OA 6-20-88

IN THE SUPREME COURT OF FLORIDA

EUGENE RAFFIELD and
RAFFIELD FISHERIES, INC.,

Petitioner,

-vs-

CASE NO. 71,677

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE DISTRICT COURT,
FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF FLORIDA

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APPELLANT,

-vs- CASE NO.

STATE OF FLORIDA,

RESPONDENT.

ANSWER BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Eugene Raffield and Raffield Fisheries (Raffield), have been charged with violating §370.08(3), Fla.Stat. (1985), but **not** for any use of a purse seine to catch saltwater foodfish in federal waters of the Gulf of Mexico. Raffield was charged with violating, on land and in Florida, that "component" of §370.08(3) which prohibits possession, for sale or shipment, of saltwater foodfish so caught.

Raffield's preemption argument is simply irrelevant. He violated a possession ban, a commonly-used device to "put teeth" into a fishing gear prohibition. This Court should recognize and uphold the application of the possession ban to Raffield as a proper and necessary measure to protect Florida's increasingly depleted saltwater foodfish.

STATEMENT OF THE CASE AND FACTS

The State generally agrees with Raffield's statement of the case and facts. However, Raffield omits several important facts necessary to place this case in its proper perspective.

Raffield correctly states that he was issued a permit under emergency federal regulations,[1] but neglects to state that the same regulations warn permit holders that state laws may apply and that state landing laws are expressly preserved:

> (a) Persons affected by tthese regulations should be aware that other Federal and State statutes and regulations may apply to their activities.
>
> * * * *
>
> (d) These regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum.

51 Fed. Reg., no. 125 at p. 23554; 50 CFR §653.3 ("Relation to other laws.") Furthermore, the preamble to the regulations stated that for the purpose of the emergency rule:

> a State landing law is a statute regulation or ordinance which makes it unlawful to land or possess within the jurisdiction of a State of any red drum.

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[1] In late June 1986, the U. S. Dept. of Commerce adopted emergency rules for redfish harvest in the Gulf of Mexico. See 51 Fed.Reg., No. 125 at pp. 23553-6 (June 30, 1986). Temporarily codified as 50 CFR §653.1 through 653.23, the emergency rules expired in late December, 1986. These rules are attached as Appendix I. Raffield was arrested on or about July 16, 1986.

51 Fed.Reg., no. 125 at p. 23553 ("Relation to State Laws").

The State takes strong objection to an incorrect statement by Raffield. Raffield was not charged with violating the purse seine prohibition in §370.08(3), but with possession in Florida, for sale or shipment, of over 85,000 pounds of redfish caught with a purse seine, a distinct violation of §370.08(3). Counsel for the State has clearly maintained this position before the trial court and the First District. Raffield's statement to the contrary (p. 2) is wrong.

Raffield dwells at length (p. 2-5) on irrelevant facts concerning the actions of the U. S. Department of Commerce (NOAA) in its decision not to regulate redfish harvest before June 1986. As the emergency regulations imply, abruptly changed conditions necessitated the strictures. In fact, the redfish population is so threatened that no redfish harvest has been allowed in federal waters of the Gulf since July 1986. Only on March 29, 1988, the Department of Commerce initiated rulemaking to continue indefinitely the prohibition of redfish harvest [2].

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[2] Redfish harvest was barred through a zero quota from late December 1986 until January 1, 1988 by final rule. See 50 CFR ss. 653.21 and 23 (10-1-87 ed), attached as Appendix 11. After January 1, 1988, all redfish harvest has been banned by emergency rule. See 53 Fed.Reg., no. 60, p. 10131 (March 29, 1988), attached as Appendix 111. The State has adopted similar prohibitions, 46-22.009(7), Fla. Adm. Code (Sept. 30, 1987).

Florida has long endeavored to protect saltwater food fish from excessive commercial harvesting. In 1933 the Legislature enacted §371.12, Fla.Stat., proscribing certain over-efficient netting practices[3]. In 1976, the United States Congress passed the Fishery Conservation and Management Act, 16 U.S.C. §§1801-1882, also known as the "Magnuson Act," for parallel purposes (R, Vol. I, 94-135). Compatible with the Magnuson Act, the State has sought to regulate commercial fishing beyond its territorial waters only when Florida-based individuals have taken food fish indigenous to the state (Ellingsen Depo., p. 11-13). These enforcements have involved a king mackerel haul off Ft. Pierce

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[3] §1, Ch. 16025, Laws of Florida (1933). The statute was later renumbered §370.08(3), Fla.Stat., § 2, Ch. 28145, Laws of Florida (1953), and was thereafter amended several times. See, e.g. §§25 and 35, Ch. 106 and §1, Ch. 231, Laws of Florida (1969). It now reads as follows:

> 370.08 Fisherman and equipment, regulation. . .
> (3) USE OF PURSE SEINES, GILL NETS, AND POUND NETS, ETC. -- No person may take food fish within or without the waters of this state with a purse seine, purse gill net, or other net using rings or other devices on the lead line thereof, through which a purse line is drawn, or pound net, or have any food fish so taken in his possession for sale or shipment. The provisions of this section shall not apply to shrimp nets or to pound nets or purse seines when used for the taking of tuna or menhaden fish only. (e.s.)

(Kidd Depo., p. **77-79;** Richter Depo., p. **8),** plus redfish hauls off Ft. Myers (Ellingsen Depo., p. 10-11).

