission), an interstate compact entity.

A. Statutory and Regulatory Background

The case arises from disputes over the management of the summer flounder fishery off the Atlantic coast. Responsibility for managing summer flounder and other marine fisheries is divided between the federal and state governments in a complex administrative system that reflects both the practical need for extensive cooperation in managing fish stocks that cross jurisdictional boundaries, and the historic divisions of power under our system of federalism.

States have long had, and retain, primary responsibility for conservation and management of fisheries within the territorial sea (waters within three miles of shore), as well as in rivers and estuaries; management within the Exclusive Economic Zone (EEZ) – from three to 200 miles from shore – is the responsibility of the federal government. *See, e.g.*, 16 U.S.C. § 1856(a). The Atlantic Coastal

states manage their fisheries through their own governmental institutions and – for those fisheries found in multiple states' coastal waters – through appellant ASMFC, an interstate compact organization.

1. The ASMFC. In 1942, Congress approved the ASMFC Compact, an agreement between the fifteen Atlantic coastal states, pursuant to Art. I, § 10, cl. 3, of the Constitution. Pub. L. No. 77-539 (1942), as amended Pub. L. No. 81-721 (1950) (S. App. 1-5). The Compact's purpose is to "promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause." Art. I. Each member State appoints three representatives to the Commission: its director of marine fisheries; a state legislator; and a public member with fisheries experience who is appointed by its Governor. Art. III. While the Compact did not "limit the powers of any signatory state," Art. IX, the Commission was granted "the power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions to promote the preservation of * * * fisheries and their protection against overfishing, waste, depletion, or any abuse whatsoever and to assure a continuing yield," and to recommend adoption of regulations by member States, Art. IV, The Compact is to remain in force and binding upon each compacting State until formally renounced by it. Art. XII.

The ASMFC promulgates fishery management plans prescribing management measures for interjurisdictional fisheries, which plans are then implemented by the respective member states, usually by adopting regulations pursuant to state law. *See Medeiros v. Vincent*, 431 F.3d 25, 27-28 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2968 (2006). The Commission typically acts through species-specific management boards – in this case, its Summer Flounder, Scup, and Black Sea Bass Management Board – whose membership includes the ASMFC Commissioners from each member state with an interest in the fishery. *See* ASMFC, Interstate Fishery Management Program Charter ("Charter"), § 4 (available at http//:www.asmfc.org (under "About Us").[1] Boards' decisions are reached through an extensive public process as set forth in the Charter, *see id*., and their decisions are appealable by a member state to the ASMFC's Interstate Fishery Management Policy Board, Charter, §§ 3(d)(9), 4(h). The ASMFC today coordinates State management of more than 20 Atlantic coastal fisheries covering 24 species/species groups, in pursuit of its mission is to build, restore and maintain

[1] Management Boards may also include, as voting members: a representative from the Potomac River Fisheries Commission and the District of Columbia; the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, if they so elect; and the Executive Director of the Regional Fishery Management Council, if the Board determines that their membership "would advance the interjurisdictional management of the specific species." Charter, § 4(b).

stocks "to assure their continued availability in fishable abundance on a long-term basis." Charter, § 6(a)(1).

2. ACFCMA. After the ASMFC had been active for five decades, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), Pub. L. No. 103-206 (1993), 16 U.S.C. §§ 5101-5108 (S. App. 6-15), to "support and encourage the development, implementation, and enforcement of effective interstate conservation and management" of "[c]oastal fishery resources that migrate, or are widely distributed, across the jurisdictional boundaries of two or more of the Atlantic States and of the federal Government[.]" *Id.* § 5101(a)(3), (b).

ACFCMA arose from concern that states' "[i]nconsistent implementation" of ASMFC plans had contributed to the continued decline of fish stocks. H. Rep. 103-202 at 6 (1993). Congress found that "[t]he failure of one or more Atlantic States to fully implement a coastal fishery management plan can affect the status of the Atlantic coastal fisheries, and can discourage other states from fully implementing coastal fishery management plans." 16 U.S.C. § 5101(a)(5). At the same time, Congress reaffirmed that "[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 Atlantic States Marine Fisheries Commission," and declared it "the responsibility of the Federal Government to

support such cooperative interstate management of coastal fishery resources." *Id*. § 5101(a)(4).

ACFCMA calls upon the ASMFC to "prepare and adopt coastal fishery management plans to provide for the conservation of coastal fishery resources," to "specify the requirements necessary for States to be in compliance with the plan," and to "identify each state that is required to implement and enforce that plan." 16 U.S.C. § 5104(a)(1). Such plans must "promote the conservation of fish stocks throughout their ranges" and be "based on the best scientific information available," and in formulating them, the ASMFC must provide "adequate opportunity for public participation." *Id*. § 5104(a)(2).

ACFCMA further provides that each state identified under § 5104(a)(1) "shall implement and enforce the measures of such plan within the timeframe established in the plan." *Id.* § 5104(b)(1). The ASMFC must review states' implementation and enforcement of its plans, and "report the results of the reviews" to the Secretary of Commerce. *Id.* § 5104(c).

ACFCMA created a new, federal remedy to address "inconsistent" implementation of ASMFC management plans by member states and the resulting harms to interstate fisheries. *See Medeiros*, 431 F.3d at 27-28. Should a member State fail to implement an essential element of an ASMFC plan, the Commission must notify the Secretary of Commerce, who must then give "careful

consideration" to the comments of the affected State and provide that State an opportunity to present its comments "directly to the Secretary." 16 U.S.C. § 5106(b)(A), and solicit comments from the ASMFC, *id.* § 5106(b)(B). The Secretary must then determine, independently, whether the State has failed to implement specified management measures and whether the measures, in fact, "are necessary for the conservation of the fishery in question." *Id.* § 5106(a). If the Secretary makes affirmative findings, he "shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State." *Id*. § 5106(c). Such a moratorium is effected pursuant to regulations promulgated by the Secretary, *id.* § 5106(d), and violations of it are subject to federal penalties, *id.* § 5106(e), (f).

ACFCMA also directs the Secretary of Commerce to develop a program to support the Commission's work, including "activities to support and enhance State cooperation in collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery research, including biological and socioeconomic research; and fishery management planning," *id*. § 5103(a), and authorizes the Secretary to provide financial support to the ASMFC and its member states to carry out their respective responsibilities under ACFCMA. *Id*. § 5107. ACFCMA provides for cooperation between state and federal fisheries

managers, particularly with respect to fisheries located in both "federal" and "state" waters. *See*, *e.g*., *id*. § 5103(b).

3. Federal Fisheries Management. Fishery management in the EEZ is governed principally by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Pub. L. No. 94-265 (1976), *as amended,* 16 U.S.C. §§ 1801-1883. That statute establishes eight Regional Councils (such as the Mid-Atlantic Council) responsible for developing and recommending to the United States Secretary of Commerce fishery management plans governing each fishery within their respective geographic areas. *See id.* § 1853; *Connecticut v. Daley*, 204 F.3d 413, 414 & n.1 (2d Cir. 2000). The Secretary, advised by the Councils and the National Marine Fisheries Service (NMFS), possesses final authority to approve federal fishery management plans under the Act. 16 U.S.C. § 1854. The Act requires that the federal plans be consistent with ten "national standards." *Id*. § 1851(a). Parties aggrieved by the Secretary's regulations adopted by the Secretary have a right to judicial review, *id*. § 1855(f), conducted in accord with the review provisions of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 701, *et seq*.. The Act prescribes limits on that review, however, including a prohibition on preliminary injunctive relief. *See* 16 U.S.C. § 1855(f)(1).

The Act reserves to the states, with only narrow exceptions, responsibility for fishery management in state jurisdictional waters. *See* 16 U.S.C. § 1856(a)(1), (a)(2); *New York v. Evans*, 162 F. Supp. 2d 161, 163 (E.D.N.Y. 2001).

4. Summer Flounder Management. Summer flounder—*Paralichthys dentatus*, also known as fluke—are distributed along the Atlantic coast from North Carolina to Canada, move freely between different States' waters and federal waters, and support important commercial and recreational fisheries. *See United Boatmen v. Gutierrez*, 429 F. Supp.2d 543 (E.D.N.Y. 2006). The commercial fishery generally uses otter trawl nets. The recreational fishery is assigned 40 percent of the overall annual summer flounder quota; most of the recreational harvest, primarily by hook and line, occurs in state jurisdictional waters. The 1980s and early 1990s saw severe depletion of summer flounder stocks, followed by a partial and continuing recovery in more recent years. *See generally* Mark Terceiro, *The Summer Flounder Chronicles: Science, Politics and Litigation, 1975-2000*, 11 REVIEWS IN FISH BIOLOGY & FISHERIES 125 (2002). Congress has specified a January 1, 2013 deadline (extended from the earlier deadline of 2010) for the rebuilding of the summer flounder fishery. Pub. L. No. 109-479, Sec. 120(a) (Jan. 12, 2007). *See* 72 Fed. Reg. 32813 (June 14, 2007).

Because the summer flounder fishery spans state and federal waters, the Atlantic coastal States (acting through the Commission), and federal authorities

have cooperatively developed and implemented joint fisheries management plans. See *Connecticut*, 204 F.3d at 414; *United Boatmen*, 429 F.Supp.2d at 546. The objectives of the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan include reducing fishing mortality, increasing spawning stock biomass, and improving yield from the summer flounder fishery.

The federal government and the ASMFC separately set quotas fixing the total poundage of fish that may be harvested in federal and state waters, respectively, with separate allocations for the commercial and recreational fisheries. *See United Boatmen*, 429 F. Supp.2d at 546-48. Because they are based on the same scientific information on the status of the stock, and for practical needs of administration, the federal and state quotas have historically been identical – so that federal and state managers can design complementary management measures to achieve a common conservation goal. *E.g.*, *id.* at 546 (addressing challenge to 23.59 million-pound quota for summer flounder for 2006, which was separately adopted by Secretary of Commerce and the Commission). In assessing recreational fishing effort and catch for the summer flounder fishery, both federal fishery managers and ASMFC staff rely on a survey methodology known as the

Marine Recreational Fishery Statistical Survey (MRFSS). *See Memorandum Opinion and Order* 8-9 (Nov. 19, 2008) (*11/19/08 Order*) (A 72-73).[2]

The annual summer flounder quota is implemented through separate measures applicable to state and federal waters, respectively. In the case of state coastal fishery, the ASMFC promulgates management measures designed to ensure that landings do not exceed the quota, and then the member states separately adopt regulations to give effect to the Commission's plan. Regulations governing fishing in federal waters (*i.e.*, the EEZ) are promulgated by the Secretary of Commerce.

For the 2008 summer flounder fishery, both the ASMFC and federal authorities decided (as they had in prior years, and as they would later do for the 2009 season) that the recreational quota for summer flounder would be implemented by "conservation equivalent" measures—meaning that each state has discretion to adopt its preferred combination of seasonal, bag, and size limits, so long as its chosen restrictions on fishing are calculated to result in a catch no greater than the State's allotted portion of the recreational quota. *See 11/19/08 Order* at 8 (A 72). The ASMFC reached this decision at the December 2007 meeting of its Board; the federal government's decision is reflected in a final rule, published on May 23, 2008, 73 Fed. Reg. 29990.

[2] We will cite each Memorandum Opinion and Order issued by the district court in this manner.

B. Proceedings Below

On June 30, 2008, the State of New York and state officials filed suit against the Secretary of Commerce and other federal officials pursuant to the judicial review provision of the Magnuson-Stevens Act, 16 U.S.C. § 1855(f), and the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*., challenging the federal rule governing the recreational component of the 2008 summer flounder fishery. *See 11/19/08 Order* at 1-2 (JA 65-66). New York's complaint (Doc. 1, 3) (A 1) attacked the Secretary's reliance on MRFSS data in establishing management measures, alleging that that reliance violated the Secretary's obligation under the Magnuson-Stevens Act to use the best available scientific information, 16 U.S.C. § 1851(a)(2), and charged that the Secretary's adoption of state-by-state conservation equivalency as the mechanism for implementing the recreational quota imposed disproportionate burdens on New York, relative to other states in the fishery, thereby violating multiple provisions of the Magnuson-Stevens Act and the APA.

