H.D.

IN THE

SUPREME COURT OF FLORIDA

No. 63,001

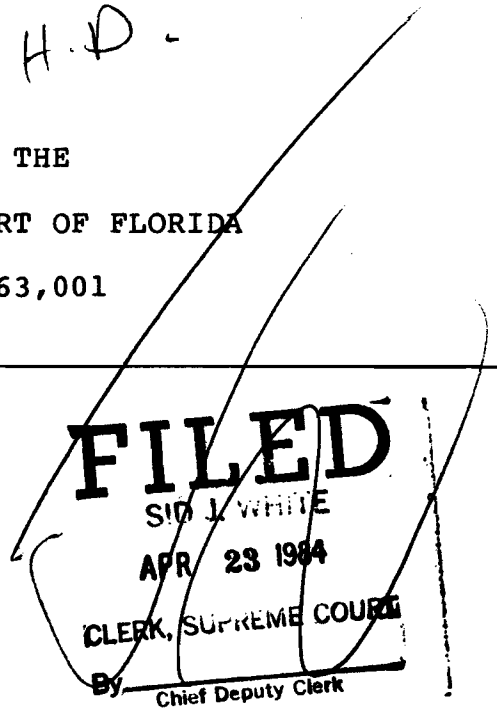
LOUIS S. LIVINGS, et al.,

Petitioners,

v.

WENDELL DAVIS, et al.,

Respondents,



RESPONDENTS'

SUPPLEMENTAL BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The Respondents are commercial fishermen who carry out a majority of their commercial fishing in the waters of the Federal Conservation Zone. Their interest in Equal Protection under the law and the free flow of commerce from the Federal Fishery Conservation Zone into the adjacent coastal states are interests that they hold in common with all other commercial fishermen. The issues that are involved in this litigation with regard to Equal Protection, The Commerce Clause and Statutory Preemption are issues of first impression in the Federal Courts of Appeal. It is only at oral argument that the Petitioners can be forced to answer questions which relate to the enforcement by the Petitioners of Florida Law in the Federal Fishery Conservation Zone. Oral argument will conclusively show that allowing state extra-territorial fishery management must necessarily violate the national standards for fishery conservation and management as set forth under Section 301 of the Act. 16 U.S.C. 1851(a).

STATEMENT OF THE ISSUES

This Supplemental Brief entertains the issues of Statutory Preemption by the Magnuson Act itself of state extraterritorial fishery management. This Supplemental Brief was allowed by the Court's Order of March 27th, 1984. The following are the issues to be argued in this brief that relate directly to the issue of statutory preemption, Equal Protection and The Commerce Clause.

I. PREEMPTION; IT WAS CONRESS' INTENT TO EXERCISE EXCLUSIVE FISHERY MANAGEMENT AUTHORITY OVER ALL FISH WITHIN THE FEDERAL CONSERVATION ZONE.

II. INTERIM STATE EXTRATERRITORIAL FISHERY MANAGEMENT BEARS NO RATIONAL RELATIONSHIP TO THE HEALTH, SAFETY, WELFARE AND MORALS OF FLORIDA REGISTERED VESSELS (OR FLORIDA CITIZENS).

III. TO ALLOW INTERIM STATE EXTRATERRITORIAL ENFORCEMENT WOULD VIOLATE THE PURPOSES OF THE ACT BY ALLOWING DISFUNCTIONAL PARTICIPATION ON THE MANAGEMENT COUNSELS.

IV. THE STATE REGISTERED VESSEL EXCEPTION [16 U.S.C. 1856(a)] AS TO DIRECT OR INDIRECT REGULATION OF FISHING ENGAGED IN BY STATE REGISTERED VESSELS ALLOWS THE STATES TO MAINTAIN CONTROL OVER THE SAFETY AND WELFARE OF ITS CITIZENRY.

STATEMENT OF THE CASE

In 1975 the Supreme Court of the United States ruled that the State of Florida was not entitled to any interest in the natural resources on the Outer-Continental Shelf of the United States more than three (3) geographic miles seaward from the coastline of the State of Florida. United States v. Florida, 425 U.S. 791, at 791 (1975).