Several vessels federally licensed for the June-July **1986** redfish harvest in federal waters of the Gulf were registered in Florida, including the "Fisherman's Pride" registered to Raffield (R 20-21, **37** Ellingsen Depo., p. **6-7).** In mid-June (before the federal emergency rules took effect) United States Fish and Wildlife Agent Bill Meller informed the Florida Marine Patrol that several Florida-registered vessels had been spotted taking redfish by purse seine in federal waters off the Louisiana coast in apparent violation of Florida law (Ellingsen Depo., p. **6-8).** On July **1** (after the rules took effect), United States Fish and Wildlife Agent Dave Hall conveyed similar information concerning Raffield's boat alone to Florida Department of Natural Resources Director Dr. Elton Gissendanner (Kidd Depo., p. **8-10).** Investigation by Florida Marine Patrol Deputy Director Clifford Kidd, undertaken pursuant to departmental policy to explore all complaints involving food fish indigenous to Florida taken by Florida boats or citizens, resulted in confirmation of these allegations only with regards to the Raffield vessel (Ellingsen Depo., p. 15; Kidd Depo,, p. **14-36).** Kidd observed Raffield's agents dock the boat, transfer the catch to three trucks and deliver it to Raffield's plant in Port St. Joe. Consequently, on July **16-17,** Raffield and several processing agents were arrested for violating **§370.08(3)** on July **16-17** and issued citations (R 4;

Kidd Depo., p. 40-70)[4]. Raffield's 85,534-pound catch and trucks were temporarily confiscated, but immediately returned upon the posting of bond (R 6-10). On September 18, the State dropped the charges against everyone except Raffield because it could not prove the others knew the redfish had been illegally taken by purse seine (R 181-182).

Trial Judge David L. Taunton granted Raffield's motion to dismiss on September 25, 1986. That dismissal was reversed by the First District Court of Appeal in State v. Raffield, 515 So.2d 283 (Fla.1st DCA 1987). On March 22, 1988, a narrowly divided Court exercised its discretionary jurisdiction to grant further review.

[4] Kidd's detailed written descriptions of the events leading to the arrests are appended to his deposition.

SUMMARY OF ARGUMENTS

Section 370.08(3), Florida Statutes (1985), a fishery conservation law, prohibits over-efficient purse-seining of saltwater foodfish; and bans the possession of foodfish so caught. The statute regulates commercial fishing, which is not a fundamental right. The law passes constitutional muster on equal protection grounds because it creates no impermissible classifications. It also is rationally related to a legitimate state objective -- the conservation of a decimated foodfish from purse seine netting. Raffield's reliance on outrageous hypothetical applications of the law are not relevant. The statute is the least restrictive possible prohibition to prevent the depletion of redfish.

The statute provides adequate notice of the prohibited conduct to persons of average intelligence. It is not subject to overbreadth for analysis as it does not infringe fundamental rights.

Raffield was charged with violation of the possession ban in §370.08(3), Fla.Stat. (1985). This ban was expressly preserved by the emergency federal regulations applicable to Raffield at the time of his arrest. Not only does this preservation distinguish this case from all other Magnuson Act preemption cases that have reached this Court, but it represents federal

consent to the possession ban.

Because Raffield was ~~not~~ charged with violating the purse-seine ban in 370.08(3), the question of federal preemption of its extraterritorial enforcement, through the mere presence of the Magnuson Act, is irrelevant. However, that Act expressly recognizes continued state authority. See 16 U.S.C. §1856(a).

Section 370.08(3) is a proper exercise of the State's police power to protect "wildlife" (i.e., redfish) from excessive commercial harvest, a matter historically left to the states. It does not facially or implicitly discriminate against interstate commerce. Its effect on interstate commerce is at most an incidental burden necessary to achieve its reasonable purpose. Under well-established federal decisions, and recent decisions by Florida courts, §370.08(3) does not violate the Commerce Clause of the United States Constitution.

ARGUMENT

ISSUE I

SECTION 370.08(3), FLORIDA STATUTES IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The State notes initially that Raffield's arguments regarding the alleged equal protection and due process concerns with Florida's purse seine law are intertwined. For clarity's sake, The State will address separately the reasons why Section 370.08(3), Florida Statutes, is constitutional both on equal protection and due process grounds, in that order.

A. SECTION 370.08(3), FLORIDA STATUTES IS A RATIONAL CLASSIFICATION OF PROHIBITED COMMERCIAL FISHING CONDUCT, AND IS NOT UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

Raffield's equal protection arguments are totally without merit. Florida's laudable legislative declaration that over-efficient netting of certain foodfish, critical to Florida's economy for recreation and a food source, is a rational exercise of governmental power necessary to accomplish a permissible state objective. See **Cleveland Board of Education v. Lafleur,** 414 **U.S.** 632 (1974), **Loving v. Virginia,** 388 U.S. **1** (1961); **McGowan v. Maryland,** 366 U.S. 420 (1967). Raffield has in no way demonstrated "purposeful discrimination." **McClesky v. Kemp,** 477 U.S. ___ , 95 L.Ed.2d 262, 107 **S.Ct.** 1756 (1987); **Whitus** v.

Georgia 385 U.S. **545 (1967).** Raffield cannot allege he is a member of a subject classification. Therefore the statute in question is not subject to strict scrutiny, but only whether it is a rational exercise of governmental power. Even when a suspect classification is involved, such as rule, a criminal defendant who alleges an equal protection violation must demonstrate the "existence of purposeful discrimination." **McClesky, supra; Whitus.** Raffield has utterly failed to meet any standard of persuasion regarding an alleged equal protection violation. Clearly, no "impermissible classification" is even involved here.

Raffield's crucial error in his claim that a preference to engage in intense commercial fishing is a fundamental right. (Raffield's brief, p. **16).** See **White v. State, 93** Fla. **905, 113** So. **94 (1927).** (Proper to protect saltwater fishery from "cupidity of those who live by the industry.") Thus, he cites to cases interpreting freedom of expression and association. See **NAACP v. Button, 371 U.S. 415 (1963); Sawyer v. Sandstrom, 615** F.2d **311 (5th** Cir. **1980).** Commercial fishing is not a fundamental right. See **S.** E. **Fisheries, Assoc. Inc. v. Department of Natrual Resources, 453** So.2d **1351, 1353** (Fla. **1984); Williamson v. Lee Optical, 348 U.S. 483 (1955); Sisk v. Texas Parks and Wildlife Department, 644** F.2d **1056** (5th Cir. **1981).** Raffield's reliance on case law interpreting statutory impacts on fundamental rights is therefore unpersuasive.

