No.

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Maritime Commission, an independent regulatory agency, administers the Shipping Act of 1984. Section 11(a) of the Act provides that "[a]ny person may file with the Commission a sworn complaint alleging a violation of this Act * * * and may seek reparation for any injury caused to the complainant by that violation." The question presented is:

Whether Congress may by statute authorize the Federal Maritime Commission to adjudicate complaints filed by private persons against state-run ports, or whether the statutory provision permitting the adjudication of such complaints is barred by the Eleventh Amendment to the United States Constitution.

LIST OF PARTIES TO THE PROCEEDING

The South Carolina State Ports Authority appeared before the United States Court of Appeals for the Fourth Circuit as the petitioner. The Federal Maritime Commission, and the United States of America, appeared before the court of appeals as respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Federal Maritime Commission respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit in *South Carolina State Ports Authority v. Federal Maritime Commission and United States of America*, No. 00-1481 (March 12, 2001).

OPINIONS BELOW

The opinion of the court of appeals is reported at 243 F.3d 165 and is reproduced as Appendix A in the separately bound appendix to this Petition ("Pet. App.") at 1a-25a. The opinion of the Federal Maritime Commission is unofficially reported at 28 Shipping Reg. (P & F) 1385 and is reproduced as Appendix B at Pet. App. 27a-38a. The opinion of the administrative law judge is unofficially reported at 28 Shipping Reg. (P & F) 1307 and is reproduced as Appendix C at Pet. App. 39a-62a.

JURISDICTION

The court of appeals entered its judgment on March 12, 2001. On May 21, 2001, Chief Justice Rehnquist extended the time for filing this petition to and including July 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a) and 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Section 11(a) of the Shipping Act of 1984, 46 U.S.C. app. 1710(a), provides: "Any person may file with the [Federal Maritime] Commission a sworn complaint alleging a violation of this Act * * * and may seek reparation for any injury caused to the complainant by that violation." Other relevant portions of the Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.*, are reproduced as Appendix D at Pet. App. 63a.

STATEMENT

This case involves the issue of whether the Eleventh Amendment to the United States Constitution prevents Congress from authorizing the Federal Maritime Commission ("Commission") to conduct administrative adjudications initiated by private persons against state-run ports. South Carolina Maritime Services, Inc. ("Maritime Services"), a South Carolina corporation that operates cruise ships, filed a complaint with the Commission, alleging that the South Carolina State Ports Authority ("SCSPA") had violated certain provisions of the Shipping Act of 1984 ("1984 Act"). The administrative law judge assigned by the Commission to hear the proceeding dismissed the complaint on the ground that SCSPA is an arm of the State of South Carolina and thus immune from adjudications under the Eleventh Amendment and the doctrine of state sovereign immunity from suit. The Commission, on its own motion, overruled that decision and held that sovereign immunity from suit does not apply to administrative adjudications before the agency. SCSPA then filed a petition for review with the United States Court of Appeals for the Fourth Circuit, invoking the court's jurisdiction under the Hobbs Act, 28 U.S.C. 2341 *et seq*. The court of appeals reversed the Commission's decision, finding that "under its Article I powers, Congress cannot authorize private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions." Pet. App. 25a.

A. Maritime Regulation

In order to bring the question presented into proper focus, a brief review of the origin of the statutory provisions at issue is necessary. The Shipping Act, 1916 ("1916 Act"), 39 Stat. 728, established federal regulation of ocean vessel common carriers, conferences of such common carriers, marine terminal operators, and other maritime businesses. Marine terminal operators, including state-run ports, were included in this regulatory scheme because the 1916 Act's original sponsors believed that effective regulation required oversight not only of vessel operators, but also of the port facilities they utilized. 53 Cong. Rec. 8276 (1916). The 1916 Act granted limited antitrust immunity to price-fixing activities, and created a regulatory program that sought to eliminate anticompetitive abuses. Congress reasoned that shielding conference activity from antitrust attack would enable shippers to enjoy the benefits of more frequent and regular sailings, greater rate stability, and enhanced capital investment in new vessels. The industry would thereby be spared the economic injury inherent in a boom-to-bust cycle. The 1916 Act was based in large part on the Interstate Commerce Act ("ICA"), 24 Stat. 379 (1887). See, *e.g.*, *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 481 (1932) ("In its general scope and purpose, as well as in its terms, [the 1916 Act] closely parallels the Interstate Commerce Act"). Section 22 of the 1916 Act established a right to file complaints with the agency alleging violations of the statute, and gave complainants the right to seek monetary reparation for actual injuries. 39 Stat. 728, 736. This is similar to section 13 of the ICA. 24 Stat. 379, 383-384.

