IN THE SUPREME COURT OF FLORIDA

CAPTAIN LOUIS S. LIVINGS, District Nine Supervisor, FLORIDA MARINE PATROL, and STATE OF FLORIDA DEPARTMENT OF NATURAL RESOURCES,

Petitioners,

v.

WENDELL DAVIS, GILBERT GREY, and HARRY ROBERT JONES,

Respondents.

Case No. 63,001

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF THE SECRETARY OF COMMERCE AS AMICUS CURIAE

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BRIEF OF THE SECRETARY OF COMMERCE AS AMICUS CURIAE

INTRODUCTORY STATEMENT

In 1976 Congress passed the Magnuson Fishery Conservation and Management Act, 16 U.S.C.A. 1801 et seq. Five years later, on May 20, 1981, the Secretary of Commerce implemented the Gulf of Mexico Shrimp Fishery Management Plan developed under the Act, regulating all shrimp fishing in federal Gulf waters. Respondents, Florida commercial shrimpers using Florida registered vessels, were arrested, prior to the implementation of the federal plan, for violating a Florida statute forbidding the possession of undersized shrimp taken from waters outside Florida's 9-mile Gulf boundary. Both the trial court (Appendix A) and the District Court of Appeal for the Third District (Appendix B), relying on Tingley v. Allen, 397 So.2d 1166 (3d Dist. Ct. App. 1981), held that the Florida statute was unconstitutional as applied on the ground that the Magnuson Act

arrogated all regulation of fishing beyond state territorial waters to the federal government.

The government submits this brief as amicus curiae in support of the position of the petitioner Florida Department of Natural Resources urging reversal of the Third District Court of Appeal's decision. The Magnuson Act does not preempt otherwise constitutional state regulation of fishing by a State's registered vessels outside its territorial waters until a conflicting federal fishery management plan is implemented regulating such fishing. 16 U.S.C. 1856(a).

STATEMENT OF FACTS

The Magnuson Act was enacted in 1976 to protect the food supply of the Nation, the United States fishing industry, and dependent coastal economies from the stresses caused by overfishing in the seas adjacent to our territorial waters, particularly by foreign fishing fleets. 16 U.S.C. 1801(a). Consistent with this purpose, the Act established a fishery conservation zone 1/ beyond the territorial sea, within which zone the United States would exercise exclusive fishery management authority and limit the access of foreign boats. 16 U.S.C. 1811, 1812, 1821 et seq. Within the federal zone, Congress

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1/ The fishery conservation zone is defined in the Magnuson Act as that area contiguous to the territorial sea, the outer boundary of which is 200 nautical miles from the baseline from which the territorial sea is measured. The inner boundary of this zone is a line coterminous with the seaward boundary of each coastal state. 16 U.S.C. 1811.

envisioned "[a] national program for the conservation and management of the fishery resources of the United States* * *to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources." 16 U.S.C. 1801(a)(6).

The framework established by the Act to accomplish these purposes called first for the establishment, through cooperative action of the states and the federal government, of Regional Fishery Management Councils. 16 U.S.C. 1852. Following their organization, the Councils were to develop fishery management plans with respect to those stocks of fish requiring conservation and management. Id. Approved plans were to be implemented and enforced by the Secretary of Commerce. 16 U.S.C. 1854, 1855, 1861.

The process of assuming federal regulation over the stocks of fish required to be managed is a lengthy one. Fishery management plans must contain: an extensive biological, economic, historical, and operational description of the fishery to be regulated, 16 U.S.C. 1853(a)(2); an assessment of the present and probable future biologic condition of the fishery, and the maximum sustainable yield and "optimum yield" to be derived therefrom, 16 U.S.C. 1853(a)(3); and further assessments relating to foreign participation in the fishery, 16 U.S.C. 1853(a)(4). All of these assessments are required to be based on the best statistical, biological, economic, social and other scientific information which can be gathered.