The State need only demonstrate the statute is rationally related to a legitimate state objective, as it does not impinge a fundamental right. See, e.g. **Vance v. Bradley,** 440 **U.S.** 93 (1979); **New Orleans v. Dukes,** 427 **U.S.** 297 (1976). Of course, the legislation is presumed constitutional. **McGowan v. Maryland,** 366 **U.S.** 420 (1961). Raffield must therefore negate "every conceivable basis which might support it." **Madden** v. **Kentucky,** 309 U.S. 83 (1940). Any legitimate purpose to which the legislation is rationally related will serve to uphold the act in the absence of legislative articulation of purposes. See **Delaware River Basin Commission v. Bucks County Water and Sewer Authority,** 641 F.2d 1087 (3rd Cir. 1981); **Alabama State Federation of Teachers, AFL-CIO v, James,** 656 F.2d 193 (5th Cir. 1981). The district court correctly discerned the rational relation of the instant statute, basicially prohibiting over-fishing, to several legitimate state interests, such as the protection of a foodfish, tourism and recreational fishing and stable economic return. See **State v. Raffield,** 515 So.2d 283, 286 (Fla. 1st DCA 1987); **Pulford v. Graham,** 418 So.2d 1204,1205 (Fla. 1st DCA 1982). This Court should affirm the decision of the district court.

In **Livings v. Davis,** 465 So.2d at 508, the Florida Supreme Court declared that **"a** state can [constitutionally] regulate the fishing activities of its citizens beyond the state's territorial waters when there is no conflict with a federal regulatory scheme." There is no conflict here. See Respondent's Issue 11,

infra. In urging this Court to overlook **Livings,** Raffields rely primarily upon the federal district court decisions of **Southeastern Fisheries Association, Inc. v. Livings,** Raffield's App. **D,** and **Bethell v. State of Florida, et al., (S.D.** Fla. 1983, Case No. 82-1516-CIV-JWK, vacated and remanded, 741 F.2d 1341 (11th Cir. 1984). These cases baldly intimate that one state's enforcement of statutes prohibiting the taking of marine products in federal waters may deprive its citizens of equal protection of the law if other adjacent states have no such statutes. The absurd extension of this argument -- that no state can enforce its laws against its citizens only -- would deprive all states of any extraterritorial enforcement powers, a result clearly not intended by the Magnuson Act. If this Court is inclined to rely upon lower federal decisions as persuasive authority regarding equal protection claims, it need look no further than **Anderson Seafoods, Inc. v. Graham,** 529 F.Supp. 512 (N.D. Fla. 1982), wherein the local federal district court refused to enjoin the State from enforcing §370.08(3) against Florida-registered vessels in federal waters. **Anderson Seafoods** is consistent within the holding of the United States Supreme Court in Skiriotes **v. Florida,** 313 U.S. **69,** 75 (1941). The State has not violated Raffield's equal protection rights under the constitution.

B. FLORIDA'S PURSE SEINE LAW DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE STATE OR FEDERAL CONSTITUTION.

There is a crisis in redfish management in Florida. See Rule 46-22.009, F.A.C. (Sept. 30, 1987); **Marine Fisheries Commission v. Organized Fisherman of Florida,** 503 So.2d 935 (Fla. 1st DCA 1987). Raffield claims the instant statute goes beyond protecting the valid interests of the state to protect the health, safety and welfare of the people of Florida. One must ask whether the total decimation of the redfish fishery must occur before Raffield would concede that State may take the necessary steps to prevent this. See **Maine** v. **Taylor,** 477 U.S. ____, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). Florida does not have "to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees. . . before it acts to avoid such consequences." **Taylor,** 91 L.Ed.2d at 127. Section 370.08(3) is one of the least restrictive statutory methods of preventing the collapse of the redfish fishery. The State emphasizes that the State's most recent fishery rule now prohibits all possession of redfish, regardless of method of catch.

This Court has recognized that it is not a denial of due process to prohibit the "possession within its boundaries of 'small shrimp' removed from water outside its boundaries." **State** v. **Millington,** 377 So.2d 685 (Fla. 1979). Raffield of course

does not even have standing to challenge any potentially improper application of Section 370.08(3), as such as not occurred. See **State** v. **Hill,** 372 So.2d 84 (Fla. 1979). Raffield, like Millington, has been charged with the possession of saltwater fish, taken by proscribed methods outside Florida (R 181-182). **Millington,** 377 So.2d at 687. The facts here are indistinguishable from **Millington.**

This Court in **Millington** restated that the "fishing industry [is] a proper subject for state legislative regulation and protection. . ." 377 So.2d at 687. Raffield cloaks his attacks on the wisdom of the purse seine law behind the cape of due process arguments. He cites a litany of absurd applications of the statute, for which he has not standing to challenge. **Hill, supra.** This Court furthermore must interpret any statute in a constitutional manner, where possible. See **Southeastern Fisheries Inc. v. Department of Natural Resources,** 453 So.2d 1351, 1354 (Fla. 1984); **Miami Dolphins Ltd. v. Dade County,** 394 So.2d 981 (Fla. 1981). Here, there is no question that it is constitutional to prosecute Raffield for the possession of 85,000 pounds of a decimated foodfish caught by an over-efficient netting method. See **Skiriotes** v. **Florida,** 313 U.S. 69, 77 (1941). This Court should affirm the district court's ruling.

