IN THE

SUPREME COURT OF FLORIDA

No. 63,001

FILED
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Chief Deputy Clerk

LOUIS S. LIVINGS, et al.,

Petitioners,

v.

WENDELL DAVIS, et al.,

Respondents.

PETITIONERS'
SUPPLEMENTAL BRIEF

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STATEMENT OF THE ISSUE

Whether Section 370.15(2)(a), Florida Statutes, has been preempted by The Fishery Conservation And Management Act, 16 U.S.C. §1801, et seq.

ARGUMENT

The State of Florida recognizes that a properly adopted federal fishery regulation will operate to supercede a conflicting state enactment as it is applied outside the state's territorial boundaries. This was the law before and after enactment of the Magnuson Fishery Conservation and Managment Act (MFCMA). Skiriotes v. Florida, 313 U.S. 69 (1941). The MFCMA extended federal jurisdiction from the 1976 12-mile limit to 200 miles from the nation's coastline. H.R. Rep. No 445, 94th Cong., 2d Sess. 24, reprinted in [1976] U.S. Code Cong. & Ad. News 596. Thus, Congress had preemptory authority over the states as to fishery regulations outside the states' borders both before and after enactment of the MFCMA. With one exception, the MFCMA did not alter the jurisdictional relationship between the federal government and the states.

That exception is noted in 16 U.S.C. §1856(a) which provides:

> Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority

> of any state within its boundaries. No state may directly or indirectly regulate any fishery which is engaged in by any fishing vessel outside it boundaries, unless such vessel is registered under the laws of such state.

Stated another way, a state may directly or indirectly regulate fishing engaged in by a vessel outside its boundaries if the vessel is registered under the laws of such state. The "exception" contained in subsection (b) relates to the authority of the Secretary of Commerce to regulate species within state waters under narrow and exceptional circumstances. The "exception" does not, as Respondents contend, pertain to the state's authority to regulate beyond its borders. The House Merchant Marine and Fisheries Committee made this point clear:

> The Congress would further find that it is not the purpose of this Act to affect State jurisdiction over fish principally found within waters under its jurisdiction, but there may be instances where Federal regulation of such species within such waters may be necessary in order to insure the effectiveness of a management plan. H.R. Rep. No. 445, 94th Cong., 2d Sess., reprinted in (1976) U.S. Code Cong. & Ad. News 641.

The unavoidable and unassailable guidepost for deriving the intent of Congress is its express reservation of state extraterritorial authority. If Congress had intended to finally and totally preempt state authority, the pertinent sentence in 16 U.S.C. §1856(a) would read "No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries." Period. If Congress had so written the law, this case would not

be before the Court. However, the MFCMA's specific reservation of state extraterritorial regulatory authority cannot be ignored. Nor can it be glossed, as Respondents attempt, by concluding that state authority is limited to providing for the safety of fishermen or their vessels. The MFCMA permits state regulation of "fishing" outside the state's borders. Fishing is defined, inter alia, as "the catching, taking, or harvesting of fish" or "any other activity which can reasonably be expected to result in catching, taking or harvesting of fish". 16 U.S.C. §1802(10). It cannot be seriously argued that Respondents' taking of shrimp does not come within the definition. Further, it is beyond dispute that Respondents use their vessels on the waters of the state. (R. 24-31) As such, their vessels are required to be registered in accordance with Florida law. Florida Statutes, Section 327.11(3). Given this set of facts, the Respondents' activities fall squarely within the extraterritorial application of Florida Statutes, Section 370.15(2)(a) as sanctioned by 16 U.S.C. §§1856(a).

Several very practical considerations explain why Congress intended continued state regulation in federal waters under certain circumstances. Does the MFCMA require the Secretary of Commerce to establish regulations for each and every species of fish which finds its way to federal waters? It does not. Several provisions in the Act support this proposition. 16 U.S.C. §§1854(c)(1)A provides:

> The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this chapter, and any other applicable law, if ---
>
> (A) the appropriate Council fails to develop and submit to the Secretary after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, <u>if such fishery requires conservation and management</u>. [Emphasis Added]

If a state already has a management scheme in place which the Secretary of Commerce determines is appropriate, the fishery would not require "conservation and management". Further support for this view is found in National Standard Seven [16 U.S.C. 1851(7)] which provides that "Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." If a state has a sound, enforceable management plan in force, the federal government may wish to avoid the duplication and expense of creating a redundant federal counterpart.

The list of reasons why the federal government might choose not to regulate a fishery in federal waters is unlimited. A couple of illustrations will suffice. Certain species spend virtually all of their lives in state waters but will travel into or through federal waters periodically for short intervals of time. Given his priorities, the Secretary of Commerce might well decide that management of such species is best undertaken at the state level.

Another compelling, practical consideration supports the necessity for continued extraterritorial state regulations.