On July 16, 2008, the United Boatmen of New York, Inc., and other private, New York-based entities and individuals engaged in the recreational summer flounder fishery (collectively, "United Boatmen"), filed a motion to intervene and to add the ASMFC as a defendant. *See 11/19/08 Order* at 11-12 (A 75-76). The United Boatmen's proposed Complaint in Intervention (Doc. 7) (A 2) attacked

both the ASMFC and the federal defendants' reliance upon MRFSS to establish state-by-state management measures, and alleged that those management measures resulted in New York fishermen being provided more limited fishing opportunities than they should rightfully enjoy. It set forth claims for relief nearly identical to the New York plaintiffs' amended complaint, except that, in addition to claiming that the federal defendants had violated the Magnuson-Stevens Act and the APA, the Boatmen claimed that the Commission's management measures for summer flounder violated the ASMFC Compact, the Charter, ACFCMA, and the APA. (The proposed complaint set forth a fifth claim – with no analogue in New York's – asserting that the Commission's adoption of measures responding to past overages in numerous states violated ACFCMA, the Compact and Charter, and the APA.). *See* Complaint in Intervention, ¶¶ 85-98 (A57-62) (complaint as ultimately filed, pleading counts identical to those in proposed complaint).

In advocating intervention and joinder of the ASMFC, the United Boatmen pointed out that New York had not sued the ASMFC and argued that, because most of the recreational summer flounder fishery is located in state waters, the New York would not adequately represent the Boatmen's interests and or secure complete relief. *See 11/19/08 Order* 14-22 (A 78-86).

The Commission opposed the United Boatmen's motion to add it as a defendant, insisting that neither the Compact nor any federal statute provides a

cause of action entitling private parties to seek judicial review of Commission fishery management plans. New York did not take a position on the United Boatmen's motion or the ASMFC's opposition.

The district court granted the United Boatmen's motion to intervene and to add the ASMFC as a defendant.[3] As part of its inquiry whether New York would "adequately represent" the United Boatmen for Fed. R. Civ. P. 24 purposes, the court addressed whether the Boatmen had a viable cause of action against the ASMFC. The court noted that "[t]he ASMFC Compact, the acts of Congress approving it, *see* Pub. L. No. 77-539 (1942); Pub. L. No. 81-721 (1950), and the [ACFCMA] do not expressly provide for judicial review of ASMFC actions." *11/19/08 Order* at 20 (JA 84). The court then considered whether a right to judicial review could be "implied," but, noting the "silence in the ASMFC and its legislation," concluded that the evidence "weigh[ed] against finding such Congressional intent." *Id*. at 26 (JA 90).

The court noted, however, that "[i]n considering whether interstate compacts are subject to a private right of action, some courts, rather than following an approach of strict statutory interpretation, have reasoned that an interstate compact

[3] The United Boatmen responded that the ASMFC did not have the right to oppose its inclusion as a defendant until it was made a party. The court agreed, but proceeded to consider the Commission's arguments, at least insofar as the arguments had also been advanced by the federal defendants. See *11/19/08 Order* at 19 (A 83).

should be subject to APA review if the compact is a 'quasi-federal agency.'" *11/19/08 Order* at 26-27 (citing, among other cases, *Coalition for Safe Transit, Inc. v. Bi-State Dev. Agency*, 778 F. Supp. 464, 467 (E.D. Mo. 1991)) (A 90-91). The court explained that, under these cases, the availability of judicial review turns upon a "fact-intensive and case specific" review of "the degree of federal interest and participation in the compact." *Id*. at 27-28 (A 91-92).

The court concluded that "the federal interest and involvement in the Commission is strong," observing that the "ASMFC was expressly authorized by Congress under the Compact Clause," that it receives federal funding under ACFCMA, and that "the ASMFC serves a federal objective – namely, the conservation and management of fishery resources in the United States." *Id*. at 28-29 (JA 92-93). While acknowledging that some factors pointed in the other direction – including the reservation of state authority in the Compact, and the ACFMCA moratorium provision – the court understood ACFCMA to give the Commission "de facto regulatory power" and opined that the "separation of the ASMFC's and the Secretary's powers appears more formal than substantive." *Id.* at 29-30 (A 93-94). "Taken together," the court reasoned, "the strong federal interest and involvement in ASMFC and the Commission's de facto regulatory power may be sufficient to transform the Commission into a quasi-federal agency." *Id*. at 30-31 (A 94-95). The court concluded that:

> If ASMFC is a quasi-federal agency, then the APA affords both [United Boatmen] and [New York] a right of action against ASMFC. *See* 5 U.S.C. §§ 701-06. Since [the New York State] plaintiffs have on the face of it a colorable claim to relief against ASMFC, I find that plaintiffs' failure to join ASMFC as a defendant constituted nonfeasance and that in not pleading a claim against ASMFC, plaintiffs have not fairly represented the interests of [United Boatmen] in this matter.

Id. at 31 (A 95). Accordingly, it granted the United Boatmen's motion, "without prejudice to ASMFC's right to move to dismiss on the ground that it is not a quasi-federal agency, or on such other grounds as may exist." *Id*. at 35 (A 99).

After the United Boatmen filed their Complaint in Intervention (A 19-64), the ASMFC moved to dismiss (Doc. 43; A 7), again insisting that neither the Compact nor any federal statute provides for a private right of judicial review of ASMFC management plans. ASMFC explained that the APA's twice-repeated definition of "agency" is restricted to "authorities of the government of the United States," 5 U.S.C. §§ 551(1), 701(b)(1), and that the Commission, as an interstate compact entity formed by states and composed of state legislative and executive officers, undisputedly did not fit that definition, and that principles of federalism and sovereign immunity would at least require a clear statement from Congress before such a private right of action could be judicially recognized.

The district court denied the ASMFC's motion. *3/9/09 Order* (JA 138-156). The court again acknowledged that "[n]either the ASMFC Compact, the acts of Congress approving it, . . . nor the Fisheries Act [*i.e*., ACFCMA], nor the ISMFP

Charter expressly provide for judicial review of ASMFC actions," and reiterated its prior conclusion that the "evidence weighed against finding that Congress intended to create an implied right of action arising under the ASMFC Compact, its authorizing legislation or [ACFCMA]." *Id*. at 6 (JA 143) (citations omitted).

The court concluded, however, that the United Boatmen did have a right to proceed against the Commission on the "quasi-federal agency" theory. The court stated that, while Congress had not provided for a statutory right of action against the ASMFC:

> There is no question * * * that Congress intended to create a private right of action against federal agencies by means of the APA -- a statute enacted to promote agency accountability. *See, e.g., Japan Whaling Ass'n v. American Cetacean Soc*., 478 U.S. 221, 230 n.4 (1986) ("The 'right of action' in [suits contesting agency action or inaction] is expressly created by the Administrative Procedure Act (APA)") * * * * The issue here is whether ASMFC qualifies as the type of entity to which Congress intended the APA to apply.

3/9/08 Order at 6 (A 143). The court acknowledged that the ASMFC did not fall within the APA's definition of "agency" as each "authority of the Government of the United States," 5 U.S.C. § 551(1), but concluded that "whether Congress designates an entity as a federal agency does not end the inquiry as to whether the entity in fact operates as a federal agency." *Id*. at 7 (citing *Government Nat. Mort. Ass'n v. Terry*, 608 F.2d 614 (5th Cir. 1979)) (A 144). It reasoned that "whether an entity is akin to a federal agency is an important consideration, as Congress intended the private right of action available under the APA to render federal

agencies accountable for their actions." *Id*. at 8 (citing *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-73 (1986)) (A 145). "It follows," the court reasoned

> that Congress may not, through legislation imposing federal obligations, oversight, funding, or otherwise, transform an entity into something closely resembling a federal agency, and yet escape the accountability mechanism it intended to apply to such federal agencies – unless, of course, it specifically provides that the APA shall not apply to the entity in question, which is not the case here.

Id. at 8 (A 145).

The court then discussed cases in which courts, relying on factors such as "federal interests" implicated by a compact entity's operations, had treated such entities as "quasi-federal agencies" for purposes of APA review. *See 3/9/09 Order* at 9-11 (citing, *inter alia*, *Seal & Co. v. Wash. Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1155-56 (E.D. Va. 1991)) (A 146-48). The court cited various factors as supporting classification of the Commission as a "quasi-federal" agency: (1) that the ASMFC had been "expressly authorized by Congress under the Compact Clause"; (2) that it received federal funding; (3) that ACFCMA imposed "federal obligations" imposed on the Commission, including the obligations to use the "best scientific information available," (4) that the "ASMFC served the federal objective of conserving a management fishery resources in the United States, a goal expressed in the [Magnuson-Stevens Act], and (5) that the ACFCMA requires states to implement the requirements of fishery management plans issued by the

Commission. *Id*. at 12-14 (A 149-50). The court concluded that "[g]iven the high level of federal participation in ASMFC, the Commission's de facto regulatory power is sufficient to transform the Commission into a quasi-federal agency for the purposes of APA review." *Id*. at 15 (A 152).

The court acknowledged that this holding raised federalism concerns, *3/9/09 Order* at 15-16 (A 152-53), but concluded that these should not preclude recognition of a private right of action. The court concluded that "Eleventh Amendment concerns are not at issue here"—because the United Boatmen did not seek damages payable from state treasuries, *id*. at 16 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) (A 153)—and that, while Congress had "intended to respect, not restrict, the states[']' powers in the ASMFC Compact and related legislation," it remained "not unreasonable to conclude that, despite state sovereignty concerns, ASMFC should be treated as a 'quasi-federal agency' and subjected to a private right of action under the APA." *Id.* at 17-18 (A 154-55).

The Commission moved for reconsideration of that ruling and of the court's conclusion that it is not entitled to sovereign immunity. Doc. 60 (A 9). In the alternative, the Commission requested that the court certify its *3/9/09 Order* pursuant to 28 U.S.C. § 1292(b). The district court denied reconsideration, but agreed to certify the *3/9/09 Order* under § 1292(b). *4/7/07 Order* (A 157-73).

While the Commission's petition to this Court for permission to appeal was pending, the district court denied the United Boatmen's motion for a preliminary injunction. *See 4/30/09 Order* (A 174-219).

This Court granted the ASMFC's petition on June 9, 2009. On June 30, 2009, the district court stayed further proceedings against the ASMFC pending the resolution of this appeal. Doc. 123 (A 18). After the United Boatmen moved for reconsideration, the court decided that the Commission's appeal of the court's denial of its sovereign immunity defense had deprived it of jurisdiction, and that it had lacked jurisdiction to enter a stay. *Memorandum Opinion and Order* (August 3, 2009) (E.D.N.Y. Doc. No. 132).[4]

SUMMARY OF ARGUMENT

The United Boatmen's claims against the ASMFC should have been dismissed because they lack any cause of action against the Commission.

As the district court recognized, neither the Compact, nor ACFCMA, nor any other statute, provides for a private right of action to challenge the

[4] On July 24, 2009, New York and state officials filed a new complaint challenging the management measures for the 2009 summer flounder season on grounds similar to those asserted in its complaint concerning the 2008 measures. This time, New York named the ASMFC as a defendant, in addition to federal fishery managers. *New York, et al. v. Locke*, No. 09-cv-3196 (E.D.N.Y.). The same day, the United Boatmen also filed a new action suit against the federal defendants and ASMFC, also challenging the 2009 summer flounder measures on grounds similar to those asserted in this case. *United Boatmen, et al. v. Locke*, No. 09-cv-3202 (E.D.N.Y.).