Congress, recognizing the federal ownership of the natural resources underlying the ocean outside the territorial limits of the states, properly determined that there was a public interest in protecting those resources. In 1976 Congress passed the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq. The legislative history with regard to the adoption of the Act is clear. The United States Code Congressional and Administrative News (1976) set forth the position previously taken by the United States Supreme Court in U.S. v. Florida, supra, that there was "sole federal jurisdiction over the fisheries resources beyond the three (3) mile territorial sea. . ." and further that . . . "in these waters, it is the federal government which has the responsibility for whatever management of the fish stocks occur at all." H.R. Rep. No. 445, 94th Cong., 2d Sess., Reprinted in (1976), U.S. Code Cong. and Ad. News 593 at 601.

The Respondents, Gray, Jones and Davis were issued criminal citations by Officers of the Florida Marine Patrol as agents for the Petitioners, for conduct which occurred in March through May of 1981.

The Respondents were charged under Section 370.15(2)(a) Florida Statutes (1979) which sought to prohibit the taking or possession of small shrimp in waters outside the State of Florida. On January 27th, 1982, the trial court entered a Final Judgment declaring the Statutes unconstitutional as it related to the taking of shrimp in the waters of the Federal Fishery Conservation Zone.

The Petitioners then appealed to the Third District Court of Appeal where the decision of the Circuit Court was affirmed, based on that court's decision in Tingly v. Allen, 397 So.2d 1176 (Fla. 3d DCA 1981). The Appellate Court then certified its decision to this Court as being in conflict with the First District Court of Appeals decision in Department of Natural Resources v. Southeastern Fisheries Association, Inc., 415 So.2d, 1326 (Fla. 1st DCA 1982).

The Respondents' Brief in this matter was submitted on February 16th, 1983 and on page 7 of the Respondents' Brief it is stated that

> "There is however a federal case pending in the United States District Court for the Southern District of Florida, Union Norman Bethell v. State of Florida, Case No. 82-1516-CIV-JWK, which will entertain a full hearing on the merits of the instant controversy."

As unusual as it may seem, the Bethell case then pending in the United States District Court for the Southern District of Florida concerned the validity of Section 370.1105, Florida Statutes (1981) which is the same Section of the Florida Statutes that had been ruled upon in Department of Natural Resources v. Southeastern Fisheries Association, Inc., supra, pending before this Court as Southeastern Fisheries v. Department of Natural Resources, Case No. 62,288.

On September 29th, 1983, the District Court ruled in the Bethell litigation, holding Section 370.1105 Florida Statutes (1981) unconstitutional to the extent that it attempts to exercise the authority of the State of Florida over the area which is beyond the territorial seas of the State of Florida (i.e. the FCZ). On page 3 of the District Court's Order Granting Plaintiffs' Motion for Summary Judgment, the District Court . . . "specifically finds that Section 370.1105 Florida Statutes has been preempted by 16 U.S.C. 1801 et seq." The District Court went on to cite the decisions in Livings v. Davis, supra, and Tingley v. Allen, supra, as having reached the same conclusion with respect to the extraterritorial effect of the Florida Statutes as to shrimp management regulations. The Federal District Court in Bethell also concluded that the extraterritorial enforcement of Section 370.1105 Florida Statutes in the Federal Fishery Conservation Zone would violate the Commerce and Equal Protection Clauses of the United States Constitition. The Court specifically found that any attempted application of the Section to out-of-state vessels would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause and, in order to uphold the application of the Section with respect to Florida registered vessels, there would be a situation where boats registered in other states would be able to use the very same equipment prohibited to Florida vessels and thereby be able to reap the economic benefits of the Federal Fishery Resources while Florida registered vessels would be prohibited from engaging in those very same fishing activities.

It is well established that State Courts should give great deference to interpretations of federal law by federal courts. After the Respondents in the case at bar filed their Notice of Supplemental Authority based on the Bethell decision (supra), this court ordered, on December 20th, 1983, that the parties in Case No. 62,288 submit supplemental briefs on the issue of statutory preemption (i.e. as opposed to regulatory preemption). Inasmuch as a federal court has now entered a final order which is preemptive and conclusive as to the issues in Southeastern Fisheries v. Department of Natural Resources, Case No. 62,288, it is respectfully submitted that the issue of extraterritorial enforcement of Section 370.1105 Florida Statutes has been adjudicated by a Federal District Court and that decision may very well moot Case No. 62,288.