Historically, the development and implementation of federal fishery managment plans has been an extremely lengthy process, occupying years. Brief of Secretary of Commerce as Amicus Curiae, Livings v. Davis, Florida Supreme Court, No. 63,001. The very fact that development of a federal regulatory scheme is undertaken amply demonstrates that conservation and management measures are necessary. Yet under Respondents' reasoning, a fishery which has been officially slated for federal regulation will be totally unregulated during the hiatus between research and development of management measures and the actual implementation of federal restrictions. The unfettered exploitation of fragile marine resources can be prevented only if state management measures are kept intact until replaced by fully implemented federal management programs. For a comprehensive treatment of the authority of states to regulate fishing extraterritorially in light of the Magnuson Act, see Greenberg and Shapiro, Federalism in the Fishery Conservation Zone: A New Role For The States In An Era Of Federal Regulatory Reform, 55 S.Cal.L. Rev. 641 (1982). After examining the powers of states to regulate fisheries extraterritorially both before and after passage of the Magnuson Act, the authors conclude that not only does the federal act not preempt the states' authority but that Congress intended a continuation of state regulation in the federal zone.

This Court's April 26, 1984 decision in Southeastern Fisheries Association, Inc. v. Department of Natural Resources, (9 FLW 147), is harmonious with the principle that the mere

existence of the MFCMA does not preempt state authority to regulate fisheries extraterritorially. In Southeastern, this court determined that Section 370.1105, Florida Statutes, could not be enforced beyond the state's borders because the legislature did not "clearly state" its intent to regulate extraterritorially. In contrast, the statute which is the subject of this appeal clearly states that "It is unlawful for any person, firm, or corporation to catch, kill or destroy shrimp or prawn within or without the waters of this state . . . .[Emphasis added]. Section 370.15(2)(a), Florida Statutes (1979). Further, this Court in Southeastern reconfirmed its holding in State v. Millington, 377 So.2d 685 (Fla. 1979), which upheld the validity of extraterritorial application of Section 370.15(2)(a), Florida Statutes.

To date, ten judicial decisions have addressed the issue of extraterritorial state regulation of fisheries in light of the MFCMA. Seven courts have adopted the rationale that state regulation beyond its boundaries is not preempted in the absence of conflicting federal regulations. These are Anderson Seafood, Inc. v. Graham, 529 F.Supp. 512 (N.D. Fla. 1982); People v. Weeren, 163 Cal.Rptr. 255, 607 P.2d 1279 (Cal. 1980), cert. den., 449 U.S. 839 (1980); Northwest Trollers Association v. Moos, 89 Wash.2d 1, 568 P.2d 793 (Wash. 1977); State v. Sterling, 448 A.2d 785 (R.I. 1982); Alaska v. F/V Baranof, No. 2785 (Al.Sup.Ct. Feb. 10, 1984); Department of Natural Resources v. Southeastern Fisheries Association, Inc., 415 So.2d 1326 (Fla. 1st DCA 1982). As noted above, this Court in Southeastern did not reach the

issue at bar but instead ruled on the basis of a lack of clear legislative intent to regulate extraterritorially.

In contrast, three courts appear to have ruled that the very existence of MFCMA, even without implementing regulations, totally preempts a state from regulating fishing beyond the state's borders. These are Tingley v. Allen, 397 So.2d 1166 (Fla. 3d DCA 1981); Livings v. Davis, 422 So.2d 364 (Fla. 3d DCA 1982) [a per curiam affirmance based on Tingley and the subject of this appeal]; Bethell v. State of Florida, Case no. 82-1516-CIV-JWK, (S.D. Fla. September 29, 1983). (On appeal as Gissendanner v. Bethell, U.S. Court of Appeals, Eleventh Circuit, Case No. 83-5727).

The issue in the instant case is virtually identical to that in the Bethell case, i.e., the state's extraterritorial authority in the absence of conflicting federal regulations. The U.S. District Court for the Southern District of Florida in Bethell took issue with the U.S. District court for the Northern District of Florida in Anderson Seafood, supra, and held that the enactment of the MFCMA, even without implementing regulations, preempted the state. A copy of the Bethell Summary Final Judgment and Order Granting Plaintiff's Motion For Summary Judgment is attached hereto as Appendix 1.

The Eleventh Circuit Court of Appeals now has pending a resolution of the conflict between Bethell and Anderson Seafood. Included within the Appendix are copies of the appellant and appellee briefs filed in the Eleventh Circuit proceeding. The

Petitioners in the case at bar urge the Court to adopt the reasoning of the Supreme Courts of Alaska, Washington, California, Rhode Island and the U.S. District Court for the Northern District of Florida.

CONCLUSION

WHEREFORE, the Respondents respectfully request the Court to disapprove the holding of the district court of appeal in Tingley v. Allen, supra, and to reverse and remand the decision in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to DAVID PAUL HORAN, Esquire, Attorney at Law, 608 Whitehead Street, Key West, Florida 33040, and to JAMES C. KILBOURNE, Esquire, Department of Justice, Todd Building - Room 639, Washington, D.C. 20530, this 11TH day of May, 1984.

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