Commission's fishery management decisions. The court recognized, as well, that the ASMFC is not an "agency" as that term is defined in the APA – as an "authority of the Government of the United States" – but nonetheless concluded that the Commission is sufficiently "akin to" a federal agency to make its actions reviewable in federal court at the behest of private parties. In so holding, the court relied upon district court opinions allowing suits other interstate compact entities suable on a "quasi-federal agency" theory, and decided that a multi-factor balancing test supported quasi-federal APA status for the Commission.

This result was contrary to plain statutory language and to bedrock principles of statutory construction. The APA does not provide a cause of action against entities that are "akin to" federal agencies. It provides one against "agencies" and supplies an express definition, which does not even arguably include interstate entities such as the Commission. As the Supreme Court has insisted, express statutory definitions must be honored. The "quasi-federal agency" cases also disregard the principle – emphasized in the Supreme Court's implied private cause of action jurisprudence – that the creation of private rights to enforce federal statutes is a matter for Congress, not courts. Furthermore, stretching the APA to cover a state entity despite Congress's express limitation of the statute to "authorit[ies] of the Government of the United States," is contrary to principles of federalism that must inform statutory construction.

Although the few courts that had adopted "quasi-federal agency" had confined it to the area of public contracting by compact agencies, as a more general doctrine of law is irreconcilable with numerous basic principles embodied in precedent of the Supreme Court and this Court, including the principle that that statutory text controls, and, more particularly, that courts must adhere to explicit legislative definitions of statutory terms; that it is for Congress, not the courts, to create private rights of action; and that, even when the statutory text provides a basis for a contrary construction, courts must construe federal statutes to avoid imposing significant burdens on states. The considerations on which the "quasi-federal agency" theory relies – such as the emphasis on "federal interests" implicated by an interstate compact agency's work – are not a permissible basis to recognize a cause of action for which Congress has not provided (and that the compacting states never agreed to). Indeed, strong federal interests and extensive federal involvement are invariably present in the cases in which the courts have refused to find implied private causes of action to enforce federal statutes.

The case should have been dismissed for an additional reason: The ASMFC member states have never relinquished, nor has Congress abrogated, the Commission's immunity from such private suits. In contrast to *Hess*, 513 U.S. 30, where Congress had provided for a cause of action applicable to state-controlled entities, here there was no such legislative intent to authorize suit against the

compact entity. The Eleventh Amendment's shelter is not limited to claims running against state treasuries, and the ASMFC was immune here because of the absence of consent from the member States and the absence of even an attempt by Congress to subject the Commission to suit.

STANDARD OF REVIEW

A district court's determination on whether Congress has created a private right of action is a question of law subject to de novo review. *See, e.g.*, *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 115-16 (2nd Cir. 2007); *McHugh v. Rubin*, 220 F.3d 53, 57 (2nd Cir. 2000). *See also United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) ("This court reviews a district court's statutory interpretation de novo.") (citing *United States v. Rood*, 281 F.3d 353, 355 (2d Cir. 2002)).

The district court's rejection of a sovereign immunity defense is also reviewed de novo. *See Gollomp v. Spitzer*, 568 F.3d 355, 365 (2d Cir. 2009) (citing *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 235 (2d Cir. 2006)).

ARGUMENT

I. THE ABSENCE OF A CAUSE OF ACTION REQUIRES DISMISSAL OF THE CLAIMS AGAINST THE COMMISSION

United Boatmen's claims against the ASMFC should not have been allowed to proceed. To be sure, their claims are based upon federal statutes, supporting jurisdiction under 28 U.S.C. § 1331, and it is settled that the interpretation of an interstate compact also presents a federal question. *See, e.g.*, *New York v. Hill*,

528 U.S. 110, 111 (2000); *Cuyler v. Adams*, 449 U.S. 433, 442 (1981). But alleging that a defendant has violated federal law is not enough; a plaintiff must also have a cause of action – a right to pursue relief against the defendant. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); *FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (plaintiff must "identify a cause of action – a 'source of substantive law * * * [that] provides an avenue for relief") (citing *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)); *Davis v. Passman*, 442 U.S. 228, 239 & n.18 (1979) ("[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. The concept of a 'cause of action' is employed specifically to determine who may judicially enforce the statutory rights or obligations."). The United Boatmen lack any viable cause of action against the ASMFC.

A. For a Private Right to Enforce a Federal Statute to be Recognized, Congressional Intent to Provide a Such a Right Must Be Evident from the Statutory Text

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *George v. NYC Dept. of City Planning*, 436 F.3d 102, 103 (2d Cir. 2006) (quoting *Sandoval*, 532 U.S. at 286). As the Court explained in *Sandoval*,

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may

> not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

532 U.S. at 286. "Over the years, the Supreme Court has come to view the implication of private remedies in regulatory statutes with increasing disfavor." *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 618-19 (2d Cir. 2002). *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772-73 (2008).[5]

As this Court observed in *Bellikoff*, when confronted with a putative federal cause of action, a court "must 'begin ... [its] search for Congress's intent with the

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[5] *Cort v. Ash*, 422 U.S. 66 (1975), instructed courts, in deciding whether a statute created a private right of action, to ask:

> First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (internal quotation marks omitted; emphasis in original). As this Court explained in *Hallwood Realty Partners, L.P.*, the Supreme Court has since "focused the analysis on the single question of whether congressional intent to create a private cause of action can be found in the relevant statute," 286 F.3d at 619, and this Court now considers the "*Cort* factors (other than congressional intent) * * * only as possible indicia for legislative intent." *Id.* at 619 n. 7 (citing *Health Care Plan, Inc. v. Aetna Life Ins. Co.*, 966 F.2d 738, 740 (2d Cir. 1992).

text and structure' of the statute, and cannot ordinarily conclude that Congress intended to create a right of action when none was explicitly provided." *Bellikoff*, 481 F.3d at 116-17 (quoting *Sandoval*, 532 U.S. at 288).

In order to find a private cause of action, the statute's "text must be phrased in terms of the persons benefited." *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692, n. 13 (1979)).[6] "[E]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga*, 536 U.S. at 285 (quoting *Sandoval*, 532 U.S. at 286) (emphases added by *Gonzaga* Court). Moreover, "the burden is on [the plaintiff] to demonstrate that Congress intended to make a private remedy available to enforce" the relevant provision of federal law. *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992).

These rigorous standards serve important constitutional purposes: "The determination of who can seek a remedy has significant consequences for the reach of federal power." *Stoneridge*, 128 S.Ct. at 772-73, and the rule requiring clear congressional intent "'reflects a concern, grounded in separation of powers,

[6] *Gonzaga* addressed whether provisions of a federal educational privacy statute were privately enforceable under 42 U.S.C. § 1983; as the Court noted, while inquiry is distinct from the implied right of action inquiry, "the inquiries overlap" in that "in either case we must first determine whether Congress *intended to create a federal right*." 536 U.S. at 283 (emphasis in original).

that Congress rather than the courts controls the availability of remedies for violations of statutes,'" *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 509, n. 9 (1990) (citation omitted). Allowing a federal right of action in the absence of clear congressional intent "runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation ...,', and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Stoneridge,* 128 S.Ct. at 773 (citation omitted).

B. Nothing in the ASMFC Compact, The Approval Legislation, or ACFCMA Provides for or Supports a Private Cause of Action Against the Commission

As the district court acknowledged, none of the relevant sources of federal law provides the necessary affirmative evidence that Congress (or the compacting states) intended to create a private right of action against the ASMFC. No language in the Compact, either as originally adopted in 1942, or as amended in 1950, even arguably confers on private parties a right of review of the ASMFC decisions. The ASMFC Compact contemplates that the Commission, composed of delegations from the member states (Art. III), will "recommend the coordination of the exercise of the police powers of the several states" to preserve fisheries and prevent overfishing or fishery depletion. Art. IV. It concerns the relationships among and mutual undertakings and obligations of member states; it confers no rights on private parties. Nor do the acts of Congress approving the Compact and

its amendment, Pub. L. No. 77-539, 56 Stat. 267 (1942); Pub. L. No. 81-721, 64 Stat. 467 (1950), contain any suggestion that Congress intended to create a private right to obtain judicial review of Commission conservation plans. No judicial precedent from the Compact's 67-year history recognizes such a cause of action.[7]

The ASMFC Compact and legislation stand in notable contrast to other compacts and authorizing legislation that expressly provide for judicial review of the compact entity's decisions.[8] The express rights of judicial review in these

[7] In *United Boatmen*, 429 F.Supp.2d 543, plaintiffs sued federal fisheries agencies and the ASMFC, challenging the recreational summer flounder quota for 2006. The ASMFC defended in part by pointed out the absence of a cause of action against the Commission. The district court did not address that argument, and, in an expedited decision, ruled for all defendants on the merits. In both *Medeiro*s, 431 F.3d 25, and *Rhode Island Fishermen's Alliance v. Dep't of Env'l Management*, 2008 WL 4467186 (D.R.I.), *appeal pending*, No. 08- 2390 (1st Cir.), the ASMFC intervened to support the State of Rhode Island's defenses of its implementation of the ASMFC management plan for American Lobster.

[8] See, *e.g.*, Washington Metropolitan Area Transit Regulation Compact ("WMATA Compact"), Pub. L. No. 101–505, 104 Stat. 1300, 1311-12, Art. XIII, Sec. 5(a) (1990) ("Any party to a proceeding under this Act may obtain a review of the Commission's order" in Fourth or D.C. Circuits by filing a petition for review within 60 days); Tahoe Regional Planning Compact ("Tahoe Compact"), Pub. L. No. 96-551, Art. VI(j)(3) (1980) ("Any aggrieved person may file an action in an appropriate court of the States of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency."); Northeast Dairy Compact, Sec. 16(c), S.J. Res. 28 (1995) (authorizing judicial review of rulings of compact commission); Pacific Northwest Electric Power Planning and Conservation Act,16 U.S.C. 839f(e) (subjecting certain actions of Pacific Northwest Electric Power and Conservation Council, a compact agency, to specified provisions of APA); Central Interstate Low-Level Radioactive Waste Compact, Compact, Art. IV, ¶ (*l*) (providing that judicial review of any final decision of Central Interstate Low-Level Radioactive

other compacts and approval statutes often subject to carefully drawn, express limitations on judicial review – such as specifications concerning on the timing of review, scope of review, exhaustion of administrative remedies, and venue in particular federal district courts or courts of appeals (or state court). *See*, *e.g.*, WMATA Compact, Art. XIII, (requiring that assignments of error first be placed before Commission by petition for reconsideration, § 4(g), and that petitions for review of WMATA decisions be filed only in the D.C. Circuit or the Fourth Circuit, within 60 days of denial of reconsideration, § 5); Columbia River Gorge National Scenic Act, 16 U.S.C. § 544m(b)(4), (6) (providing separately for "citizen suits" against compact commission, subject to 60-day notice requirement, and for actions for judicial review of compact commission's decisions, but providing that proper forum for these actions is state court in Washington or Oregon); Tahoe Compact, Art. VI(j)(3) (authorizing review of compact entity decision in federal or state court).

Waste Commission decision must be sought within 60 days), *reprinted in* 2A NEB.REV.STAT. app. ¶ (BB) at 964 (1989) (approved by Pub. L. No. 99-240, tit. II, sec. 222, 99 Stat. 1859, 1863 (1986)); Delaware River Basin Compact, Pub. L. No. 87-328, Section 3.8 ("any determination of the [Commission] shall be subject to judicial review in any court of competent jurisdiction"); Columbia River Gorge National Scenic Act, 16 U.S.C. § 544m(b)(4) (providing for judicial review of specified types of decisions of the Columbia River Gorge Commission, created under the Columbia River Gorge Compact).