THE FACTUAL AND CASE HISTORY OF THE BETHELL DECISION

The Bethell litigation was instituted after the arrest of a Florida citizen, Union Norman Bethell, at a point eight (8) miles outside the territorial limits of the State of Florida. Suit was filed under the Civil Rights Act, Title 42 Section 1983 to redress the deprivation under color of State Law, rights secured by the laws of the United States. Cross-Motions for Summary Judgment were filed by the parties and thereafter, the Court granted Plaintiff's Motion for Summary Judgment holding that there was statutory preemption, by the Magnuson Act, of state extraterritorial fishery management and in addition, that extraterritorial enforcement of the Florida Statute against Union Norman Bethell, violated the Equal Protection Clause of

the United States Constitution and any attempt to apply the Section to out-of-state vessels would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause. An appeal was taken from the Summary Judgment by the Defendants/ Appellants and the case is now pending in the United States Court of Appeals for the Eleventh circuit under Case No. 83-5727, Gissendanner et al., v. Bethell.

SUMMARY OF ARGUMENT

The Petitioners argue that there is some type of "interim state extraterritorial enforcement" under the Magnuson Act which ceases when a federal fishery management plan is adopted. Since this is the central issue in the entire argument of whether there is statutory preemption by the Act itself, or regulatory preemption pursuant to a fishery mangement plan adopted under the Act, the entire argument must center on the effect of such "interim state extraterritorial enforcement" on the commercial fishermen whose fishing activites in the Federal Fishery Conservation Zone would be regulated. One of the reasons oral argument is so necessary in this matter is that the Petitioners must be asked to justify their position on, and enforcement of, state fishery management regulations within the Federal Fishery Conservation Zone. First, the Petitioners should be asked to point out any part of the Magnuson Act or any legislative history thereof which would even arguably give any support to "interim state extraterritorial enforcement". If there is no legislative history whatsoever to go on and no provision of the Act that even arguably refers to such a policy or procedure, the Court must give full meaning to the eleven (11) words in 16 U.S.C. 1856 and adjudicate that whatever state regulation of fishing which is engaged in by fishing vessels outside state boundaries [when such vessels are registered under the laws of such state] would continue with or without the promulgation of a Federal Fishery Mangement Plan.

It has long been settled that Courts must strictly construe a statute viewing it as "an enactment technical in the strict sense of the term to be applied as such." Phillips v. United States, 312 U.S. 246 at 251 (1941); Board of Regeants v. New Left Education Project, 404 U.S. 541 at 545 (1972); Swift and Company v. Wickham, 382 U.S. 111 at 124 (1965). Using a "strict construction of the statute", if there is any question as to the exclusive fishery management authority that has been asserted by Congress under the Act, that Section of the Act entitled "Exclusive Fishery Management Authority" should be consulted. With no reservation or exception, the Act states that . . . "the United States shall exercise **exclusive fishery mangement authority. . . over . . . all fish** within the Fishery Conservation Zone." 16 U.S.C. 1812. This is certainly in line with the previous decision of the United States Supreme Court in United States v. Florida, supra. which stated that . . . "as against the State of Florida, the United States is entitled to all the . . . natural resources underlying the Atlantic Ocean more than three (3) geographic miles seaward from the coastline . . . and the State of Florida is not entitled to any interest in such . . . resources." 425 U.S. at 791. The Equal Protection and Commerce Clause arguments taken in conjunction with an inquiry into the justification for the State's use of its police power over state registered vessels within the FCZ is a central inquiry into the federal constitutional issues that have been adjudicated by the Federal District Court in the Bethell litigation.

Finally, the Petitioners must be asked to justify the extraterritorial enforcement of state fishery management laws in light of the readily apparent Equal Protection and Commerce Clause violations that would result. Using the hypothetical example of a Florida registered vessel with an Alabama crew, fishing directly beside an Alabama registered vessel,with a Florida crew and a third vessel, registered in Florida, with a crew composed of both Alabama and Florida citizens, the Petitioners must be asked to justify the different treatment of the vessels, their crews and indeed, even the foodfish coming on board the vessels. Is there some reason to treat these articles of commerce differently merely because the foodfish are being caught in the Fishery Conservation Zone by Florida registered vessels rather than vessels sailing out of Alabama, Georgia or any other coastal state.