The statute does not violate substantive due process, as it is rationally related to a legitimate state interest. Contrary

to Raffield's claim, the statute does not apply to "all waters of the world," but only to the over-efficient netting of certain foodfish, caught aboard Florida vessels, or knowingly possessed in Florida. Raffield's reliance upon federal district court opinions is misplaced as such is not binding on this Court. **Roche v. State, 462** So.2d **1096, 1099** note two (Fla. **1985).** The State notes that the opinion in **Southeastern Fisheries Association, Inc. v. Livings, (S.D.** Fla. **1983),** Raffield's App. **"C"**, contains no authority for its bald assertion that **§370.08(3)** is "neither fair nor equitable." By its logic, Florida could not prohibit its citizens from drug trafficking if Alabama allowed its citizens to do so, as such would deny "benefits" to Florida's citizens. Both district court opinions cited by Raffield relied on Florida case law no longer in effect. See Issue 11, infra; **Livings v. Davis, 465** So.2d **507** (Fla. **1985).** This Court need simply examine the conservation law's obvious rational relation to a legitimate State interest, which the State has adequately demonstrated. See **Marine Fisheries Comm v.** OFF, **supra; Skiritoes, supra; Bayside Fish Flour Co, v. Gentry, 297** U.S. **422 (1936).** In **Bayside** the Supreme Court properly recognized that for a state to distinguish between fish caught outside the state's jurisdiction would allow "the covert depletion of the local supply. **. . "** **297** U.S. at **422.** Prohibiting the over-efficient netting of certain food-fish, regardless of where caught, is absolutely necessary to prevent the easy evasion of

the law. See **Maine v. Taylor, supra.** State law enforcement officials could not enforce game laws if they had to determine whether an illegally possessed deer came from Georgia or Florida.

1. Procedural Due Process

As noted, this Court has specifically held a fish conservation statute is not subject to an overbreadth attack. **Southeastern Fisheries Association, Inc. v. Department of Natural Resources,** 453 So.2d 1351,1353 (1984). Therefore, Raffield's claim that §370.08(3) "suffers from the total defect of overbreadth as it proscribes conduct beyond . . . the State's police power" is fatally defective legal reasoning. See Raffield's brief, page seventeen.

Raffield's only remaining argument is that the statute is vague. Yet this Court has held similar attacks on another conservation statrute regarding imported crawfish, to be "without merit." **Kenny v. Kirk,** 212 So.2d 296 (Fla.1968). See also, **Southeastern Fisheries, supra.** Raffield's comment that the statute could be applied to Peruvian sardines is irrelevant, as the only question is whether §370.08(3) is constitutional as applied to him. **New York v. Ferber,** 458 U.S. 747 (1982); **Falzone v. State,** 500 So.2d 1337 (Fla.1987). In **State v. Millington,** 377 So.2d 685, 687 (Fla.1979), this Court held that a criminal defendant charged with illegal possession of undersized shrimp taken from the Gulf and landed in Tampa lacked standing to

challenge the pertinent statute on due process and equal protection grounds, to the extent that it made possession of such shrimp on the high seas a criminal offense. See also **State v. Hill,** 372 So.2d 84 (Fla.1979). Therefore, the only question presented concerning Raffield's vagueness claim is: Can there be any doubt but that Raffield, a successful businessman of at least average intelligence, understood that his possession of redfish he knew were taken by purse seine, violated §370.08(3). See **Marrs** v. **State,** 413 So.2d 774 (Fla.1st DCA 1982).

The answer is of course not. Just as "the State of Florida [may] constitutionally proscribe the possession within its boundaries of 'small shrimp' removed from waters outside its boundaries" consistent with the due process clauses, **State** v. **Millington,** 377 So.2d 685,688, *so* too may it proscribe the in-state possession of redfish taken on the open seas. See also, **State** v. **Hill, supra.** Raffield's claim that §370.08(3) violates due process because it purportedly is not calculated to fulfill the legitimate state interest of protecting the redfish is largely irrelevant, see **State** v. **Millington, supra;** and totally false, see **State Marine Fisheries Comm. v. Organized Fishermen of Florida, supra,** The State has consistently asserted only that petitioner's in-state transportation and possession of redfish taken outside Florida's territorial waters violated §370.08(3). (R 183).

Raffield's vagueness argument premised on allegedly differing interpretations of the statute, (Raffield's brief, page 20) is without merit, as "small variances in the understanding of individual officers which could possibly be calrified on closer reading of the statute to not necessarily show vagueness." **Gardner** v. **Johnson,** 451 So.2d 477 (Fla.1984). Furthermore, Section 370.08(3) gives adequate notice of the prohibited conduct. The statute contains three distinct subclasses, each readily understandable by people of average intelligence.

The first clause informs that "no person may take [certain] food fish within . . . the waters of this state" by certain netting practices. Redfish are specifically designated as a "food fish" by §370.01(12), Fla.Stat. No reasonable person could fail to understand therefore that the netting of redfish within Florida's waters is prohibited. No ambiguity there.

The second clause prohibits the same over-efficient netting of fish caught from outside Florida's waters. The United States Supreme Court has recognized that "the State of Florida may . . . govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest." **Skiriotes** v. Florida, 313 U.S. 69,77 (1941). Such regulation may be done legislatively, assuming one element of the offense occurs within Florida. See **Southeastern Fisheries,** 453 So.2d 1351,**supra; Burns** v. **Rosen,** 201 So.2d 629 (Fla.1st DCA 1967); §910.005, Fla.Stat.