ACFCMA, enacted in 1993, likewise does not evidence a congressional intent to create a private right of action against the ASMFC. Most important, and in stark contrast to the Magnuson-Stevens Act, 16 U.S.C. § 1855(f), there is no language in that statute that so provides. To the contrary, the statute's text and legislative history emphatically confirm the continuing primacy, discretion, and independence of the States, acting through the Commission, in developing plans for fisheries in state jurisdictional waters. *See, e.g.*, 16 U.S.C. § 5101(a).[9]

This feature of ACFCMA was central to the Commission's support for the 1993 legislation. At hearings on the legislation, the ASMFC Chairman, Philip G. Coates – also then Director of Massachusetts' Division of Marine Fisheries – expressed the Commission's support for the legislation and testified that: "This bill – in its entire theory and concept – relies on the good judgment of the states to determine what is necessary for Atlantic coastal fishery resources." Hearing Before the Subcommittee on Fisheries Management of the House Committee on Merchant

[9] See also H.R. Rep. 103-202 at 6 (1993) ("Under the legislation, the Commission and the States continue to be responsible for the management of coastal fisheries."); Sen. Rep. 103-201 at 7 (1993) (describing legislation as "allow[ing] states to develop coherent and compatible conservation goals for an Atlantic coastal fishery resource without interfering with a State's authority to manage fisheries within its jurisdiction").

Marine and Fisheries, H.R. 2134 at 59 (May 19, 1993).[10] The Commission had been promulgating fishery management plans since long before ACFCMA's enactment – indeed, ASMFC plans for 19 fisheries were in place at the time of the hearings on the proposes federal legislation, *see* Hearing at 54 – and a private right to judicial review would have been novel, consequential and controversial; yet nothing in ACFCMA's text or history hints at any such intent.

The elaborate mechanism ACFCMA adopted for cases in which states failed to implement fishery management plan components developed by the Commission – whereby the Secretary of Commerce may impose and enforce a federal moratorium based on his independent findings of noncompliance with the measures and of conservation need, *see* 16 U.S.C. § 5106 – also reflects Congress's concern for the ACFCMA the Commission's independent status, and ensures that disputes over non-implementation of a plan would be resolved by the Secretary of Commerce (after hearing from the affected state and the Commission). While a party aggrieved by the Secretary's imposition of a moratorium under ACFCMA could obtain APA review of that federal "agency action," *see* 5 U.S.C. §§ 702, 704, the moratorium mechanism indicates the care with which Congress addressed the sensitive federalism issues presented and

[10] Indeed, a bill introduced in the previous Congress failed due to "controversy" over a proposal "to give the Federal Government a substantial role" in managing fisheries in state jurisdictional waters. H.R. Rep. 103-202 at 6.

makes Congress's failure to provide for a private right of judicial review of ASMFC decisions all the more prominent.

At the time the ACFCMA was enacted in 1993, the Magnuson-Stevens Act provision expressly subjecting federal fishery management plans promulgated by the U.S. Department of Commerce to APA review, *see* 16 U.S.C. § 1855(f), had been in place for 17 years. That provision contains special limitations that recognize the special exigencies of fishery management – including a requirement that suit be filed within 30 days of publication of the Secretary of Commerce's action, and a provision barring preliminary relief, *see* 16 U.S.C. 1855(f)(1)(A). Congress, in enacting ACFCMA, did not choose to extend such any review provision to the Commission. Nor has it done so in any other statute.[11]

C. The APA Does Not Apply to Interstate Compact Entities Like the ASMFC

As the district court recognized, *e.g*., *3/9/09 Order* at 7 (A 144), the APA by its terms does not apply to the ASMFC. The APA's provisions on rulemaking, adjudication, and judicial review are all restricted to entities that fall within the statute's express definition of "agency," *i.e*., "each authority of the Government of

[11] The Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq*. – cited in the United Boatmen's Complaint in Intervention, *e.g*., ¶¶ 21, 87 (A 31, 58)— likewise does not provide a cause of action, but only provides for a declaratory remedy when jurisdiction is proper. *See, e.g.*, *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 14 F.3d 726, 731 (2d Cir. 1993) ("The Declaratory Judgment Act does not * * * provide an independent cause of action.") (citations omitted).

the United States." 5 U.S.C. §§ 551(1), 701(b)(1). "It is axiomatic that the statutory definition of [a] term excludes unstated meanings of the term." *Meese v. Keene*, 481 U.S. 465, 484 (1987). The APA does not apply to interstate compact agencies. *See Old Town Trolley Tours of Washington, Inc. v. Washington Metropolitan Area Transit Comm'n*, 129 F.3d 201, 204 (D.C. Cir. 1997) (compact commission not an APA "agency" because it is "an authority, not of the federal government, but of Virginia, Maryland, and the District of Columbia"). *See also Ritter v. Cecil County*, 33 F.3d 323, 327 (4th Cir.1994) (APA does not apply to county housing authority that administered federal program because it is not an APA "agency"); *Day v. Shalala*, 23 F.3d 1052,1063-64 & n.12 (6th Cir. 1994) (state entity administering federal program not subject to APA because not within statutory definition of "agency").

The Commission's structure and procedure –composed of state legislators, state fishery conservation officials, and gubernatorially appointed citizen representatives with knowledge of marine fisheries issues, decisionmaking by majority vote of state delegations, *see* Compact, Arts. III, VI – only emphasizes its distinctively non-"federal" character.[12] That structure and state-by-state voting process reflects a form of *representative* decisionmaking that differs markedly from federal "agencies."

[12] Federal legislators are constitutionally prohibited from serving as federal agency officials. U.S. Const., Art. I, § 6, cl. 2.

The court's conclusion that the APA's express limitation to "authorit[ies] of the federal government" statutory definition "does not end the inquiry" (*3/9/07 Order* at 7) (A 144) was error. To the contrary, when a statute's text is plain, "the inquiry should end," and "'the sole function of the courts is to enforce it according to its terms,'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). More particularly, the Supreme Court has held that an "explicit definition" in a statute is "controlling." *See, e.g.*, *Burgess v. United States*, 128 S. Ct. 1572, 1577 (2008); *see also Keene*, 481 U.S. at 484-85. Congress limited the APA to instrumentalities of the federal government; it did not choose to embrace other entities – whether or not they might be deemed to be "akin to" federal agencies, or share similar "objectives." Courts are not free to expand to APA's scope beyond the limits legislated by Congress – let along to take the constitutionally troubling step of expanding to APA's application to an entity composed of States.

The APA's definition of "agency" is broad – it embraces all manner of federal administrative bodies whether they be called "agencies," "administrations," "boards," "departments," or otherwise.[13] But the definition imposes a categorical

[13] In discussing the APA's definition of "agency," the Attorney General's Manual explained that: "It will be seen from the above that agency is defined as each authority of the Government of the United States, whether or not within or subject to review by another agency. This definition was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and

constraint, *i.e.*, that the entity, however titled, be an "authority of the Government of the United States." *See Old Town Trolley Tours*, 129 F.3d at 204; *Ritter*, 33 F.3d at 327; *Day*, 23 F.3d at 1063-64.

The district court cited *Government Nat. Mortgage Ass'n v. Terry*, 608 F.2d 614 (5th Cir. 1979), for the proposition that "whether Congress designates an entity as a federal agency does not end the inquiry as to whether the entity in fact operates as a federal agency." *3/9/09 Order* at 7 (A 144). But the very passage cited by the district court emphasizes that statutory definitions control, explaining that: "Congress need not label an entity 'an agency' in order to entitle that organization to invoke the jurisdiction granted by [28 U.S.C.] section 1345. An entity is an agency for purposes of [28 U.S.C.] section 1345 *because it satisfies the definition of agency provided by section 451*." 608 F.2d at 616 (emphasis added); *see* 28 U.S.C.§ 451 (as used in Title 28, "[t]he term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States").

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offices, but that these agencies, in turn, are further subdivided into constituent units which may have all the attributes of an agency insofar as rule making and adjudication are concerned." U.S. Dep't of Justice, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947). The breadth of the definition was intended to sweep in the full range of federal administrative bodies. But as the definition's plain language indicates, it was never intended to apply to nonfederal entities, let along state ones.

Treating the APA's definition of "agency" as non-exhaustive is inconsistent, not only with basic principles of statutory construction concerning congressionally defined terms, but also with the Supreme Court's insistence that private rights of action flow only from demonstrated congressional intent to provide such rights. *See, e.g.*, *Stoneridge*, 128 S. Ct. at 772-73; *Gonzaga*, 536 U.S. at 284; *Bellikoff*, 481 F.3d at 116-17. Moreover, given that Congress expressly defined APA "agencies" as authorities of the *federal* Government, it is particularly inappropriate to apply the statute to a *state* entity—a category that enjoys a markedly different status in our federal system, and whose regulation by Congress would (at a minimum) trigger "clear statement" rules designed to protect the States. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64-65 (1989); *McNally v. United States*, 483 U.S. 350, 360 (1987) (avoiding construction of federal statute that "leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials"); *infra*, Point II.

D. The "Quasi-Federal Agency" Cases Do Not Warrant Recognition of a Private Cause of Action

Despite the APA's express definition of what counts as an "agency" for purposes of that statute, the district court allowed the claims against the Commission to go forward based upon district court decisions that it interpreted as

recognizing a cause of action against compact entities whose actions were found, upon a "fact-intensive and case-specific" inquiry, to implicate "federal interests," warranting their treatment as "quasi-federal agencies" subject to APA review. *See 3/9/09 Order* 7-15 (A 144-152).

Even on their own terms, these decisions provide decidedly limited support for the proposition that a federal court may recognize a cause of action against an interstate compact agency absent a specific demonstration of congressional intent to provide for such a right. In several of the cases the district cited for the "quasi-federal agency" theory, the question of a private right of action was not decided at all. In *The Bootery, Inc. v. WMATA*, 326 F. Supp. 749. 778-79 (D.D.C. 1971), and *Otis Elevator Co. v. WMATA*, 432 F. Supp. 1089, 1093-94 (D.D.C. 1976), the question was instead whether the law of disappointed-bidder "standing" should apply in a case against a compact agency. *See Elcon Enterprises v. WMATA*, 977 F.2d 1472, 1480 n. 2 (D.C. Cir. 1992) (citing *The Bootery* and *Otis*, and expressly reserved the question whether there was an "implied cause of action under the WMATA compact" – an issue WMATA apparently had not raised in any of the cases). In *Coalition for Safe Transit, Inc. v. Bi-State Dev. Agency*, 778 F. Supp. 464, 468 (E.D. Mo. 1991), the issue was whether removal was proper, and the court in upholding removal held only that, "plaintiffs' claim for relief arises, *if at*

all, as an implied federal cause of action available to persons aggrieved by the actions of a quasi-federal agency." (emphasis added).

In only two of the "quasi-federal agency" cases – *Union Switch and Signal Inc. v. Bi-State Development Agency*, No. 91-1401C(7) (E.D. Mo. 1991), and *Seal & Co. v. WMATA*, 768 F. Supp. 1150 (E.D. Va. 1991) – did the courts purport to recognize an implied right of judicial review against the compact agency. But in both, the district courts found, based upon the particulars of the compacts at issue, that Congress specifically had intended to allow for a review of the respective agencies' public contracting decisions. *See Coalition for Safe Transit*, 778 F. Supp. at 467 (describing unpublished *Union Switch* decision as having concluded "that Congress, in enacting the [Bi-State] compact, intended to create a private cause of action"); *Seal*, 768 F. Supp. at 1156. In *Seal*, the district court's relied upon the facts that the WMATA's detailed public contracting regulations were intended precisely to mirror federal contracting rules, and that Congress itself had been intimately involved in negotiating the compact – factors that, as the district court in this case noted, are absent here. *3/9/09 Order* at 25 (calling *Seal* "distinguishable" insofar as it found congressional intent to create a cause of action) (A 89).

But while *Union Switch* and *Seal* turned on distinctive considerations raised by public contracting, [14] and both of which purported to find in the specific interstate compacts, as applied to specific facts, evidence of congressional intent to authorize suit, the decisions also do suggest a broader principle – that a right of APA review may be afforded against nonfederal entities, *without* specific evidence that Congress so intended, provided that there is a sufficient degree of "federal interests" and "federal participation" in the compact agency's operations. *See 3/9/09 Order* at 8-9 (A 144-145). In that respect, the decisions violate basic precepts of statutory construction and overstep the proper division of judicial and legislative authority emphasized in numerous recent decisions of the Supreme Court and this Court.