The 1984 Act replaced the 1916 Act in most respects, and was modeled after the 1916 Act in large part.[1] Pub. L.

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[1] One key difference between the two statutes is that the 1916 Act governed regulation of both domestic and international oceanborne maritime commerce, whereas the 1984 Act solely governs international commerce, except for the statute's coverage of marine terminal operators like SCSPA,

(Continued . . .)

98-237, 98 Stat. 67, 46 U.S.C. app. 1701 *et seq.* Like section 22 of the 1916 Act before it, section 11(a) of the 1984 Act permits any person to file a complaint alleging a violation of the Act and to seek monetary reparation. Such a complaint may be filed against any of the maritime businesses regulated by the statute, including state-run marine terminal operators like SCSPA. The Commission adjudicates complaints by first holding administrative hearings, and then issuing a written report "stating its conclusions, decisions, findings of fact, and order." 46 U.S.C. app. 1710(f). Ordinarily, the agency assigns an administrative law judge to conduct complaint proceedings in the first instance, with the Commission itself hearing appeals from the judge's rulings; the Commission may also on its own motion review the judge's determinations.

The Commission was established in 1961 as an independent Executive Branch agency responsible for administering the 1916 Act, and presently regulates the foreign oceanborne commerce of the United States under the 1984 Act. Reorganization Plan No. 7 of 1961, 75 Stat. 840. Prior to 1961, the 1916 Act was administered by a succession of agencies similar in design to the Commission.

B. The Eleventh Amendment and State Sovereign Immunity From Suit

The scope of application of the Eleventh Amendment to the Constitution, and the related doctrine of state sovereign immunity from suit, is at issue in this case. The Eleventh Amendment provides that "[t]he Judicial power of the United

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(. . . continued)

over which the 1984 Act confers authority to regulate both domestic off-shore and international commerce. 46 U.S.C. app. 1702(14). It is also worth noting that the remainder of the 1916 Act not replaced by the passage of the 1984 Act was abolished by the Interstate Commerce Commission Termination Act, Pub. L. 104-885, 109 Stat. 8033 (1995).

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The text of the Amendment forbids a citizen of one state from suing another state in federal court without that state's consent. In *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court found that state sovereign immunity is more expansive than the linguistic boundaries of the Eleventh Amendment, and forbade a suit in federal court against a state by a citizen of that same state.

The Court has addressed the issue of state sovereign immunity from suit in several recent cases. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court ruled that Congress lacks the authority to abrogate a state's sovereign immunity from suit in federal court under the Indian Gaming Regulatory Act. The Court limited its inquiry in *Seminole Tribe* to whether Congress could "expand the jurisdiction of the federal courts beyond the bounds of Article III" of the Constitution. *Id.* at 65. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court found that Congress may not abrogate state sovereign immunity from suit in a state's own courts under the Fair Labor Standards Act. The Court recognized that state sovereign immunity arises from the "system of federalism," and not exclusively from the text of the Eleventh Amendment; it described such immunity in terms relating to the possibility of "suit * * * prosecuted in state or federal court." *Id.* at 745.

C. Proceedings Before the Federal Maritime Commission

1. Maritime Services' administrative complaint before the Commission

Maritime Services filed a complaint with the Commission alleging that SCSPA had violated the 1984 Act by refusing to allow Maritime Services' cruise ship, the M/V TROPIC SEA, to berth at SCSPA's facilities in Charleston, South Carolina.