The third clause states that no person may possess food fish for sale or shipment, taken by the prohibited methods. This simply prohibits such possession, with the knowledge of how the food fish were captured. Although the statute does not specifically require intent, "an injury can amount to a crime only when initiated by intention . . .mere omission . . . of . . intent will not be construed as eliminating that element from the crimes denounced. **Morrissette** V. **United States,** 342 U.S. 246,250,263 (1952). This is why the State dropped the charges against Raffield's processing agents, as there was insufficient evidence those suspects had knowledge of the catch methods employed. This is also the simple answer to Raffield's irrelevant hypotheticals which will never occur.

If Raffield had harboured doubts regarding the statute's applicability, he could have sought a declaratory judgment. See **Southeastern Fisheries,** 453 So.2d at 1353. The statute however is readily understandable and not violative of due process because of vagueness. The courts do not "require the legislature to draft laws with such specificity that [they] . . . may be easily avoided." **Southeastern Fisheries,** 453 So.2d at 1353. The district court properly found the statute satisfied due process, and this Court should affirm.

ISSUE II

SECTION 370.08(3),F.S., IS NOT PREEMPTED BY THE FEDERAL REGULATIONS APPLICABLE TO RAFFIELD, OR BY THE MAGNUSON ACT ALONE.

A. Background: The Magnuson Act and Federal Regulation of Redfish

Congress passed the Magnuson Fisheries Conservation and Management Act or the "Magnuson Act" (16 U.S.C. §1801 et. seq.), in 1976. The purpose of the Act is 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. Consistent with this purpose, the Act established a fishery conservation zone (FCZ)[5] 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 FZC, Congress 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).

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[5] The fishery conservation, now deemed the "exclusive economic zone" or the EEZ, is defined 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. §1802(6), 1811.

The Magnuson Act sought to accomplish these purposes by calling first for the establishment, though cooperative action of the states and the federal government, of Regional Fishery Management Councils. 16 U.S.C. $1852. The Councils develop fishery management plans (FMPs) regarding those fish requiring conservation and management. Id. Approved FMPs are implemented and enforced by the Secretary of Commerce under 16 U.S.C. §§1854, 1855, and 1861.

The typical process[6] of assuming federal authority over fish populations for which federal management is required is lengthy. 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 must be based on the best statistical, biological, economic, social and other scientific information available. 16 U.S.C. §1851(a)(2); 16 U.S.C. §1852(g)(1). The FMPs are developed by the Regional Fishery Management Councils with the participation of "all interested persons" through public hearings. 16 U.S.C. §1852(h)(3).

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[6] Raffield's situation was not typical. When he was arrested there was no federal FMP for redfish, much less final implementing regulations. Raffield was subject to emergency redfish rules, adopted pursuant to 16 U.S.C. s.1855, which were in effect until late December, 1986.

New 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 by creating an "exception" to federal preemption. As amended in late 1984, 16 U.S.C. §1856 (a)(3) provides in part:

> [A] State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State.

Raffield's vessel was registered under Florida law. Consequently, extraterritorial enforcement of §370.08(3) against him would have been proper before the enactment of the federal emergency redfish rules. However, the emergency rules allowed up to one million pounds of redfish to be harvested with any gear. See 50 CFR S653.20. Until that quota was reached and the federal fishery closed,[7] the purse seine ban of §370.08(3) could not be enforced in federal waters. In contrast, Raffield was arrested for acts, committed on land and in Florida, that violated the possesion ban in that statute.

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[7] The Secretary of the Department of Commerce ordered the fishery closed as of July 20, 1986. See 51 Fed. *Reg.*, no. 142 at p. 26554 (July 24, 1986), attached as Appendix IV. The State has also banned *any* possession of redfish. 46-22.009(7), F.A.C.

B. Section 370.08(3)'s Possession Ban Is Not Preempted by Federal Regulations Applicable to Raffield When Arrested.

The only federal measures specifically addressing redfish when Raffield was arrested were the June 25, 1986, emergency rules. The rules were necessitated by the tremendous increase in commercial harvest of redfish to satisfy burgeoning nationwide demand for "blackened redfish." See the preamble to the rules, 51 Fed. Reg., No. 125, p. 23551-23553.

Raffield was charged with possession, in Florida, of redfish caught by purse seine for sale or shipment. Even if extraterritorial enforcement of s. 370.08(3)'s purse seine ban were preempted, the charges against Raffield would stand, since a completely different criminal act, possession of purse-seined redfish, was charged by the State.

Raffield relies heavily upon his federal permit to take redfish, issued under the emergency rules. He neglects to mention that the same rules also provide:

> Section 653.3 Relation to other laws.
> (a) Persons affected by these regulations should be aware that other Federal and State statutes and regulations may apply to their activities.
> * * *
> (d) These regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum. (e s.)

Furthermore, the preamble to the emergency rules, in its section entitled "Relation to State Laws," provides:

> Relation to State Laws
> The Secretary recognizes the conservation and managment efforts of the coastal states in the Gulf of Mexico with regard to the red drum fishery. The Secretary desires to support those efforts through the emergency action to the maximum extent permitted under the Magnuson Act. It is the intent of the Secretary to supplement the States' efforts to conserve red drum. Therefore, the emergency rule does not supersede any State landing laws which apply to red drum. For purposes of the emergency rule, a State landing law is a statute, regulation or ordinance which makes it unlawful to land or possess within the jurisdiction of a State any red drum. (e.s.) Fed. *Reg.*, no. 125 at p. 23553.

On their face, the emergency rules preserve §370.08(3)'s possession ban. Such preservation does not distinguish between fish caught in state or federal waters, and was highly significant to the First District in its opinion. **State** v. **Raffield,** 505 So.2d at 285.

Raffield relies (pp. 27-29) on irrelevant events and testimony occurring in 1984 to argue that the United States Department of Commerce affirmatively decided to preclude state extraterritorial regulations through emergency rules adopted in mid-1986. As the use of emergency rulemaking implies, the

redfish situation changed so markedly[8] that the 1984 events are inconsequential. As elaborated below, a federal decision as to extraterritorial enforcement is simply irrelevant to in-state enforcement of §370.08(3), which is the case here.