[14] All of the quasi-federal agency cases involve public procurement by interstate compact entities – an area in which the entities (unlike the ASMFC) dealt directly with the public – and the doctrine has heretofore been limited to that area. Indeed, the court below (*3/0/09 Order* at 10 (A 147)), cited *dicta* in a Third Circuit decision holding that plaintiffs lacked a private right of action under a federal statute governing the activities of an interstate compact entity, in which the court of appeals distilled the factors "relevant to quasi-federal agency classification" as follows: "(1) whether the originating compact is governed, either explicitly or implicitly, by federal procurement regulations; (2) whether a private right of action is available under the compact; and (3) the level of federal participation." *Id*. at 10 (quoting *American Trucking Ass'n, Inc. v. Delaware River Joint Toll Bridge Comm'n*, 458 F.3d 291, 304 n.10 (3d Cir. 2006)). The court below acknowledged that the first two factors were not present, but explained that it would focus on what it identified as the "most important" factor of federal participation. *3/0/09 Order* at 11 (A 148).

First, as demonstrated above, the APA specifically defines "agency" as limited to authorities of the "government of the United States." 5 U.S.C. §§ 551(1), 701(b)(1) – language that plainly (and, in this case, undisputedly) does not include nonfederal entities such as interstate compact agencies. The "quasi-federal agency" doctrine's premise – that a court may expand the scope of a defined statutory term – is directly contrary to hornbook law. *E.g.*, *Burgess*, 128 S. Ct. at 1577 ("[w]hen a statute includes an explicit definition, we must follow that definition"). *See also Stenberg v. Carhart*, 530 U.S. 914, 942-43 (2000) (citing, *inter alia*, *Keene*, 481 U.S. at 484-85; *Colautti v. Franklin*, 439 U.S. 379, 392-93, n. 10 (1979); *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 502 (1945); *Fox v. Standard Oil Co. of N. J.*, 294 U.S. 87, 95-96 (1935)). As the Supreme Court has explained, where a statute's text is plain, "the inquiry should end" there. *Ron Pair Enterprises, Inc.*, 489 U.S. at 241. Congress simply did not authorize courts to extent the APA's judicial review provisions to nonfederal entities that are deemed to be "akin to" federal agencies. Congress's intent to provide a broad charter for review of agency action, *see 3/9/09 Order* at 6-7 (A 143-144) , must be understood in light of the language Congress used, including the limitation of the APA's scope to authorities of the United States government.[15]

[15] The *Seal* court incorrectly stated that a right to review is "is presumed" to be available unless there is clear evidence of congressional intent to *preclude* review. *Seal*, 768 F. Supp at 1153 n.6 (citing *Japan Whaling Ass'n*, 478 U.S. at 230 n.4).

Second, the "quasi-federal agency" approach contradicts clear and recent precedent from the Supreme Court that causes of action are created by Congress, not courts, and that their recognition requires clear evidence of congressional intent. *See*, *e.g*., *Stoneridge*, 128 S.Ct. at 772-73; *Bellikoff*, 481 F.3d at 116-17. As the Supreme Court has emphasized, the various policy considerations bearing on whether to provide a private rights of action are for Congress to decide, and absent proof that Congress has to provided such a right, courts may not do so, "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286.

Third, judicial recognition of a cause of action against interstate entities in the absence of an express congressional direction violates basic principles of federalism. Even when plain statutory text provides colorable support, courts may not adopt constructions of federal statutes that burden state interests absent a clear statement demonstrating that Congress actually intended to impose the burden. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). Expanding a federal statute

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See also *3/9/09 Order* at 6 (A 143) (citing same *Japan Whaling* footnote). But in *Japan Whaling*, that presumption applied because plaintiffs in that case were suing the U.S. Department of Commerce – an "authority of the government of the United States" – and therefore enjoyed a "'right of action' * * * expressly created by the Administrative Procedure Act (APA)." 478 U.S. at 230 n.4. As the Supreme Court's decisions repeatedly confirm, when Congress has not expressly provided for review, private rights of action may not be "presumed." *See*, *e.g*., *Sandoval*, 532 U.S. at 286.

beyond its language so as to impose substantial obligations upon a state entity's policymaking process when Congress has *expressly limited* that statute to "authorit[ies] of the government of the United States" is, to put it mildly, incompatible with the first principles of federalism. *See United States* v. *Bass*, 404 U.S. 336, 349 (1971) (clear statement rule ensures that Congress "ha[d] in fact faced" the federalism consequences and actually intended them).

In addition to its more profound flaws, the "quasi-federal agency" theory is neither logically consistent nor practically administrable. The courts espousing it have provided no explanation, if the APA's explicitly limited definition of "agency" may be disregarded, why the APA's extensive provisions on public records, 5 U.S.C. §§ 552, 552a, 552b, rulemaking, *id*. § 553, and adjudication, *id*. §§ 554, 556-57, may (or must) not also be similarly applied to compact agencies. Furthermore, a theory on which the availability of judicial review turns on "fact-intensive and case specific" threshold inquiries (*11/19/08 Order* at 28; A 92) is an invitation to uncertainty, inconsistency, and costly litigation – and in which the threshold question of whether a cause of action exists depends, not on choices made by Congress through statutory text, but on ad hoc, discretion-laden judicial inquiries.[16]

[16] The uncertainty and inefficiency inherent in the "case-by-case" approach to judicial review under the "quasi-federal agency" theory is illustrated by *Heard Communications, Inc. v. Bi-State Development Agency*, 18 Fed. Appx. 438 (8th Cir.

E. "Federal Interests" and "Involvement" Do not Warrant Judicial Recognition of a Private Right of Action against a Compact Entity

Nor does all this even exhaust the flaws in the theory that the APA's requirements may be extended to interstate compact agencies when they are found to be "quasi-federal agencies." Contrary to the theory, the presence of a "federal interest" or "federal participation" in an interstate compact entity's operations does not warrant the creation of a cause of action for which Congress has not specifically provided. Indeed, in *all* of the decisions from the Supreme Court and other federal courts denying plaintiffs' claims that an implied cause of action should be recognized, "federal interests" and "federal participation" were manifest. Yet the courts held that no implied private cause of action was present, because of the absence of statutory text indicating a congressional intent to provide one, and because the task of creating rights of action to enforce federal statutes is for Congress. *See, e.g.*, *Stoneridge,* 128 S.Ct. at 773; *Sandoval,* 532 U.S. at 286.

2001) (unpublished), in which the Eighth Circuit affirmed a later district court opinion finding, on the facts, and after *discovery* had illuminated the factual issues deemed necessary to decide the availability of judicial review, that "in this case Bi-State [the interstate compact commission] was not a quasi-federal agency." *Id*. at 439. The court distinguished the *Union Switch* case, in which a contrary conclusion had been reached with respect to the same compact entity, on the ground that the particular contract at issue there had been federally funded, and that "the court in *Union Switch* relied on Bi-State's compliance with federal contract procurement procedure," whereas, in the instant case, the "procurement procedures were only implicated in the event of a protest." *Id.* at 441.

For example, in *California v. Sierra Club* 451 U.S. 287 (1981), plaintiffs sought to sue under a provision of the federal Rivers and Harbors Appropriation Act dealing with a quintessentially federal subject of obstructions in navigable waters. The Court, however, found that the statute did not evince a congressional intent to create a private right of action, explaining that: "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Id*. at 297. The Court has found private causes of action lacking under federal securities statutes and regulations, *e.g*., *Stoneridge Inv. Partners,* 128 S.Ct. at 772 -773 (no implied right of action against secondary actors under federal regulations promulgated under § 10 the Securities Exchange Act of 1934, 15 U.S.C. § 78j); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 174-76 (1994) (no private right of action for aiding and abetting a violation of § 10(b)), and other regulatory statutes that unquestionably involve important federal interests, *e.g*., *Brunner v. Ohio Republican Party*, 129 S.Ct. 5, 6 (2008) (unanimously overturning stay because plaintiffs unlikely to prevail on argument that federal statute regulating states' administration of presidential elections is privately enforceable); *Sandoval*, 532 U.S. 275 (no private right to enforce disparate impact regulations promulgated by the U.S. Department of Education under Title VI of the Civil Rights Act of 1964); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (noting and relying

upon parties' agreement that there is no private cause of action under federal Food, Drug, and Cosmetic Act). *See also Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986) (no private cause of action under provisions of the Federal Aviation Act).

In all of these cases, and many more, there was a federal interest at least as strong as the federal interest in management of coastal fisheries under the ASMFC Compact and the ACFCMA. Yet, the courts held that there was no cause of action because plaintiffs could not demonstrate congressional intent to create such a cause of action under the standards elaborated in the Supreme Court's cases. *Cf. Ritter*, 33 F.3d at 327 (APA inapplicable notwithstanding that state subdivision was administered federal program); *Day*, 23 F.3d at1063-64 (same). The same is true here – neither the Compact, nor the legislation approving it, nor ACFCMA, nor the APA, contains the necessary affirmative evidence of legislative intent to create a private right of action against the ASMFC.

Similarly, federal financial support for a state or interstate agency does not call up a private right to sue that agency. Where specific indicia of congressional intent are lacking, implied rights of action have been denied against defendants that were wholly federally funded. *See Baba v. Japan Travel Bureau Int'l*, 111 F.3d 2, 6 (2d Cir. 1997) ("Title VII provides no express or implied cause of action against the EEOC" for failure-to-investigate claims); *see also Sandoval*, 532 U.S. 275 (no

private cause of action for violation of regulations under Title VI, which prohibits discrimination by recipients of federal funds); *Day*, 23 F.3d at 1064 (rejecting argument that APA applied to Ohio's Office of Disability Determination, notwithstanding plaintiffs' argument that Office was "completely funded" by federal Social Security Administration). The Help America Vote Act provides extensive federal funding for state election reforms, *see, e.g.*, 42 U.S.C. §§ 15403, 15461, 15462, but does not create a private cause of action against the recipient state's officials. *See Brunner*, 129 S. Ct. at 6.[17]

Federal financial assistance for state and local government entities is ubiquitous, but does not, at least without specific direction from Congress, create a

[17] Citing an affidavit from the United Boatmen's Council attaching a 2007 budget, the district court stated that "over 90% of ASMFC's operating budget consists of federal funds." *3/9/09 Order* at 13 (A 150) (citing Exhibit 1 to Declaration of Philip L. Curcio) (Feb. 1, 2009) (A 133). The sums listed, however, include both monies used by the Commission to support its small staff of approximately 22 employees, as well as monies that the ASMFC disburses directly to the member states to support fisheries research and management, pursuant to ACFCMA and other statutes. *See, e.g.*, 16 U.S.C. § 5107 (authorizing support for ASMFC and member states). While even 100% federal funding would not warrant application of the APA to an entity that is not an "authority of the Government of the United States," the funding argument is unsound for additional reason: The ASMFC Commissioners – the officials ultimately responsible for ASMFC decisions, and who do much of the Commission's actual work – are state legislators, executive officials, and Governor-appointed representatives of fisherman's groups. Compact, Art. III. None of the Commissioners receive any salary from the ASMFC (or the federal government); instead, it comes from their respective states or organizations.

private right to sue those entities.[18] It is settled *constitutional* law that any conditioning of federal funding on a state entity's amenability to private suits require express statutory language: "[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously ..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Unambiguous language imposing the funding conditions is a prerequisite to the very "legitimacy of Congress's power to legislate under the spending power." *Pennhurst*, 451 U.S. at 17. There is no language in the ACFCMA – or any other legislation – imposing the APA's judicial review provisions on the ASMFC decisions as a condition of ASMFC's federal funding.