16 U.S.C. 1851(a)(2); 16 U.S.C. 1852(g)(1). The plans are developed by the Regional Fishery Management Councils established by the Act with the participation of "all interested persons" through public hearings. 16 U.S.C. 1852(h)(3).

Once approved by a Regional Council, a fishery management plan is submitted to the Secretary of Commerce for an extensive review process, 16 U.S.C. 1854(a) and (b), after which the Secretary may approve the plan or disapprove it in whole or in part. Id. Only plans found by the Secretary to be consistent with the national standards established by the FCMA will be implemented, and then only after further opportunity for public participation by written comment, and, if the Secretary desires, by public hearing. 16 U.S.C. 1855.

On March 31, April 13, and May 2, 1981, the Florida Marine Patrol charged the respondents Wendell Davis, Gilbert Grey, and Harry Robert Jones, citizens of Florida, with possession of undersized shrimp in violation of FLA. STAT. §370.15(2)(a) (hereinafter the "Florida Small Shrimp Law"), 2/ which prohibits the possession of undersized shrimp taken within or without the state waters. The Patrol arrested the

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2/ The statute provides, in part, as here relevant:

> It is unlawful for any person, firm, or corporation to* * *have in his possession any small shrimp or prawn taken* * * [within or or without the waters of this state], provided such small shrimp or prawn constitute at least 5 percent of all such shrimp or prawn in such possession.

the respondents within Florida waters and confiscated the catch which was ultimately bonded. The vessels involved, which were either owned or operated by the respondents, were registered under Florida law, and the State of Florida requires permits for commercial shrimping. Respondents brought a declaratory judgment action to have the Florida Small Shrimp Law declared unconstitutional, and in one case obtained a continuance of criminal proceedings pending the resolution of the issue.

The Gulf of Mexico Shrimp Fishery Management Plan (Shrimp Plan) was developed under the Magnuson Act and implemented by the Secretary of Commerce on May 20, 1981. The Shrimp Plan governs all fishing for listed shrimp species in the Gulf of Mexico federal fishery conservation zone.

The implementing regulations (50 C.F.R. 658.25, 46 Fed. Reg. 27497) declare that there shall be no minimum size requirements for shrimp harvested in the federal fishery conservation zone. In response to the inconsistency between this regulation and Florida statute 370.15(2)(a), the Florida legislature in late June or early July 1981 amended Section 370.15 (2)(a) to provide that it shall apply only to shrimp taken from waters within the state. The bill became law on July 8, 1981. This case thus concerns the interval between the passage of the Magnuson Act and the implementation of the Shrimp Plan.

The Magnuson Act gives the States a large role in the management of the fisheries. They are to participate in and advise on the establishment of the plans. 16 U.S.C. 1801(b)(5). The Regional Fishery Management Councils established by the Act are to be composed principally of nominees from the region's constituent coastal states and are supposed to represent those states' interests and expertise. 16 U.S.C. 1852(b)(1); see Committee on Commerce, and National Ocean Policy Study, 94th Cong., 2d Sess., A Legislative History of the Fishery Conservation and Management Act of 1976 (hereinafter "Legislative History"), at p. 843. Fishery management plans may incorporate fishery conservation and management measures of the coastal states (provided they conform to the national standards established by the Act). 16 U.S.C. 1853(b)(5).

The provisions of the Magnuson Act dealing with the division of jurisdiction over fishery management continue this cooperative approach. Section 306(a) of the Act, 16 U.S.C. 1856(a), provides:

> No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State. (emphasis added).

The government submits that this provision authorizes otherwise constitutional state regulation of fishing by its registered vessels in federal waters until there is implemented a conflicting federal fishery management plan governing that fishing.

ARGUMENT

I

ABSENT A CONFLICT WITH A FEDERAL STATUTE, FLORIDA STATUTE 370.15(2)(a) IS CONSTITUTIONAL

State legislation to protect its fishery resources and associated industry has historically extended beyond its borders. In the absence of conflicting federal legislation, the extraterritorial impact of state regulation has been upheld to the limited extent set forth in the following cases.