Raffield advances the contorted notion that because §370.08(3) carries criminal penalties, it should be strictly construed and preemption should be found. His logic is flawed: principles and events relevant to the preemption issue have nothing to do with the clarity of the language describing acts prohibited by §370.08(3). The statute clearly prohibits use of purse seines to catch saltwater "foodfish" (defined by §370.01(12)(1985) to specifically include redfish). Regardless, strict construction leaves no doubt that Raffield should have known the law applied to him.

Raffield attempts to rely on final federal regulations adopted five to six months after his arrest. (Raffield's Brief, p. 33) The regulations (App. F to Raffield's initial brief) would have superseded state landing laws as to redfish caught in federal waters. Raffield's reliance is incorrect. The final regulations, intended to apply longer than the prior emergency rules, did not apply to Raffield when he was

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[8] See that part of the preamble to the emergency rules entitled "Background," describing circumstances giving rise to the "emergency" regarding the red drum fishery. 51 Fed. Reg., no. 125 at pp. 23551-23552 (June 30, 1986).

arrested. Raffield omits the fact that the final regulations were amended to preserve the application of a state's law to redfish landed in that state!

For the first time in this case, Raffield attempts to avoid the "savings clause" in 50 CFR 5653.3. He argues that it was to prevent preemption of state law as to fish caught in state waters. This is incorrect. The Magnuson Act generally does not apply to state waters. See 16 U.S.C. §1856(a). The geographic field of the Act's applicability is limited to federal waters by the definition of the "exclusive economic zone." 16 U.S.C. §1802(6). Therefore, it was not necessary to preserve state laws as applied to redfish caught in state waters. Raffield's argument would render 5653.3 purposeless.

Federal rules cannot preempt state law in state waters unless the Secretary of Commerce makes certain findings and gives special notice pursuant to 16 U.S.C. §1856(b). That procedure was not invoked during the promulgation of the emergency rules applicable to Raffield. His reading of 5653.3 cannot be relied upon to circumvent other requirements of the Magnuson Act.

There is no need for this Court to address the preemption of extraterritorial enforcement of §370.08(3)'s purse seine ban. When Raffield was arrested, the use of purse seines to catch up to one million pounds of redfish in federal waters of the Gulf was legal under the federal rules. The federal emergency rules

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[9] See 50 CFR §653.3(d) (10-1-87 ed.), which is included as part of Appendix II.

expressly preserved state landing laws such as the possession ban in §370.08(3). Therefore, the issue is whether the Magnuson Act alone preempted enforcement of §370.08(3)'s possession ban, in Florida, when Raffield was arrested.

Federal preemption of state law is rooted in the Supremacy Clause of the United States Constitution. See, **Fidelity Federal Savings and Loan Association v. Cuesta,** 458 U.S. 141, 151, (1982). The supremacy clause "invalidates state laws that interfere with, or are contrary to federal law." **Hillsborough County, Florida v. Automated Medical Laboratories, Inc.,** 471 U.S. 707, 85 L.Ed. 2d 714, 105 S.Ct. 2371, 2375 (1985), quoting **Gibbons v. Ogden,** Wheat. 1, 211 (1824). State law may be preempted in any one of three ways: (1) Congress may preempt state law through express statutory language; (2) Congressional intent to preempt all state law may be inferred when federal regulation is so comprehensive that Congress has "left no room" for state regulation or when the federal interest is *so* dominant that enforcement of state law is assumed to be precluded; or (3) when state law directly conflicts with federal law or regulations. **Hillsborough County,** 105 S.Ct. at 2375. See also, **Michigan Canners and Freezers Association, Inc. v. Agriculture Marketing and Bargaining Board,** 467 **U.S.** 461, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984). However, matters regulated under historic state police powers are not invalidated under the Supremacy Clause:

> Where. . . the field that Congress is said to have preempted has been traditionally occupied by the States. We

> start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. **Jones v. Rath Packing Company,** 430 **U.S.** at 525, 97 S.Ct. at 1309 (quoting **Rice v. Santa Fe Elevator Corp.,** 331 **U.S.** at 230, 67 S.Ct. at 1152).

Hillsborough County, 105 S.Ct. at 2376.

To determine if extraterritorial enforcement of §370.08(3), Florida Statutes, has been preempted by the Magnuson Act alone, it must be determined: (a) what field the federal law would preempt; (b) which types of preemption, if any exist; and (c) how §370.08(3) fits into this analysis.

The "field" that would be preempted here is regulation of saltwater fishing, specifically the netting of saltwater foodfish. Not only has such regulation been a traditional subject of state police powers, but the regulation of fish and other wildlife is a matter over which the states historically have exercised "supreme control.'' **Bayside Fish Flour Co. v. Gentry,** 297 **U.S.** 422, 80 L.Ed. 722 (1936). See also, **Lawton v. Steele, 152 U.S.** 133, 38 L.Ed. 385 (1894); and **Manchester v. Massachusetts,** 139 **U.S.** 240, 35 L.Ed. 159 (1891).

There is no express preemption of state law in the Magnuson Act. To the contrary, 16 U.S.C. §1856(a) clearly preserves state authority:

> s.1856, State jurisdiction
> (a) In general
> (1)... [N]othing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any state within its boundaries.

* * *

> (3)... [A] State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State.

The first sentence preserves traditional state jurisdiction within territorial waters. The last sentence proves Congressional intent to assert jurisdiction in federal waters without fully occupying the field. It expressly maintains a state's extraterritorial enforcement authority against vessels, such as Raffield's, registered under its laws. By deliberately allowing such enforcement, Congress left room in the field for state regulation.