Maritime Services intended to offer cruises to nowhere, and cruises to the Bahamas. Gambling would be allowed on these cruises.

Maritime Services' complaint was based on an allegation of disparate treatment - it asserted that SCSPA *had* permitted another cruise ship operator to offer gambling cruises from Charleston. Maritime Services averred that by letting one operator offer gambling cruises, but forbidding Maritime Services from offering such cruises, SCSPA had violated section 10(b)(10) of the 1984 Act, which prohibits marine terminal operators from "unreasonably refus[ing] to deal or negotiate," and section 10(d)(4) of the 1984 Act, which forbids marine terminal operators from giving "any undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person." Pet. App. 63a. Maritime Services asked the Commission to seek a temporary restraining order and preliminary injunction in district court against SCSPA; to award reparations, interest, and attorneys' fees to Maritime Services; to order SCSPA to cease and desist from violating the 1984 Act; and to award any other just and proper relief.

Pursuant to Commission regulations, 46 C.F.R. 502.146(a) (1999), Maritime Services' complaint was assigned to an agency administrative law judge. SCSPA filed a motion to dismiss with the judge, arguing that as an arm of the State of South Carolina, it enjoys sovereign immunity from complaint proceedings before the Commission. On January 5, 2000, the administrative law judge granted SCSPA's request and dismissed the complaint. Pet. App. 39a-62a. The Commission determined on its own motion to review the judge's conclusions.

2. The Commission's decision: the Eleventh Amendment does not apply to administrative adjudications held under the Shipping Act of 1984

On March 23, 2000, the Commission issued an order overruling the administrative law judge and holding that the doc-

trine of state sovereign immunity does not preclude administrative proceedings initiated by private complainants against state-run ports. Pet. App. 27a-38a. The Commission, reviewing Supreme Court precedent, observed that state sovereign immunity from suit has always been applied to lawsuits before courts, not to administrative adjudications before Executive Branch agencies. The Commission ruled that:

> The doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission. There is no compelling reason offered by either the [administrative law judge] or SCSPA to extend the reach of the Supreme Court's holdings in *Seminole Tribe* and *Alden*, and thereby nullify the Commission's jurisdiction over state ports, which jurisdiction has been in place for decades. The Shipping Act of 1984, and the Shipping Act, 1916 before it, illustrate Congress's decision that the regulation of ports, whether publicly or privately owned, is essential to protecting the nation's oceanborne commerce. Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities.

Pet. App. 33a (footnote omitted). The Commission thus held that Maritime Services' complaint proceeding against SCSPA could go forward.

D. Proceedings Before the Court of Appeals

After the Commission issued its decision, SCSPA filed a petition for review with the court of appeals. The proceeding before the agency was held in abeyance pending the outcome of the petition for review. The Commission and the United

States of America appeared as respondents before the court, each filing a brief and participating separately at the oral argument.

On March 12, 2001, the court of appeals issued its opinion and judgment, in which it overruled the Commission's conclusion that state sovereign immunity does not apply to administrative adjudications. The court found that:

> any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after ratification of the Eleventh Amendment. Such an adjudication is equally as invalid today, whether the forum be a state court, a federal court, or a federal administrative agency.

Pet. App. 13a.

The court of appeals rejected the Commission's argument that the agency is not a court exercising the judicial power of the United States, finding the issue "irrelevant to the disposition of this case." Pet. App. 11a. Addressing the Commission's contention that administrative proceedings are not "suit[s] in law or equity" within the scope of the Eleventh Amendment, the court found that an administrative adjudication's "placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication" to which the Eleventh Amendment should apply. Pet. App. 15a. The court of appeals also declined to accept the Commission's argument that state sovereign immunity would not have attached to the regulation of maritime commerce, a subject of historic federal interest fundamental to the genesis of the Constitution. Pet. App. 22a-23a.