PREEMPTION; IT WAS CONGRESS' INTENT TO EXERCISE EXCLUSIVE FISHERY MANAGEMENT AUTHORITY OVER ALL FISH WITHIN THE FEDERAL FISHERY CONSERVATION ZONE

The Petitioners have admitted that the touch-stone of preemption analysis is Congressional intent. Howard v. Uniroyal, Inc., _____ Fed 2d. _____ (11th Cir., Nov. 21st, 1983); Maryland v. Louisiana, 451 U.S. 725, 101 S.Ct. 2114 (1981). Yet the Petitioners conclude on the basis of a provision of the Act under "state jurisdiction", that they has the right to directly interfere with the activities of Florida citizens and/or Florida registered vessels within the Federal Fishery Conservation Zone if the vessel is registered under the laws of Florida. 16 U.S.C. 1856(a). Using this state-registered vessel exception under the provision of the Act regarding state jurisdiction, the Petitioners seek to justify some type of "interim state extra-

territorial enforcement" which ceases when such extraterritorial enforcement is in conflict with an adopted and in force fishery management plan. Using the strict construction which is necessitated under Phillips v. The United States, supra, at 251 and Board of Regeants v. New Left Education Project, supra at 545, it is clear from the Act itself that whatever extraterritorial enforcement over state registered vessels as is done by the Petitioners, does not cease pursuant to any terms of the Act or any legislative history thereof, upon adoption of a Federal Fishery Management Plan. Neither the Petitioners nor Federal Amicus have pointed to any part of the Act or any legislative history thereof which would give support to such "interim state extraterritorial enforcement". With no legislative history whatsoever to go on and no provision of the Act that even arguably refers to such enforcement, the Court would have to adjudicate that whatever regulation which is engaged in by the Petitioners as to state registered vessels outside state boundaries must continue, with or without the promulgation of a Federal Fishery Management Plan.

With regard to "fishery management authority" as opposed to some state registered vessel exception to regulation of "fishing", there is no equivocation and no doubt whatsoever as to the Congressional intent. First, with regard to the Act itself, it begins by stating under the findings, purposes and policies that there will be a "national (not state) program for the development of the federal resources of the FCZ" 16 U.S.C. 1801(a)(7). Congress goes on to state that its purpose is to take immediate action to conserve and

manage the federal fishery resources by establishing a "Fishery Conservation Zone within which the United States will assume exclusive fishery management authority over all fish. . . " 16 U.S.C. 1801(b)(1)(a). Congress further declared that it was its intent . . . "to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of federal fishery resources as provided for in this Chapter . . . " 16 U.S.C. 1801(c)(2).

Nothing could be more clear as to the intent of Congress with regard to whether the Federal Government has exclusive fishery management authority than to consult that portion of the Act which is entitled "exclusive fishery management authority". The Act states that . . . "the United States shall exercise exclusive fishery management authority . . . over . . . all fish within the Fishery Conservation Zone." 16 U.S.C. 1812(1).

Since the Petitioners and the Federal Amicus agree that preemption analysis is grounded on Congressional intent [as if the language of the Act is not clear enough] we can look to the legislative history accompanying the adoption of the Act. Where the language of an Act of Congress is not clear [Respondents, the Trial Court, the Appellate Court and the Federal District Court beleive it is clear] the Court is justified in seeking enlightenment from the reports of Congressional Committees. Wright v. Mountain Trust Bank, 300 U.S. 440, 57 S.Ct. 556 (1937); Duplex Printing Press Company v. Deering, et al., 254 U.S. 443, 41 S. Ct. 172 (1921). During the adoption of the Magnuson Act by the 94th Congress, Second Session, the United States Code and Congressional Administrative News stated as follows:

> . Federal Jurisdiction . . . there is also a sole federal jurisdiction over the fishery resources found beyond the three (3) mile territorial sea and within the present twelve (12) mile limit as to our fishery's economic zone. In these waters, it is the federal government which has the responsibility for whatever management of the fish stocks occur at all. (emphasis supplied) H.R. Rep. 445, 94th Cong., 2d Sess., re-printed in 1976, U.S. Code Cong. and Admin. News, page 601.

When Congress states in the United States Code, Congressional and Administrative News that the federal government has exclusive management authority over whatever management of the fish stocks occur at all, can there be any reasonable doubt as to what the Congressional intent was with regard to preemption?