Laws which seek to conserve the resource by measures which prohibit, as did the Florida Small Shrimp Law (as here applied), the possession within the state of the resource (certain kinds or at certain times) taken within or without the state, have been constitutionally justified as necessary to enable the state to protect the resource within its territorial borders. The rationale for the decision is that evasion of enforcement would be facilitated if the "incidental" restraint on interstate and foreign commerce (by penalizing possession of resource originating outside the state) were not permitted. The cases are vintage. Silz v. Hesterberg, 211 U.S. 31, 43 (1908); Bayside Fish Co. v. Gentry, 297 U.S. 422, 426 (1936); Cf. Andrus v. Allard, 444 U.S. 51 (1979). The Florida Small Shrimp Law was upheld on the authority of this settled body of law by the Florida Supreme Court in State v. Millington, 377 So.2d 685 (1979).

Another established precedent is Skiriotes v. Florida, 313 U.S. 69 (1941), where the Court held that Florida had jurisdiction to prohibit its resident fishermen from using certain types of gear in the sponge fishery in waters adjacent to, but beyond, the state's territorial limits. The Court found that the State had a legitimate interest in the proper maintenance of the sponge fishery harvested by its domestic fishing industry. Absent a conflicting federal statute, there existed no impediment to the State's regulating the conduct of its citizens in exploiting the resource in adjacent waters. 313 U.S. at 75; see also Felton v. Hodges, 374 F.2d 337 (5th Cir. 1967) (combining the Skiriotes and Silz rationales).

Absent a conflict with federal law, Florida statutes of the type validated by the foregoing cases are constitutional. See Florida Department of Natural Resources v. Southeastern Fisheries Assoc., Inc., 415 So. 2d 1326, 1329 (Fla. 1st. Dist. Ct. App. 1982); Tingley v. Allen, 397 So. 2d 1166, 1168 (Fla. 3d Dist. Ct. App. 1981). We turn, therefore, to whether or not such a conflict exists.

II

IN THE ABSENCE OF A CONFLICTING REGULATION IMPLEMENTING A FEDERAL PLAN MANAGING THE SAME FISHERY, THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT DOES NOT PREEMPT THE ENFORCEMENT OF FLORIDA STATUTE 370.15(2)(a) AGAINST ITS REGISTERED FISHING VESSELS

This Court need not concern itself in this instance with the decisional law establishing the general standards

for determining the superseding effect of federal statutes. By specifically excepting from the prohibition on state extraterritorial fishery regulation, regulation of "vessels registered under the laws of such State," 16 U.S.C. 1856(a), Congress has specifically addressed this question. Although no legislative history exists concerning this exception, its meaning is clear from a consideration of its language against the background of the statutory scheme and the historical limited extraterritorial jurisdiction of the coastal states.

The exception found in 16 U.S.C. 1856(a) must mean that some form of state extraterritorial fishing regulation is permissible after the enactment of the Magnuson Act. The Court's duty is "to give effect, if possible, to every clause and word of a statute." United States v. Menusche, 348 U.S. 528, 538-539 (1954). By declaring that no state extraterritorial regulation survives the Act, both the Third District's decision in the instant case and its decision in Tingley v. Allen, supra, violate this principle and defeat Congress' express intention. What form of state regulation was intended is learned by considering the pre-existing law and the statute's purposes.

Congress acknowledged in the Magnuson Act that in the ordinary case the implementation of federal regulation, where required by the Act, would not take place concurrently with the Act's passage in 1976. This fact is eloquently testified to by the lapse of years until the implementation, on

May 20, 1981, of the Gulf of Mexico Shrimp Fishery Management Plan; the Shrimp Plan had been in development since shortly after the formation of the Gulf of Mexico Fishery Management Council in 1977. Congress was assuredly aware of the coastal states' efforts, in regulating their coastal fisheries, to extend the impact of regulation to adjacent extraterritorial waters when necessary to protect those interests. See 121 Cong. Rec. 32541 (1975) (discussing California's extraterritorial shrimp regulation). Under these circumstances, Congress must have intended by the exception to preserve for the states their limited fishery jurisdiction over their citizens in extraterritorial waters, at least prior to the implementation of a federal plan.