REASONS FOR GRANTING THE WRIT

The court of appeals held unconstitutional the provision of the Shipping Act of 1984 enabling private persons to file complaints against state-run ports. Given the significance of a

judicial holding invalidating an Act of Congress, this Court should review the court of appeals' determination that "under its Article I powers, Congress cannot authorize private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions." Pet. App. 25a. It is essential that the Court provide guidance on the existence and extent of state sovereign immunity in the federal administrative setting. Because the scope of sovereign immunity from suit is the only issue in this case, the Court is presented with a considerable opportunity to address the question in a factually straightforward proceeding free from other potentially controlling issues. The case assumes further significance because the extraordinary federal interest in the effective and uniform regulation of maritime commerce will be severely affected by the court of appeals' decision. A final basis for review is that the court of appeals' opinion creates a conflict in principle among the circuits on the application of sovereign immunity from suit to administrative adjudications.

I. The Court of Appeals Held a Federal Statutory Provision Unconstitutional

The court of appeals' decision holds unconstitutional a provision of the 1984 Act. See *United States v. Gainey*, 380 U.S. 63, 65 (1965) (the Court may grant certiorari "to review the exercise of the grave power of annulling an Act of Congress"). Ruling that state sovereign immunity from suit applies before "federal agencies and commissions," Pet. App. 25a, the court of appeals determined that private persons may not file administrative complaints against unconsenting states with the Commission under section 11(a) of the 1984 Act. By reaching this conclusion, the court construed a significant constitutional principle in a novel manner and applied it to a branch of the federal government to which it has never before applied.

This is important for a number of reasons. First, the scope of the Eleventh Amendment and the doctrine of state sovereign immunity is an issue of national significance. As

interpreted by the court of appeals, the Eleventh Amendment would invalidate any Congressional determination to vest in administrative agencies the capacity to adjudicate disputes initiated by private persons against unconsenting states. This Court granted certiorari in *Alden* "in light of the importance" of a decision by the Maine Supreme Judicial Court that "call[ed] into question the constitutionality of the provisions of the [Fair Labor Standards Act] purporting to authorize private actions against States in their own courts." 527 U.S. at 712. The constitutionality of the private complaint provisions of the 1984 Act have similarly been called into question by the court of appeals.

Moreover, the court of appeals' decision would immunize state-run ports from a type of regulation to which Congress thought they should be subject. 53 Cong. Rec. 8276 (1916).[2] This Court has held that the states are subject to Commission regulation. *California v. United States*, 320 U.S. 577, 585-6 (1944). By granting the states immunity from certain Commission proceedings, the court of appeals' decision affects the relationship between the states and a federal agency.

In terms of immediate application, the court of appeals' decision will prevent the Commission from administering the 1984 Act as the statute is designed, because the agency will be precluded from regulating state-run ports through the use of privately-initiated administrative adjudications. In its order in this proceeding, the Commission noted that such reg-

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[2] Congress' objective of ensuring that competitive economic principles apply to maritime commerce would be thwarted by the court of appeals' decision. State-run ports compete against one another, and against non-state entities, for business. See, *e.g.*, *South Carolina State Ports Auth. v. Georgia Ports Auth.*, 49 Fed. Reg. 7657 (Thursday, March 1, 1984) (SCSPA filed a complaint with the Commission against the Georgia Ports Authority, alleging that the latter violated the Shipping Act, 1916 by using an inaccurate consulting firm report to solicit steamship lines and to divert cargo from Charleston, S.C. to Savannah, Georgia). Immunity from some forms of Commission regulation would give state-run ports a competitive advantage over other maritime businesses.

ulatory authority is crucial: "Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." Pet. App. 33a. The Commission will lose an important component of its regulatory authority under the court of appeals' interpretation of the scope of state sovereign immunity from suit.[3]

The court of appeals invalidated a federal statutory provision of nationwide applicability and significance, in a manner that affects the relationship between a federal agency and the states. This is precisely the type of dispute that requires this Court's review and guidance, and the Court should therefore grant certiorari.