Four (4) years after enactment of the Magnuson Act, Congress had before it some related legislation (The Salmon and Stealhead Conservation and Enhancement Act of 1980, 16 U.S.C. 3301, et seq.) and in the legislative history Congress speaks to the Magnuson Act itself [not a federal fishery management plan] when it states:

> Prior to the enactment of the Fishery Conservation and Mangement Act of 1976 (FCMA), salmon were managed individually by the various states of the west coast and by the indian tribes pursuant to several treaties . . . the FCMA asserted jurisdiction over U.S. origan salmon from three (3) miles seaward to the extent of their range . . ." H.R. Rep. No. 96-1243, Page I, 96th Congress, 2d Sess., re-printed in 1980, U.S. Code Congress. and Admin. News, 6793, 6818.

In 1983, the Secretary of Commerce adopted certain administrative regulations for the purposes of carrying out the Magnuson Fishery Conservaton and Mangement Act. These administrative regulations have

been announced to the general public as the policies upon which the Secretary of Commerce operates and upon which the American people can rely. Specifically, 50 C.F.R. Sections 602.17(b) reads:

> (b) Necessity of Federal Management
> (1) General. The principal that not every fishery needs regulation is implicit in this standard. The Act does not require counsels to prepare (federal fishery mangement plans) for each and every fishery . . only for those where regulation would serve some useful purpose and where the present or future benefits of regulation would justify the costs. . . NOAA believes that the requirements of Executive Order No. 12291 and other regulatory reform legislation quite appropriately focus attention on the threshold question of the actual need for management through regulation. Even when a council believes there is an advantage to managing a fishery, growing public concern over excesive federal regulation of private activities and over the need to reduce the costs of government emphasises the responsibility to insure that fishery management plans are developed only for those fisheries where the need for federal regulation can be clearly demonostrated. 48 Fed. Register 7414-7417 (1983), to be codified in 50 C.F.R. Sections 602, Appendix A to (b).

Finally, with regard to the Congressional intent and implementaion of fishery management in the FCZ, there were certain national standards that were set forth. These national standards can be viewed as merely the re-affirmation of the Equal Protection and Commerce Clauses of the United States Constitution. Congress stated within the Act itself that conservation and management measures ". . . shall not discriminate between residents of different states." 16 U.S.C. 1851(a)(4).

If there was any doubt as to what the congressional intent with regard to discrimination between residents of different states, it is certainly cleared up by Congress' discussion of 16 U.S.C. Section 1851 in House Report No. 445 which states:

> With respect to the standard that requires measures to be non-discriminatory between residents of different states, the committee would like to make it clear that this sub-paragraph would require the management plan to provide for uniform and equal treatment of United States citizens and corporations operating or engaging in the fisheries concerned without regard to their particular residence or state of incorporation. H.R. Rep. No. 445, 94th Cong. 2d Sess. Reprinted in 1976, U.S. Cong. Code and Admin. News 593, 630.

With regard to the Petitioners' argument of "interim state extra-territorial enforcement" over state registered vessels, there was never any intent on behalf of Congress to disregard existing state fishery management measures; however, the Act provides that if a federal fishery is in need of regulation because it is depleted or in eminent danger of becoming depleted or under intensive use, then the state representatives on the respective fishery management councils may propose a plan and such plan may;

> (5) incorporate, consistent with the national standards, the other provisions of this chapter, and any other applicable law, the relevant fishery conservation and management measures of the coastal states nearest to the fishery. (emphasis supplied) 16 U.S.C. 1853(b)(5)

In concluding this analysis of the Act and congressional intent it is hard to imagine why any court would disregard the direct language of the Act and disregard the legislative history in order to justify some type of "interim state extraterritorial enforcement" against state registered vessels.

INTERIM STATE EXTRATERRITORIAL FISHERY MANAGEMENT BEARS NO RATIONAL RELATIONSHIP TO THE HEALTH, SAFETY, WELFARE AND MORALS OF FLORIDA REGISTERED VESSELS (OR FLORIDA CITIZENS)

Federal and State Courts have found that it is a valid exercise of the State's police power to attempt to conserve fish located in state waters by prohibiting the possession of fish taken outside the state. The Courts have found the effects of these types of laws on inter-state commerce to be incidental and necessary to prevent possible deception by fishermen in that there is an inability to distinguish fish taken from within the state from those taken outside the state and that would render enforcement of the state laws difficult at best. Bayside Fish Company v. Gentry, 297 U.S. 422, 56 S.Ct. 513, (1936). However, the Petitioners preferred nexus between legitimate state interests and regulation of certain extraterritorial conduct cannot pass constitutional muster because the law seeks to prohibit the use of certain fishing equipment and the possession of certain sizes of certain species outside the territorial waters of Florida by direct regulation of such extraterritorial activities. The actions of the state and the Petitioners are not to facilitate enforcement and conservation of fish located in state waters by prohibiting possession of certain fish . . . "in order to facilitate enforcement. . .". See Hjelle v. Brooks, 377 Fed Supp. 430 at 441 (1974).