The contrary view violates the purposes of the Act. If Congress intended, as Tingley purports, that the Magnuson Act curtail the pre-existing extraterritorial jurisdiction of the states without a concurrent federal regime to replace that jurisdiction, the Act, passed to protect the resources, would have the immediate effect of exposing them to greater exploitation than that which pre-existed the Act's passage. This cannot be the law.

The only other reported cases to consider the matter support the views urged here. In Florida Department of Natural Resources v. Southeastern Fisheries Assoc., Inc., supra, 415 So. 2d at 1329, the First District Court of Appeal expressly rejected the Third District's decision in Tingley. The First

District concluded that Section 306(a) of the Magnuson Act, 16 U.S.C. 1856(a), did not preempt a Florida statute which made it unlawful to fish for salt water finfish with any trap or to possess any fish trap. The First District relied principally upon People v. Weeren, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255, cert. denied, 449 U.S. 839 (1980), in which California citizens used state licensed fishery vessels in the taking of broadbill swordfish in violation of the regulations of the California Fish and Game Department. This fishing activity occurred in the federal conservation zone off the coast of California in waters adjacent to the State's territorial sea. No federal regulatory plan for swordfish had been implemented. The California Supreme Court held that the Magnuson Act did not prohibit the state from asserting jurisdiction in these circumstances over fishing activities occurring beyond California's seaward boundary, noting in its decision:

> We also find significance in the fact that because the federal government has developed no swordfish regulations, the exclusion of any such state regulation would create the danger of wholly unregulated exploitation of that species in coastal waters and on the high seas, thus resulting in the possibility of substantial or indeed total depletion of an important natural resource. Had Congress intended by its successive enactments such a drastic curtailment of the state's Skiriotes jurisdiction, it would have said so. 607 P.2d at 1286-87, 163 Cal. Rptr. at 262-63.

Where a Florida statute prohibiting the use of purse seines within and without its territorial waters was attacked

on the ground that the Magnuson Act preempted such regulation, a federal court sitting in Florida interpreted 16 U.S.C. 1856(a) to permit it, where the boats in question were registered under Florida law. Anderson Seafoods, Inc. v. Graham, MCA 81-270, U.S.D.C. No. Dist. Fla., Order Denying Motion for Preliminary Injunction, Jan. 8, 1982 (Appendix C). No federal management plan prohibiting the use of the devices was in effect. As "the meaning of a federal statute is for federal courts to decide," Enochs v. Smith, 359 F.2d 924, 926 (5th Cir. 1966), the government submits that this Court may appropriately apply the Anderson decision here.

Respondents' vessels were registered under Florida law, Fla. Stat. 327.11, thus bringing them within the literal language of the exception. The fishing in which they were engaged was regulated and licensed by the State. Furthermore, they were Florida residents using vessels operating out of Florida ports, thus supplying the nexus for state extraterritorial regulation found to be necessary in Skiriotes. Under these circumstances no issue as to the application of the exception to respondents can remain. See Florida Department of Natural Resources v. Southeastern Fisheries Assoc., Inc., supra, 415 So. 2d at 1329, People v. Weeren, supra, 163 Cal. Rptr. at 263.

CONCLUSION

For the foregoing reasons, the United States respectfully urges this Court to reverse the decision of the Third District Court of Appeal. The Magnuson Act does not preempt state extraterritorial fishing regulation of its registered vessels, otherwise constitutional, absent implementation of a conflicting federal fishery management plan.

Respectfully submitted,

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