The district court also repeatedly cited the fact that the purpose of the ASMFC compact – the "conservation and management of fishery resources in the United States" – is also a goal of the Magnuson-Stevens Act, and concluded that the ASMFC therefore served a "federal objective." *11/19/08 Order* at 29 (JA 93). *See also 3/9/09 Order* at 13 (JA 150). But this says nothing about whether Congress created a private right to sue the Commission; the list of topics on which

[18] The APA, notably, does not contain language making the statute applicable to nonfederal activities that receive funding from the federal government.

the federal government and the states share "goals" and "objectives," is endless, and embraces topics from education, to crime control, to environmental protection, to health care. States' interest in protecting their fisheries is a traditional and central aspect of their policy power, *e.g.*, *California v. F.E.R.C.*, 495 U.S. 490, 497 (1990); that the federal government shares that interest does not answer focused question of whether Congress provided for judicial review of ASMFC fishery management plans. *See Sandoval*, 532 U.S. at 286-87 (conclusion that a private right of action would be "compatible" with federal statute not a valid basis for recognizing such a right). When it approved the ASMFC compact, Congress was well aware of both the federal and state interests in coastal fisheries. Congress chose to reaffirm "that the responsibility for managing Atlantic coastal fisheries rests with the States," 16 U.S.C. § 5101(a)(4), and did not impose a private right of action, even though it had done so expressly for federal fisheries management.[19]

[19] The district court also cited the fact that the National Marine Fisheries Service and the Fish and Wildlife Service may sit on ASMFC Management Boards, see Charter, § 4(b)(3), as supporting "quasi-federal" characterization. *3/9/09 Order* at 13 (A 150). But that the Commission, recognizing the importance of coordination in the management of interjurisdictional species found in federal and state waters, may choose to invite federal agencies (and others) to be a part of its management process (representing a small minority of the vote), does not transform the Commission into a federal agency – just as the Magnuson-Stevens Act's provisions requiring that state representatives sit on the Act's Councils established under that Act, *see* 16 U.S.C. § 1852(a)(1)(B), does not transform the Councils into state authorities.

Finally, the district court concluded that the absence of any statutory text providing a right of action against the ASMFC could be overlooked because failing to bring the Commission within the APA's scope (or at least its judicial review provisions) would allow it to "escape the accountability mechanism" that the APA represents. *3/9/09 Order* at 8 (A 145). The reasoning, once again, irreconcilable with the Supreme Court's instructions. *See Sandoval*, 532 U.S. at 286 (absent demonstration that Congress intended to create one, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute"). Moreover, although it is not subject to APA review, the ASMFC is subject to extensive "accountability mechanisms" – checks that have served the Commission and its member states for decades, and that set it apart from federal agencies for which the APA was designed. First, the ASMFC's structure – composed of State conservation agency directors; state legislators, and "public representatives" appointed by state Governors – ensures that Commissioners themselves are politically responsible, and distinguishes the Commission from the federal agencies to which the APA applies. As noted, in important respects, the Commission's structure is more like a legislature – in which each state is represented by its delegation of Commissioners – than an executive agency, and the Commission's responsiveness to the public is enhanced by the extensive public process that precedes its policy

decisions. The ASMFC's structure imposes constraints unlike those faced by any federal agency: Because all states have a common interest in protecting interstate fishery resources (and each may withdraw from the Compact), each state must work cooperatively with fellow member states over the long term.[20]

Moreover, ASMFC plans are not self-executing, and do not regulate private conduct. They are implemented by member states, typically by state conservation agency regulations. In addition to distinguishing the Commission's decisions from the "final agency action" that is a statutory prerequisite for APA review, 5 U.S.C. § 704, the fact that Commission plans are implemented through rulemaking by the individual member States affords yet another opportunity for public participation in the management process.

ACFCMA's carefully crafted procedures, 16 U.S.C. § 5106, provide further checks, including (1) independent review by the Secretary of Commerce of the basis for the ASMFC plan elements in question and the finding of state noncompliance; (2) a requirement that the Secretary give "careful consideration" to the affected State's views; and (3) the availability of APA review of any secretarial decision to impose a federal moratorium. *See supra*, pp. 5-6. Furthermore, while private parties lack a cause of action against the Commission, member States stand

[20] Although New York did not utilize the power here, States may appeal Management Board's decisions to the ISFPM's Policy Board, which includes the full Commission's membership. See, *e.g*., Charter, §§ 3(d)(9), 4(h).

on a different footing. An interstate compact is a contract among states, *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823), and, member States may seek judicial relief to enforce rights under the agreement. *See Texas v. New Mexico*, 462 US 554, 569-70 (1983); *State of Neb. v. Central Interstate Low-Level Radioactive Waste Compact Com'n*, 187 F.3d 982, 985 (8th Cir. 1999).

Given the marked differences between the ASMFC and federal "agencies" to which the APA applies, and given Congress's own evident concerns about respecting state sovereignty, Congress was certainly not *required* (but cf. *3/9/09 Order* at 8 (A 145)) to subject the ASMFC to APA review. That Congress did not do so is dispositive here.

II. IN THE ABSENCE OF LANGUAGE IN THE COMPACT OR APPROVAL STATUTES PROVIDING FOR SUCH ACTIONS, THE ASMFC IS IMMUNE FROM SUIT BY PRIVATE PARTIES

Although the absence of a cause of action is dispositive, there is a second basis on which dismissal was required. The Eleventh Amendment independently precluded the district court from recognizing, in the absence of any manifestation of consent from the member States or any condition imposed by Congress on its approval of the Compact, a private right of action authorizing review of an interstate agency's exercise of core police powers delegated to it by its member States.

As the district court recognized, the ASMFC is not a private or even municipal entity. Rather, it is composed of *states* and its actions entail the coordinate exercise of their core sovereign policy-making powers. The Supreme Court's precedents instruct that federal courts must resist statutory constructions that impinge on state sovereignty, *see Gregory*, 501 U.S. at 470; that disturb the state-federal balance, *Bass*, 404 U.S. at 349; or that raise significant constitutional doubts, *see Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 160-61 (2001). These rules express States' status as independent sovereigns; they reflect the rule that political and structural rules of legislative representation (and not judicial enforcement) are the principal protections for States; and they assure that Congress has squarely faced the implications for federalism of actions that impose burdens on states. *See*, *e.g.*, *Gregory*, 501 U.S. at 464; *Bass*, 404 U.S. at 349.

Although the district court acknowledged that States' interests were implicated, *e.g.*, *3/9/09 Order* at 15-18 (A 152-155), the court did not find Congress had faced them, and its consideration was focused on similarities between ASMFC and the bi-state entity whose claim of Eleventh Amendment immunity was rejected (over strong dissent) in *Hess*, 513 U.S. 30. However, the issues *Hess* addressed were altogether different from the ones implicated here. The federal statute at issue there—the Federal Employers Liability Act, 45 U.S.C. §§

51 *et seq.* (FELA) – unambiguously provided injured workers a right of recovery against their employers for personal injuries suffered in the workplace. The *Hess* Court confronted an instance in which Congress had already expressed a clear intent that the federal statute apply to the States – and where the Supreme Court had expressly sustained its power to do so, in the face of State objections. *See Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205-207 (1991) (reaffirming *Parden v. Terminal Ry. of Alabama State Docks Dept*., 377 U.S. 184, 190-191 (1964)). The only question actually presented in *Hess* was whether the Eleventh Amendment nonetheless barred application of FELA to a railroad operated by an interstate compact agency – and even on that question, four Justices dissented. In marked contrast to this case, the federal courts in *Hess* were not asked to pronounce State policy decisions "arbitrary and capricious" or enforce procedural requirements on State decision-making; they were required only to determine whether a railroad employer was factually and legally responsible for particular injuries.

In contrast to *Hess*, here there is no "federal statutory right," *see* 513 U.S. at 52-53, that Congress intended to extend against state actors. Thus, the critical first step in the sovereign immunity inquiry—whether Congress has attempted to subject the state entity to suit, *see Dellmuth v. Muth*, 491 U.S. 223, 227-228 (1989) (requiring clear statement for abrogation of Eleventh Amendment immunity); *id.*

at 232 (concluding that court may not rely on a "permissible inference" from a statute's language and structure in finding abrogation of immunity); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) ("Congress may * * * abrogate [Eleventh Amendment] immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute"); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991) – has not occurred in the case of the ASMFC. Even assuming that, notwithstanding *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), Congress *could* abrogate the immunity of the coastal States and subject them to searching federal court review of the "coordinated exercise" of their police powers, *cf. City of Boerne v. Flores*, 521 U.S. 507 (1997); *Lizzi v. Alexander*, 255 F.3d 128, 133 (4th Cir. 2001) (in post-*Hess* decision, holding that interstate compact agency possessed Eleventh Amendment immunity and that immunity had not been validly abrogated), Congress surely has not done so by the requisite "unmistakable" statutory language, *see Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 474 (1987). As noted above, even a statute conditioning acceptance of congressional funds on compliance with federal requirements obligations would be subject to a clear statement requirement, *see South Dakota*, 483 U.S. at 206-208; *Pennhurst*, 451 U.S. at 17, and would still not be enforceable by private parties, absent an express congressional provision of such a right, *see Sandoval*, 532 U.S. at 287-88.

Because there is no clear statutory language – or any language – indicating such a legislative decision, the Commission is immune from suit by private parties in federal court.

To be sure, this case, as the district court observed (*3/9/09 Order* at 16 (A 153)), is unlike *Hess* in that that money damages are not at issue here. But as the text of the Eleventh Amendment makes clear, protection of the State treasury is only one aspect of the shelter that Amendment provides, *see* U.S. Const., Amendment XI (recognizing that immunity extents to cases "law or equity"); *Cory v. White,* 457 U.S. 85, 91 (1982) ("the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity"); *Alabama v. Pugh,* 438 U.S. 781, 782 (1978), and as the Supreme Court's (post-*Hess*) decisions emphasize, the Eleventh Amendment does not exhaust the sovereign immunity that States retain under the Constitution. *See Alden v. Maine,* 527 U.S. 706, 713 (1999) ("the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment," but is instead "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today").

Here, unlike the tort suit against a state-controlled business enterprise in *Hess*, the United Boatmen's claims implicate powers at the very core of state sovereignty – they claim the right to initiate federal court review of the states'

policy decisions under the Compact, and to invoke the powers of a federal court to set aside the Commission's decisions. Those decisions concern the "coordinated exercise" of the Atlantic States' police powers over their waters and fisheries – subjects that are, again, at the heart of state sovereignty. *E.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997); *California*, 495 U.S. at 497.

Indeed, Congress recognized that sovereign immunity is not limited to suits seeking money damages: that is why the APA contains an express waiver allowing (only) suits for declaratory and injunctive relief to proceed against agencies of the United States. Thus, even a "federal" entity would be immune from the sort of lawsuit at issue here, absent an express statutory waiver of federal sovereign immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); 5 U.S.C. § 702 (waiving federal sovereign immunity for APA suits). A regime that would dismiss suits against indisputably federal entities but nonetheless allowed courts to *imply* a right to judicial review of interstate compact agencies' exercise of the coordinated police power of the States, to suit without any affirmative indication from Congress, would turn fundamental principles of constitutional federalism on their head.

The Eleventh Amendment prohibited the district court from recognizing an implied right for private parties to secure review of the ASMFC's fishery management decisions. The action is subject to dismissal on that basis as well.

CONCLUSION

The District Court's *3/9/09 Order* should be vacated, and the case should be remanded with instructions to dismiss the claims against the Commission.

Respectfully submitted,

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August 4, 2009

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is printed in proportionally spaced 14-point font and that, according to the word-count function of Microsoft Word, it contains 13,812 words.