Although it is difficult to define, the state's police power is no more than the exercise of the individual rights of citizens to entrust their elected representatives with the perogative to enact laws for

the protection of the lives, health, morals, comfort and general welfare of those individual citizens. Under our system of government laws are a restriction on our individual rights and not a grant of authority. Although the police power is very broad and comprehensive, it can be exercised only if there is a demonstrable public purpose or benefit to be achieved. McInerny v. Ervin, 46 So 2d 458 (1950). The validity of the exercise of the police power depends upon its applicability to the general public as distinguished from a particular group or class. The principle focus of any inquiry must be the practical operation of the statute since the validity of state laws must be judged chiefly in terms of their probable effect. Hughes v. Okalahoma, 441 U.S. 322, at 336, 99 S. Ct. 1717 at 1736, (1979). In order to justify interference with private rights the interests of the public generally must require such interference. Bay Harbor Islands v. Schlapik, 57 So.2d 855 (Fla. 1952); Miami Beach v. Sea Coast Towers-Miami Beach, 156 So.2d 528 (Fla. 3d DCA 1963).

It is the position of the Respondents that there exists conflicting regulation with respect to fishery management (See 16 U.S.C. 1812, Exclusive Fishery Management Authority over all fish within the FCZ); however, even in the absense of conflicting federal legislation, the state retains some authority to regulate matters of "legitimate local concern" even though interstate commerce may be effected. Raymond Motors Transportation, Inc. v. Rice, 434 U.S. 429 at 440 (1978). Notwithstanding the importance of the "legitimate local concern" the law is clear with regard to state extraterritorial enforcement under the police power. In 1978 the Supreme Court of the

United States ruled that extraterritorial enforcement . . . "may not be accomplished by discrimination against articles of commerce (foodfish?) coming from outside the state (Federal Fishery Conservation Zone?) unless there is some reason . . . to treat them differently." Philadelphia v. New Jersey, 437 U.S. 617 at 626-627, 98 S.Ct. 2531 at 2532 (1978). The exercise of the state's police power is confined to those acts which have reference to the protection of the public health, safety, welfare and morals because the predicate for invoking the police power is that the public welfare requires the proposed regulation and it is reasonably expected to correct the evil prescribed. McInerny v. Ervin, supra; Ops. Fla. Atty. Gen. 077-139 (1977). At oral argument, the Petitioners should be asked to justify treating foodfish coming into the state from the Federal Fishery Conservation Zone differently merely because they are caught by a Florida registered vessel rather than a vessel out of Alabama, Georgia or any other coastal state.

After the United States Supreme Court's decision in U.S. v. Florida, supra, there was no doubt whatsoever as to whether the State of Florida was entitled to any interest in the natural resources of the Outer-Continental Shelf. In matters of federal law, of course, all of the state courts owe obedience to the decisions of the Supreme Court of the United States. Kansas City Southern R. Co. v. Van Vant, (1923) 260 U.S. 459, 43 S. Ct. 176, 67 L. Ed. 348. The case of the U.S. v. Florida was brought by the United States against the State of Florida to determine Florida's interest in natural resources on the Outer-Continental Shelf under the 1951 Outer-Continental Shelf Lands Act, 43 U.S.C. 1331. It was the Supreme Court's construction of this

federal law which showed that the State of Florida has no interest in the natural resources and therefore, it follows that the State of Florida has no authority to regulate with respect to the management of federal natural resources of the Outer-Continental Shelf. It must necessarily follow that because the State of Florida has no authority to regulate the federal fishery resources, any attempt at extraterritorial fishery management would not and could not be reasonably construed as expedient for the protection of the public health, safety, welfare and morals of the citizens of the State of Florida (much less state registered vessels).