The Magnuson Act alone does not preempt state law. In **Anderson Seafood, Inc. v. Graham,** 529 F.Supp. 512,514 (N.D. Fla. 1982), a corporation sought to enjoin Florida from enforcing §370.08(3). In denying the injunction, the Court said:

> Congress's reservation of State authority to regulate fishing indicates it did not intend complete preemption. [citations omitted] This conclusion is buttressed by the fact that Florida's laws regulating fishing outside its boundaries have been on the books since 1953. Congress must be presumed to have been aware of existing State regulation. Yet, its law contemplates continued State regulation rather than completely forbidding it.

See also, **Washington Trollers Assoc.v. Kreps,** 466 F.Supp. 309, 312 (W.D. Wa.1979), **rev'd on other grounds,** 645 F.2d 684 (9th Cir.1981); **State of Louisiana v. Baldridge,** 538 F.Supp. 625,628

(E.D. La.1982); State v. Painter, 695 P.2d 241 (Alaska 1985), cert.den. 474 U.S. 990, 88 L.Ed.2d 352, 106 S.Ct. 400 (1985) (mere presence of substantively identical federal regulations does not preempt enforcement of state law in federal waters); State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984), cert.den., 105 S.Ct. 98 (1984); People v. Weeren, 607 P.2d 1279, 1286-7 (Cal.1980), cert.den., 449 U.S. 837 (1980).

This Court has already decided this issue in the State's favor. In Livings v. Davis, 465 So.2d 507,509 (Fla.1985), the Court unanimously held the mere existence of the Magnuson Act did not preempt enforcement of Florida's minimum shrimp-size law in federal waters.

Raffield was charged with violating §370.08(3) on land and in Florida. To find that law preempted in this instance would directly contravene the opening sentence of 16 U.S.C. §1856(a), providing that the Manuson act shall not be construed to diminish the jurisdiction or authority of a state within its boundaries.

The Court's duty is "to give effect, if possible to every clause and word of a statute.'' United States v. Menasche, 348 U.S. 528, 538-539 (1954). If no state extraterritorial regulation survived passage of the Act, this principle and the express Congressional intent would be defeated.

The federal emergency rules preserved enforcement of §370.08(3)'s possession ban against Raffield. The Magnuson Act alone does not preempt extraterritorrial, much less territorial, enforcement of state law. Raffield was constitutionally arrested and charged.

ISSUE IV

SECTION 370.08(3) DOES NOT VIOLATE THE COMMERCE CLAUSE.

A state may regulate fishing without offending the United States Constitution. Skiriotes V, Florida, **313** U.S. **69 (1941);** Lawton v. Steele, supra. In Bayside Fish Flour Company v. Gentry, **297** U.S. **422,426,** supra, the Supreme Court upheld a California statute regulating the manufacture, canning and packing of sardines within the state, regardless of whether the fish were caught within or without state waters. Bayside, like Raffield, charged that the statute interfered with interstate commerce and denied due process and equal protection of the law. The Supreme Court determined that such incidental interference was insufficient to invalidate the statute:

> Over these fish, and over state wild game generally, the state has supreme control. If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts. It is unnecessary to do more than refer to New York ex rel. Silz v. Hesterberg, supra. **(211** U.S. pp. **39** et seq. **53** L.Ed. **79, 29** S.Ct. 10) and Van Camp Seafood Company v. Department of Natural Resources (D.C.), **30** F.2d 111, where the decisions are collected. (e.s.)

The prohibition of the use of purse seines to catch saltwater food fish and attendent possession ban in §370.08(3) are measures, incidentally affecting commerce, designed to protect and conserve wildlife. As applied to Raffield, §370.08(3) was enforced to prevent his possession, for sale or shipment, of

purse-seined redfish regardless of where caught. The decision in Bayside is directly on point.

Florida's law serves the legitimate local purpose of conserving and protecting saltwater foodfish, such as redfish, from over-harvest through the use of highly efficient purse seines.[10] On its face, it applies equally to citizens, nonresidents, and aliens. There is no attempt to allow only Florida residents to use purse seines, to confine the benefits of harvesting redfish to Florida residents, or to prevent legally harvested redfish from entering or leaving the state. The statute does not facially or implicitly discriminate against interstate commerce. It is an evenhanded attempt to effectuate a legitimate state interest with only incidental effects or interstate commerce, and therefore constitutionally acceptable. **Pike** v. **Bruce Church, Inc.,** 397 **U.S.** 137,142, 90 S.Ct. 844,847, 25 L.Ed.2d 174 (1970).

This Court's proper scope of inquiry, as announced in **Hughes** v. **Oklahoma,** 441 **U.S.** 322, 99 S.Ct. 1727, 60 L.Ed.2d 50 (1979), deserves attention:

> Under that general rule we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means

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10 The efficiency of purse seines and their effect of their use in the redfish fishery were the main factors for promulgating the emergency rules applicable to Raffield. See the part of the preamble to the rules entitled "Background," 51 **Fed. Reg.,** no. 125 at p. 23552 (June 30, 1986).

> could promote this local purpose as well without discriminating against interstate commerce. Id. at 336.