/s/ Sean H. Donahue
Sean H. Donahue

SPECIAL APPENDIX

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ATLANTIC STATES MARINE FISHERIES COMPACT

Public Law 539, 77th Congress
Chapter 283, 2nd Session, 56 Stat. 267
As Amended by Public Law 721, 81st Congress
Approved August 19, 1950

AN ACT

(An Act creating the Atlantic States Marine Fisheries Commission)

Granting the consent and approval of Congress to an interstate compact relating to the better utilization of the fisheries (marine, shell and anadromous) of the Atlantic seaboard and creating the Atlantic States Marine Fisheries Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the consent and approval of Congress is herby given to an interstate compact relating to the better utilization of the fisheries (marine, shell and anadromous) of the Atlantic seaboard and creating the Atlantic States Marine Fisheries Commission, negotiated and entered into or to be entered into under the authority of Public Resolution Numbered 79, Seventy-sixth Congress, approved June 8, 1940, and now ratified by the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia, which compact reads as follows:

The contracting states solemnly agree:

ARTICLE I

The purpose of this compact is to promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause. It is not the purpose of this compact to authorize the states joining herein to limit the production of fish or fish products for the purpose of establishing or fixing the price thereof, or creating and perpetuating monopoly.

ARTICLE II

This agreement shall become operative immediately as to those states executing it whenever any two or more of the States of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida have executed it in the form that is in accordance with the laws of the executing state and the Congress has given its consent. Any state contiguous with any of the aforementioned state and riparian upon waters frequented by anadromous fish, flowing into waters under the jurisdiction of any of the aforementioned states, may become a party hereto as hereinafter provided.

ARTICLE III

Each state joining herein shall appoint three representatives to a Commission hereby constituted and designated as the Atlantic States Marine Fisheries Commission. One shall be the executive officer of the administrative agency of such state charged with the conservation of the fisheries resources to which this compact pertains or, if there be more than one officer or agency, the official of the state named by the governor thereof. The second shall be a member of the legislature of such state designated by the said Commission or Committee on Interstate Cooperation of such state, or if there be none, or if said Commission on Interstate Cooperation cannot constitutionally designate the said member, such legislator shall be designated by the governor thereof; provided, that if it is constitutionally impossible to appoint a legislator as a commissioner from such state, the second member shall be appointed by the governor of said state in his discretion. The third shall be a citizen who shall have knowledge of the interest in the marine fisheries problem, to be appointed by the governor. The Commission shall be a body corporate with the powers and duties set forth herein.

ARTICLE IV

The duty of the said Commission shall be to make inquiry and ascertain from time to time such methods, practices, circumstances and conditions as may be disclosed for bringing about the conservation of, the prevention of the depletion and physical waste of the fisheries, marine, shell and anadromous of the Atlantic seaboard. The Commission shall have power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions to promote the preservation of those fisheries and their protection against overfishing, waste, depletion or any abuse whatsoever and to assure a continuing yield from the fisheries resources of the aforementioned states.

To that end, the Commission shall draft and, after consultation with the Advisory Committee hereinafter authorized, recommend to the governors and legislatures of the various signatory states, legislation dealing with the conservation of the marine, shell and anadromous fisheries of the Atlantic seaboard. The Commission shall, more than one month prior to any regular meeting of the legislature in any signatory state, present to the governor of the state its recommendations relating to enactment to be made by the legislature of that state in furthering the intents and purposes of this Compact.

The Commission shall consult with and advise the pertinent administrative agencies in the states party hereto with regard to problems connected with the fisheries and recommend the adoption of such regulations as it deems advisable.

The Commission shall have power to recommend to the states party hereto the stocking of the waters of such states with fish and fish eggs, or joint stocking by some or all of the states party hereto, and when two or more of the states shall jointly stock waters the Commission shall act as the coordinating agency for such stocking.

ARTICLE V

The Commission shall elect from its number a Chair and a Vice Chair and shall appoint, at its pleasure, remove or discharge such officers and employees as may be required to carry the provisions of this compact into effect, and shall fix and determine their duties, qualifications and compensation. Said Commission shall adopt rules and regulations for the conduct of its business. It may establish and maintain one or more offices for the transaction of its business and may meet at any time or place but must meet at least once a year.

ARTICLE VI

No action shall be taken by the Commission in regard to its general affairs except by the affirmative vote of a majority of the whole number of compacting states present at any meeting. No recommendation shall be made by the Commission in regard to any species of fish except by the affirmative vote of a majority of the compacting states which have an interest in such species. The Commission shall define what shall be an interest.

ARTICLE VII

The Fish and Wildlife Service of the Department of the Interior of the Government of the United States shall act as the primary research agency of the Atlantic States Marine Fisheries Commission, cooperating with the research agencies in each state for that purpose. Representatives of the said Fish and Wildlife Service shall attend the meetings of the Commission.

An Advisory Committee to be representative of the commercial fishermen and the salt water anglers and such other interests of each state as the Commission deems advisable shall be established by the Commission as soon as practicable for the purpose of advising the Commission upon such recommendation as it may desire to make.

ARTICLE VIII

When any state other than those named specifically in Article II of this compact shall become a party thereto for the purpose of conserving its anadromous fish in accordance with the provisions of Article II, the participation of such state in the action of the Commission shall be limited to such species of anadromous fish.

ARTICLE IX

Nothing in this compact shall be construed to limit the powers of any signatory state or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory state imposing additional conditions and restrictions to conserve its fisheries.

ARTICLE X

Continued absence of representation or of any representative on the Commission from any state party hereto shall be brought to the attention on the governor thereof.

ARTICLE XI

The states party hereto agree to make annual appropriations to the support of the Commission in proportion to the primary market value of the products of their fisheries, exclusive of cod and haddock, as recorded in the most recent published reports of the Fish and Wildlife Service of the United States Department of the Interior, provided no state shall contribute less than two hundred dollars per annum and the annual contribution of each state above the minimum shall be figured to the nearest one hundred dollars.

The compacting states agree to appropriate initially the annual amounts scheduled below, which amounts are calculated in the manner set forth herein, on the basis on the catch record of 1938. Subsequent budgets shall be recommended by a majority of the Commission and the cost thereof allocated equitable among states in accordance with their respective interests and submitted to the compacting states.

SCHEDULE OF INITIAL STATE CONTRIBUTIONS

MAINE	$700.
NEW HAMPSHIRE	200.
MASSACHUSETTS	2300.
RHODE ISLAND	300.
CONNECTICUT	400.
NEW YORK	1200.
NEW JERSEY	800.
DELAWARE	200.
MARYLAND	700.
VIRGINIA	1300.
NORTH CAROLINA	600.
SOUTH CAROLINA	200.
GEORGIA	200.
FLORIDA	1500.

ARTICLE XII

This compact shall continue in force and remain binding upon each compacting state until renounced by it. Renunciation of this compact must be preceded by sending six months notice in writing of intention to withdraw from the compact to the other states party hereto.

SECTION 2. Without further submission of said compact, the consent and approval of Congress is hereby given to the States of Connecticut, North Carolina, South Carolina, Georgia and Florida, and for the purpose of the better utilization of their anadromous fisheries, to the States of Vermont and Pennsylvania, to enter into said compact as signatory States and as parties thereto, in addition to the States which have now ratified the compact.

SECTION 3. The Atlantic States Marine Fisheries Commission constituted by the compact shall make an annual report to Congress not later than sixty days after the beginning of each regular

session thereof. Such report shall set forth the activities of the Commission during the calendar year ending immediately prior to the beginning of such session.

SECTION 4. The right to alter, amend or repeal the provisions of Sections 1, 2, and 3 is hereby expressly reserved, (approved May 4, 1942); provided that nothing in this compact shall be construed to limit or add to the powers or the proprietary interest of any signatory state or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by a signatory state imposing additional conditions and restrictions to conserve its fisheries. Added by P.L. 721, 81st Congress, 2nd Session, approved August 19, 1950.

AMENDMENT NUMBER ONE

The States consenting to this amendment agree that any two or more of them may designate the Atlantic States Marine Fisheries Commission as a joint regulatory agency with such powers as they may jointly confer from time to time for the regulation of the fishing operations of the citizens and vessels of such designating States with respect to specific fisheries in which such States have a common interest. The representatives of such States on the Atlantic States Marine Fisheries Commission shall constitute a separate section of such Commission for the exercise of the additional powers so granted provided that the States so acting shall appropriate additional funds for this purpose. The creation of such section as a joint regulatory agency shall not deprive the States participating therein of any of their privileges or powers or responsibilities in the Atlantic States Marine Fisheries Commission under the general compact. (Consented to by P.L. 721, 81st Congress, 2nd Session, approved August 19, 1950.)

TITLE 16 - CONSERVATION

CHAPTER 71 - ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT ACT

Sec. 5101. - Findings and purpose

(a) Findings

The Congress finds the following:

(1)
Coastal fishery resources that migrate, or are widely distributed, across the jurisdictional boundaries of two or more of the Atlantic States and of the Federal Government are of substantial commercial and recreational importance and economic benefit to the Atlantic coastal region and the Nation.

(2)
Increased fishing pressure, environmental pollution, and the loss and alteration of habitat have reduced severely certain Atlantic coastal fishery resources.

(3)
Because no single governmental entity has exclusive management authority for Atlantic coastal fishery resources, harvesting of such resources is frequently subject to disparate, inconsistent, and intermittent State and Federal regulation that has been detrimental to the conservation and sustainable use of such resources and to the interests of fishermen and the Nation as a whole.

(4)
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.

(5)
The failure by one or more Atlantic States to fully implement a coastal fishery management plan can affect the status of Atlantic coastal fisheries, and can discourage other States from fully implementing coastal fishery management plans.

(6)
It is in the national interest to provide for more effective Atlantic State fishery resource conservation and management.

(b) Purpose

The purpose of this chapter is to support and encourage the development, implementation, and enforcement of effective interstate conservation and management of Atlantic coastal fishery resources.

Sec. 5102. - Definitions

In this chapter, the following definitions apply:

(1)
The term "coastal fishery management plan" means a plan for managing a coastal fishery resource, or an amendment to such plan, prepared and adopted by the Commission, that -

(A)
contains information regarding the status of the resource and related fisheries; and

(B)
specifies conservation and management actions to be taken by the States.

(2)
The term "coastal fishery resource" means any fishery, any species of fish, or any stock of fish that moves among, or is broadly distributed across, waters under the jurisdiction of two or more States or waters under the jurisdiction of one or more States and the exclusive economic zone.

(3)
The term "Commission" means the Atlantic States Marine Fisheries Commission established under the interstate compact consented to and approved by the Congress in Public Laws 77-539 and 81-721.

(4)
The term "conservation" means the restoring, rebuilding, and maintaining of any coastal fishery resource and the marine environment, in order to assure the availability of coastal fishery resources on a long-term basis.

(5)
The term "Councils" means Regional Fishery Management Councils established under section 1852 of this title.

(6)
The term "exclusive economic zone" means the exclusive economic zone of the United States established by Proclamation Number 5030, dated March 10, 1983. For the purposes of this chapter, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of that zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

(7)
The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine animal life other than marine mammals and birds.

(8)
The term "fishery" means -

(A)
one or more stocks of fish that can be treated as a unit for purposes of conservation and management and that are identified on the basis of geographical, scientific, technical, commercial, recreational, or economic characteristics; or

(B)
any fishing for such stocks.

(9)
The term "fishing" means -
(A)
the catching, taking, or harvesting of fish;

(B)
the attempted catching, taking, or harvesting of fish;

(C)
any other activity that can be reasonably expected to result in the catching, taking, or harvesting of fish; or

(D)
any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity or the catching, taking, or harvesting of fish in an aquaculture operation.

(10)
The term "implement and enforce" means to enact and implement laws or regulations as required to conform with the provisions of a coastal fishery management plan and to assure compliance with such laws or regulations by persons participating in a fishery that is subject to such plan.

(11)
The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

(12)
The term "Secretary" means the Secretary of Commerce.