In concluding this argument regarding the State's police power as applied to extraterritorial fishery management, it is abundently clear that both the State and the Federal Governments found that the "shrimp count law" was biologically indefensible and destuctive of the resource it was meant to protect. Beyond that the issue of statutory [as opposed to regulatory] preemption and the violation of the equal protection Commerce Clauses, the reasonable regulations under the State's police power must have a real and substantial relation to the object sought to be obtained. Attempts by the Petitioners to regulate the harvesting of the federal natural resources of the Outer-Continental Shelf, in which the State of Florida has no legally cognizable interest, are unconstitutional.

TO ALLOW INTERIM STATE EXTRATERRITORIAL ENFORCEMENT WOULD VIOLATE THE PURPOSES OF THE ACT BY ALLOWING DISFUNCTIONAL PARTICIPATION ON THE MANAGEMENT COUNSELS

The Magnuson Act gives the states a large role in the management of fisheries by allowing state representatives on the Fishery

Management Counsels to participate in and advise on the establishment of fishery management plans as are needed. 16 U.S.C. 1801(b)(5). The regional fishery management counsels are composed principally of nominees of the regions constituent coastal states and these state nominees are supposed to represent those coastal 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 Management Act of 1976 at page 843. There can be no doubt that the purpose of Congress was to allow the representatives of the coastal states and the fishing industry and consumer and environmental organizations and other interested persons to participate in and advise on the establishment and administration of fishery management plans. See 16 U.S.C. 1801 (b)(5)(a); however, it was also declared to be the policy of Congress that the fishery management councils would authorize no impediment to or interference with fishing on the high seas except as necessary for the conservation and management of fishery resources as provided for in the Magnuson Act. See 16 U.S.C. 1801(c)(2). The purpose of the Magnuson Fishery Conservation Mangement Act as stated in the body thereof and also evident in the Legislative History that has already been discussed, was to treat the federal resources outside the three (3) mile territorial limit of the coastal states as a single, uniformly regulated resource for the benefit of all citizens of the United States.

If this Court were to reverse the trial court, the Appellate Court and the Federal District Court in Bethell, supra, and allow the state some type of "interim state extraterritorial enforcement" over state

registered vessels, the state representatives on the fishery management councils would be free to pursue their own unilateral regulatory scheme within the Federal Fishery Conservation Zone by circumventing the adoption of a federal fishery management plan. The State contends that until specific federal fishery management plans are originated by the regional fishery management councils and then adopted by the Secretary of Commerce, there will be no regulation over the natural resources outside the state's territorial waters other than the "interim state extraterritorial regulation". The state representatives on the Mangement Councils can effectively preclude the adoption of a Federal Fishery Management Act in favor of continued state extraterritorial enforcement. Although the adoption of existing state management measures has been allowed under the provisions of the Act (if in conformity with the national standards under the Act), the state representatives on the councils are in the precarious position of voting on the implemention of a plan which under the Petitioners theory would preempt prior state extraterritorial fishery mangement regulations. The disfunction participation of state representatives on the fishery mangement councils calculated to stop the implementation of the federal plan in favor of continued state extraterritorial enforcement is a real and present danger and must be addressed by this court!

The expressed "fear" of the Petitioners is that if there is statutory as opposed to regulatory preemption of state extraterritorial enforcement, there will be no regulation over the natural resources outside the state's territorial waters. The Petitioners overlook the determination made by Congress regarding the immediate need [after the passage of the Act itself] for certain fish to be immediately regu-

lated because they were in danger of being depleted. The fish that were obviously in need of such regulation were set forth in a report by Congress and the Committee considering the legislation said that;

> The Committee expects the Secretary to carefully study those species of fish that may possibly fall within this definition (depleted) and take the necessary steps to see that they receive proper management. H.R. Rep. No. 445, 94th Cong. 2d Sess. Reprinted in 1976, U.S. Code Cong. and Admin. News 593, at 616 (emphasis supplied).

The Legislative history also allowed the states to directly request implementaion of fishery management plans with respect to any coastal species or Continental Shelf species which the state believes to be depleted or in imminent danger of becoming depleted or under intensive but unregulated use because of the absence of authorization. See H.R. Rep. No. 445, 94th Cong. 2d Sess. Reprinted in 1976, U.S. Code Cong. and Admin. News 593 at 639.