Under the three-part test announced in **Hughes,** §370.08(3) does not violate the Commerce Clause. First, the statute regulates evenhandedly and does not discriminate against interstate commerce. Second, the Supreme Court has declared that there are legitimate local purposes in state laws designed to preserve living natural resources. **Lawton v. Steele, supra, Bayside Fish Flour Company v. Gentry, supra.** Third, there is no discrimination against interstate commerce created by this statute, *so* the availability of alternative means to promote the State's interest is not applicable. **Baltimore Gas and Electric Co. v. Heintz,** 760 F.2d 1408 (4th Cir.1985), **cert.den.,** 106 S.Ct. 141 (1985) (Maryland statute prohibiting public service company from acquiring certain stock before state approval does not violate Commerce Clause). Further, fishing restrictions (oftentimes prohibiting certain gear) have been uniformly upheld by the Supreme Court, primarily because "protection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection." **LaCoste v. Department of Conservation,** 263 **U.S.** 545,552, 68 L.Ed. 437, 44 S.Ct. 186 (1924). See also, **Maine v. Taylor,** ___ U.S. ___, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) (upholding wildlife statute overtly discriminating against interstate commerce, in the absence of reasonable alternatives).

Raffield argues that §370.08(3) is defective under the Commerce Clause because it does not apply to redfish caught with

gear other than a purse seine. That the law applies only to purse seines is obvious. Equally obvious is the fact that any fishing gear restriction necessarily treats the subject gear differently. Purse seines, admittedly used by Raffield in this case, are highly efficient. They catch fish in large amounts, and, when drawn up, tend to injure or kill those fish that fall out of the net. Perhaps the Florida Legislature should have addressed the "evil" of the use any type of net to catch redfish. Instead, the Legislature tailored §370.08(3) narrowly, to focus on purse seines. The fact that the Legislature addresses only one aspect of a perceived evil does not create a flaw in an otherwise acceptable statute for equal protection purposes. City of New Orleans v. **Dukes**, 472 U.S. 297,305, 49 L.Ed.2d 511,518, 96 S.Ct. 2513 (1976) (ordinance prohibiting pushcart vendors not established for at least 8 years did not deny equal protection). The fact that §370.08(3) applies only to purse seines is irrelevant to a Commerce Clause analysis, which must address any burden on interstate commerce actually created by the statute. Raffield would find fault with, and have this Court question the wisdom of, the law because it is narrowly focused on purse seines, rather than prohibiting the use of any type net.[11]

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[11] On page 42, Raffield, in another omission, states that the Marine Fisheries Commission's (MFC) rule banning sale of red drum in Florida was rejected by the Governor and Cabinet before being followed by other redfish rules. In addition to being irrelevant here, MFC rules are confined to state waters. More important, the MFC, as of January 1, 1988, prohibited all redfish harvest in state waters. 46-22.009(7), Fla.Admin. Code.

Raffield advances **Southeastern Fisheries v. Livings,** an unpublished decision by the Southern District of Florida, as authority for the proposition that §370.08(3) violates the Commerce Clause. Unfortunately, Raffield overlooks the fact that the Southern District cited no authority for this proposition. Moreover, the only cases cited by the Southern District on substantive matters were **Tingley** v. **Allen,** 397 So.2d 1166 (Fla.3rd DCA 1981) and **Livings** v. **Davis,** 422 So.2d 364 (Fla.3rd DCA 1982). **Tingley** was disapproved, and the **Livings** decision was quashed by this Court in **Livings v. Davis, 465** So.2d 507 (Fla.1985). Raffield's reliance on the **Southeastern Fisheries** is futile, since that case rests upon Florida Third District Court decisions that were quashed or disapproved by this Court.

In **State** v. **Millington,** 377 So.2d 685 (Fla.1979), the defendant attacked §370.15(2)(a), Fla.Stat., making it unlawful to catch, kill, or destroy shrimp or prawn within or without waters of the State, and making it unlawful to possess a catch including more than five per cent of "small" shrimp as defined in the statute. Like Raffield, the defendant in **Millington** was charged with illegal possession of saltwater fish caught in federal waters. He challenged the constitutionality of the statute, alleging that by prohibiting such possession regardless of whether the shrimp were caught within or without Florida waters, the statute impermissibly burdened interstate commerce. This Court rejected that argument, citing **Bayside Fish Flour Co., supra,** for the proposition that if a statute having a reasonable purpose and uniform application also incidentally affects

interstate commerce, the statute does not violate the Commerce Clause. See also, **National Fishermen Producers Co-operative Society, Ltd. of Belize City v. State,** 503 So.2d 430 (Fla.3rd DCA 1987) (Florida minimum lobster tail size and closed season, as established by §370.14, Fla.Stat., do not violate the Commerce Clause).

Here, §370.08(3), also extending to "within and without" state waters, conserves saltwater food fish by prohibiting possession of unlawfully caught fish. Otherwise, law enforcement would be frustrated, by being limited only to those instances when catching redfish with purse seines was observed.

When a statute regulates evenhandedly to effect a legitimate local interest, it should be upheld unless the burden imposed on commerce is clearly excessive. **Baltimore Gas and Electric Co. v. Heintz,** supra. Moreover, unless a statute facially discriminates against interstate commerce, a balancing test is appropriate and a court will not fault a state's selection among non-discriminatory alternatives. **Id.** 750 F.2d at 1427. Florida has chosen a gear-use restriction and a possession ban as its non-discriminatory alternatives.

The Commerce Clause is barely implicated by a statute of this nature. Any effect upon interstate commnerce is purely incidental to §370.08(3)'s legitimate purpose. The law does not violate the Commerce Clause.

CONCLUSION

Section 370.08(3), Fla.Stat., does not violate Raffield's rights to equal protection or due process. t is not preempted by the Magnuson Act, and does not impermissibly burden interstate commerce. Therefore, the First District's opinion was correct in all respects and must be affirmed.

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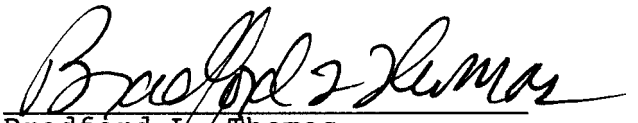
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been forwarded to Ken Oertel, by hand-delivery, Post Office Box 6507, Tallahassee, FL 32314-6507, this 5th day of May 1988.



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