(13)
The term "State" means Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, the District of Columbia, or the Potomac River Fisheries Commission

Sec. 5103. - State-Federal cooperation in Atlantic coastal fishery management

(a) Federal support for State coastal fisheries programs

The Secretary in cooperation with the Secretary of the Interior shall develop and implement a program to support the interstate fishery management efforts of the Commission. The program shall include activities to support and enhance State cooperation in collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery research, including biological and socioeconomic research; and fishery management planning.

(b) Federal regulation in exclusive economic zone

(1)
In the absence of an approved and implemented fishery management plan under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), and after consultation with the appropriate Councils, the Secretary may implement regulations to govern fishing in the exclusive economic zone that are -

(A)
compatible with the effective implementation of a coastal fishery 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. 1851). The regulations may include measures recommended by the Commission to the Secretary that are necessary to support the provisions of the coastal fishery management plan. Regulations issued by the Secretary to implement an approved fishery management plan prepared by the appropriate Councils or the Secretary under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.) shall supersede any conflicting regulations issued by the Secretary under this subsection.

(2)
The provisions of sections 307, 308, 309, 310, and 311 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857, 1858, 1859, 1860, and 1861) regarding prohibited acts, civil penalties, criminal offenses, civil forfeitures, and enforcement shall apply with respect to regulations issued under this subsection as if such regulations were issued under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)

Sec. 5104. - State implementation of coastal fishery management plans

(a) Coastal fishery management plans

(1)
The Commission shall prepare and adopt coastal fishery management plans to provide for the conservation of coastal fishery resources. In preparing a coastal fishery management plan for a fishery that is located in both State waters and the exclusive economic zone, the Commission shall consult with appropriate Councils to determine areas where such coastal fishery management plan may complement Council fishery management plans. The coastal fishery management plan shall specify the requirements necessary for States to be in compliance with the plan. Upon adoption of a coastal fishery management plan, the Commission shall identify each State that is required to implement and enforce that plan.

(2)
Within 1 year after December 20, 1993, the Commission shall establish standards and procedures to govern the preparation of coastal fishery management plans under this chapter, including standards and procedures to ensure that -

(A)
such plans promote the conservation of fish stocks throughout their ranges and are based on the best scientific information available; and

(B)
the Commission provides adequate opportunity for public participation in the plan preparation process, including at least four public hearings and procedures for the submission of written comments to the Commission.

(b) State implementation and enforcement

(1)
Each State identified under subsection (a) of this section with respect to a coastal fishery management plan shall implement and enforce the measures of such plan within the timeframe established in the plan.

(2)
Within 90 days after December 20, 1993, the Commission shall establish a schedule of timeframes within which States shall implement and enforce the measures of coastal fishery management plans in existence before December 20, 1993. No such timeframe shall exceed 12 months after the date on which the schedule is adopted.

(c) Commission monitoring of State implementation and enforcement

The Commission shall, at least annually, review each State's implementation and enforcement of coastal fishery management plans for the purpose of determining whether such State is effectively implementing and enforcing each such plan. Upon completion of such reviews, the Commission shall report the results of the reviews to the Secretaries

Sec. 5105. - State noncompliance with coastal fishery management plans

(a) Noncompliance determination

The Commission shall determine that a State is not in compliance with the provisions of a coastal fishery management plan if it finds that the State has not implemented and enforced such plan within the timeframes established under the plan or under section 5104 of this title.

(b) Notification

Upon making any determination under subsection (a) of this section, the Commission shall within 10 working days notify the Secretaries of such determination. Such notification shall include the reasons for making the determination and an explicit list of actions that the affected State must take to comply with the coastal fishery management plan. The Commission shall provide a copy of the notification to the affected State.

(c) Withdrawal of noncompliance determination

After making a determination under subsection (a) of this section, the Commission shall continue to monitor State implementation and enforcement. Upon finding that a State has complied with the actions required under subsection (b) of this section, the Commission shall immediately withdraw its determination of noncompliance. The Commission shall promptly notify the Secretaries of such withdrawal

Sec. 5106. - Secretarial action

(a) Secretarial review of Commission determination of noncompliance

Within 30 days after receiving a notification from the Commission under section 5105(b) of this title and after review of the Commission's determination of noncompliance, the Secretary shall make a finding on -

(1)
whether the State in question has failed to carry out its responsibility under section 5104 of this title; and

(2)
if so, whether the measures that the State has failed to implement and enforce are necessary for the conservation of the fishery in question.

(b) Consideration of comments

In making a finding under subsection (a) of this section, the Secretary shall -

(A)
give careful consideration to the comments of the State that the Commission has determined under section 5105(a) of this title is not in compliance with a coastal fishery management plan, and provide such State, upon request, with the opportunity to meet with and present its comments directly to the Secretary; and

(B)
solicit and consider the comments of the Commission and the appropriate Councils.

(c) Moratorium

(1)
Upon making a finding under subsection (a) of this section that a State has failed to carry out its responsibility under section 5104 of this title and that the measures it failed to implement and enforce are necessary for conservation, the Secretary shall declare a moratorium on fishing in the fishery in question within the waters of the noncomplying State. The Secretary shall specify the moratorium's effective date, which shall be any date within 6 months after declaration of the moratorium.

(2)
If after a moratorium is declared under paragraph (1) the Secretary is notified by the Commission that the Commission is withdrawing under section 5105(c) of this title the determination of noncompliance, the Secretary shall immediately determine whether the State is in compliance with the applicable plan. If so, the moratorium shall be terminated.

(d) Implementing regulations

The Secretary may issue regulations necessary to implement this section. Such regulations -

(1)
may provide for the possession and use of fish which have been produced in an aquaculture operation, subject to applicable State regulations; and

(2)
shall allow for retention of fish that are subject to a moratorium declared under this section and unavoidably taken as incidental catch in fisheries directed toward menhaden if -

(A)
discarding the retained fish is impracticable;

(B)
the retained fish do not constitute a significant portion of the catch of the vessel; and

(C)
retention of the fish will not, in the judgment of the Secretary, adversely affect the conservation of the species of fish retained.

(e) Prohibited acts during moratorium

During the time in which a moratorium under this section is in effect, it is unlawful for any person to -

(1)
violate the terms of the moratorium or of any implementing regulation issued under subsection (d) of this section;

(2)
engage in fishing for any species of fish to which the moratorium applies within the waters of the State subject to the moratorium;

(3)
land, attempt to land, or possess fish that are caught, taken, or harvested in violation of the moratorium or of any implementing regulation issued under subsection (d) of this section;

(4)
fail to return to the water immediately, with a minimum of injury, any fish to which the moratorium applies that are taken incidental to fishing for species other than those to which the moratorium applies, except as provided by regulations issued under subsection (d) of this section;

(5)
refuse to permit any officer authorized to enforce the provisions of this chapter to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter;

(6)
forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection under this chapter;

(7)
resist a lawful arrest for any act prohibited by this section;

(8)
ship, transport, offer for sale, sell, purchase, import, or have custody, control, or possession of, any fish taken or retained in violation of this chapter; or

(9)
interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section.

(f) Civil and criminal penalties

(1)
Any person who commits any act that is unlawful under subsection (e) of this section shall be liable to the United States for a civil penalty as provided by section 308 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1858).

(2)
Any person who commits an act prohibited by paragraph (5), (6), (7), or (9) of subsection (e) of this section is guilty of an offense punishable as provided by section 309(a)(1) and (b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1859(a)(1) and (b)).

(g) Civil forfeitures

(1)
Any vessel (including its gear, equipment, appurtenances, stores, and cargo) used, and any fish (or the fair market value thereof) taken or retained, in any manner, in connection with, or as the result of, the commission of any act that is unlawful under subsection (e) of this section, shall be subject to forfeiture to the United States as provided in section 310 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1860).

(2)
Any fish seized pursuant to this chapter may be disposed of pursuant to the order of a court of competent jurisdiction or, if perishable, in a manner prescribed in regulation.

(h) Enforcement

A person authorized by the Secretary or the Secretary of the department in which the Coast Guard is operating may take any action to enforce a moratorium declared under subsection (c) of this section that an officer authorized by the Secretary under section 311(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861(b)) may take to enforce that Act (16 U.S.C. 1801 et seq.). The Secretary may, by agreement, on a reimbursable basis or otherwise, utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal department or agency and of any agency of a State in carrying out that enforcement

Sec. 5107. - Financial assistance

The Secretary and the Secretary of the Interior may provide financial assistance to the Commission and to the States to carry out their respective responsibilities under this chapter, including -

(1)
the preparation, implementation, and enforcement of coastal fishery management plans; and

(2)
State activities that are specifically required within such plans

Sec. 5107a. - State permits valid in certain waters

(a) Permits

Notwithstanding any provision of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), this chapter, or any requirement of a fishery management plan or coastal fishery management plan to the contrary, a person holding a valid license issued by the State of Maine which lawfully permits that person to engage in commercial fishing for American lobster may, with the approval of the State of Maine, engage in commercial fishing for American lobster in the following areas designated as Federal waters, if such fishing is conducted in such waters in accordance with all other applicable Federal and State regulations:

(1)
west of Monhegan Island in the area located north of the line 43 (degrees) 42 08 N, 69 (degrees) 34 18 W and 43 (degrees) 42 15 N, 69 (degrees) 19 18 W;

(2)
east of Monhegan Island in the area located west of the line 43 (degrees) 44 00 N, 69 (degrees) 15 05 W and 43 (degrees) 48 10 N, 69 (degrees) 08 01 W;

(3)
south of Vinalhaven in the area located west of the line 43 (degrees) 52 21 N, 68 (degrees) 39 54 W and 43 (degrees) 48 10 N, 69 (degrees) 08 01 W; and

(4)
south of Bois Bubert Island in the area located north of the line 44 (degrees) 19 15 N, 67 (degrees) 49 30 W and 44 (degrees) 23 45 N, 67 (degrees) 40 33 W.

(b) Enforcement

The exemption from Federal fishery permitting requirements granted by subsection (a) of this section may be revoked or suspended by the Secretary in accordance with section 308(g) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1858(g)) for violations of such Act or this chapter

Sec. 5107b. - Transition to management of American lobster fishery by Commission

(a) Temporary limits

Notwithstanding any other provision of this chapter or of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), if no regulations have been issued under section 5103(b) of this title by December 31, 1997, to implement a coastal fishery management plan for American lobster, then the Secretary shall issue interim regulations before March 1, 1998, that will prohibit any vessel that takes lobsters in the exclusive economic zone by a method other than pots or traps from landing lobsters (or any parts thereof) at any location within the United States in excess of -

(1)
100 lobsters (or parts thereof) for each fishing trip of 24 hours or less duration (up to a maximum of 500 lobsters, or parts thereof, during any 5-day period); or

(2)
500 lobsters (or parts thereof) for a fishing trip of 5 days or longer.

(b) Secretary to monitor landings

Before January 1, 1998, the Secretary shall monitor, on a timely basis, landings of American lobster, and, if the Secretary determines that catches from vessels that take lobsters in the exclusive economic zone by a method other than pots or traps have increased significantly, then the Secretary may, consistent with the national standards in section 301 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851), and after opportunity for public comment and consultation with the Atlantic States Marine Fisheries Commission, implement regulations under section 5103(b) of this title that are necessary for the conservation of American lobster.

(c) Regulations to remain in effect until plan implemented

Regulations issued under subsection (a) or (b) of this section shall remain in effect until the Secretary implements regulations under section 5103(b) of this title to implement a coastal fishery management plan for American lobster

Sec. 5108. - Authorization of appropriations

(a) In general

To carry out this chapter, there are authorized to be appropriated $10,000,000 for each of fiscal years 2001 through 2005.

(b) Cooperative statistics program

Amounts authorized under subsection (a) of this section may be used by the Secretary to support the Commission's cooperative statistics program

CERTIFICATE OF SERVICE

09-1594-cv The State of New York v. United Boatmen

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Sworn to me this

August 4, 2009

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Docket Number: 09-1594-cv

I, Ramiro A. Honeywell, hereby certify that the Appellant's Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/4/2009) and found to be VIRUS FREE.

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