What has followed the enactment of the Magnuson Fishery Conservation and Mangement Act of 1976 is not an absense of regulation, but rather a comprehensive regulatory scheme which is designed to protect the federal marine resources without unnecessarily restricting utilization of the resources available so as to assure a maximum sustained benefit to United States citizens. By putting the state representatives of the fishery management councils in the position of voting <u>against</u> the implementation of a federal fishery management plan in favor of continued extraterritorial state enforcement, this court would be putting its stamp of approval on the disfunctional

that strong state interest cannot be disputed. However, federal fishery management authority over the federal fishery resources included within the Act's definition of "fish" is reserved, in the Federal Fishery Conservation Zone, to the federal, not state government. See 16 U.S.C. 1802(6), (definition of "fish") and 16 U.S.C. 1812, (Exclusive Fishery Management Authority).

If the "state registered vessel exception" within Secton 1856 is interpreted as allowing continued state control over the safety and welfare of its citizens onboard state registered vessels, then there is no conflict within the Act and there is no such thing as "interim state extraterritorial enforcement" of state fishery management measures. The legislative history illustrates the very real distinction between regulation of fishing [regarding the safety and welfare of citizens aboard state registered vessels] and the exclusive fishery management authority over all fish within the Fishery Conservation Zone. The 1976 United States Code Congressional and Administrative News, page 601, states that in the FCZ. . . "it is the federal government which has the responsiblity for whatever management of the fish stocks occur <u>at all</u>" and under state jurisdiction <u>with regard to the territorial sea</u> Congress stated that . . . "whatever regulation, of both fishermen and fish harvest, that occurs in this area is as deemed necessary and appropriate by each concerned state." From these two (2) quotes it is quite apparent that there is a difference between the regulation of fishermen and the regulation of fish harvest. This Court, in upholding the decisions below, can preserve the integrity of the Magnuson Act and continue the state's control over the safety and welfare of state citizens on state registered vessels.

CONCLUSION

Because of Florida's proximity to the rich fishing grounds of the Outer-Continental Shelf, there are literally hundreds of boats from other states, and even other nations, as well as Florida boats that harvest the resources within the Federal Fishery Conservation Zone off the Florida Keys. The second most important industry to Monroe County is its fishing industry with the fish houses and fish processing plants employing a very high percentage of the Monroe County/Florida Keys workforce. The detrimental effect of State extraterritorial enforcement against Florida registered vessels as applied to the catching of the fish of the Outer-Continental Shelf can easily be seen when it is considered that the fish houses and processing plants of the Florida Keys are within two (2) to three (3) hours running time from the Federal Fishery Conservation Zone which surrounds the Florida Keys. The enforcement of the shrimp count law against Florida citizens while citizens of other states remain free to land, grade and pack all of the shrimp that they find in their nets, is violative of the Equal Protection, Privileges and Immunities, and Due Prosses Clauses of the United States and Florida Constitutions. Common sense, statutory law and the legislative history are in line with the trial court's opinion in the case below. The trial court's decision should be upheld on the grounds that were stated below.

> It is neither fair nor equitable to allow boats registered in other states to sail into the rich shrimping grounds north of the Florida Keys, catch their loads of shrimp and then sail back to the ports in Alabama, Louisiana, Mississippi and Texas, while Florida citizens are prohibited from the same conduct by operation of F.S. 370.15(2)(a) Livings v. Davis, Case No. 81-684-CA-17 (Fla. 16th Circuit Court, 1981).

The Federal District Court decision in Bethell regarding Bethell's exercise of rights secured to him by Federal Law and the Federal District Court's adjudication of Bethell's Equal Protection and Commerce Clause issues, are directly on point with the case at bar. The central adjudication by the Federal District Court was that

> . . . to uphold the application of this Section (Section 370.1105 Florida Statutes) with respect to Florida registered vessels would result in a denial of Equal Protection. Boats registered in other states would be able to use fish traps in the FCZ . . . and reap the economic benefits while Florida registered vessels would be prohibited from engaging in those same fishing activities. This result directly contravenes the mandate of 16 U.S.C. 1851(4) which clearly provides that "conservation and management measures shall not discriminate between residents of different states. . ."

Accordingly, the opinion of the trial court and Florida's Third District Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief for Respondents has been furnished by U. S. Mail to KEVIN X. CROWLEY, ESQUIRE, Acting General Counsel, Department of Natural Resources, Suite 1003, Douglas Building, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303 and JAMES C. KILBOURNE, ESQUIRE, Department of Justice, Todd Building - Room 639, Washington, D.C. 20530 this 17th day of April, 1984.

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