II. There Are Fundamental Differences Between a Lawsuit Before a Court and an Administrative Adjudication Before an Agency

In applying state sovereign immunity to the administrative setting, the court of appeals relied on *Seminole Tribe* and *Alden* to guide its analysis. Pet. App. 4a. Reviewing those cases, the court concluded that "embedded in the structure of the Constitution is the principle that a private party may not file a complaint against an unconsenting state." Pet. App. 9a. The court then analyzed the rationale presented in the Commission's decision, which held that this principle applies to lawsuits before courts, not to administrative adjudications before the agency. A description of the Commission's arguments in defense of its decision, and the court's stated grounds for rejecting those arguments, will illustrate not only the importance of the question presently before this Court,

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[3] In *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947), this Court found that the determination whether to regulate through adjudication or rulemaking properly belongs to the agency. By creating a separate category of marine terminal operators not subject to one type of Commission regulation, the court of appeals' judgment infringes upon the agency's discretion to determine the form its regulatory action should take.

but additionally the significant differences between this case, and *Seminole Tribe* and *Alden.*

A. The Federal Maritime Commission is not a court and cannot exercise "[t]he Judicial power of the United States"

In defense of its decision, the Commission argued to the court of appeals that the agency is not a court and does not exercise the judicial power of the United States. The Eleventh Amendment forbids attempts to apply "[t]he Judicial power of the United States" to a suit against an unconsenting state. U.S. Const. amend. XI. Absent an exercise of this power, the Eleventh Amendment and state sovereign immunity would seem to be inapplicable. Furthermore, this Court in *Alden* applied sovereign immunity to proceedings before state courts, which are judicial bodies exercising judicial power. 527 U.S. at 749. Absent an exercise of judicial power, the analysis in *Alden* would also seem inapplicable.

In contending that it does not exercise judicial power, the Commission relied on this Court's decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), which held that only agencies with an "exclusively judicial role" are capable of exercising the judicial power of the United States. 501 U.S. at 892. The Commission's administrative tasks under the 1984 Act are numerous and diverse, and the agency does not have an exclusively judicial role, as the court of appeals recognized. Pet. App. 11a ("the FMC also exercises executive, legislative, and administrative responsibilities"). Nor does the Commission have traditional judicial powers: it cannot punish contempt, but must seek court action for that. 46 U.S.C. app. 1713(c) (upon a party's failure to comply with a Commission subpoena, the Attorney General may seek enforcement of the subpoena in district court); see also 46 U.S.C. app. 1712(e) (upon a party's failure to pay a civil penalty assessed by the Commission, the Attorney General may seek recovery in district court). The Commission's adju-

dicatory findings are reviewed as administrative agency decisions, not as court rulings. See *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (standards for review of an agency's statutory interpretations). Under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, the Commission is a party to proceedings to review its orders in the courts of appeals, confirming the agency's interest in the interpretation and enforcement of the statutes it administers. Furthermore, unlike an exclusively judicial body, the Commission has program interests which would be harmed by a finding of sovereign immunity, inasmuch as the agency would be precluded from using adjudication as a means of implementing its policies. Under this Court's decision in *Freytag*, the Commission plainly does not exercise the judicial power of the United States. This is not to say that the Commission does not adjudicate, but rather, that such adjudication is not judicial. In a concurring opinion in *Freytag*, Justice Scalia observed:

> It is no doubt true that all such [administrative] bodies "adjudicate," *i.e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing "inherently judicial" about "adjudication." To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of judicial power, as we recognized almost a century and a half ago.

501 U.S. at 909 (Scalia, J., concurring in part and concurring in the judgment).

While acknowledging this Court's holding in *Freytag*, the court of appeals nevertheless ruled that whether or not the Commission exercises judicial power "is irrelevant to the disposition of this case." Pet. App. 11a. The court recognized that under *Freytag*, some "Article I tribunals may exercise the judicial power of the United States," and for this reason "it would seem anomalous to limit state sovereign immunity strictly to an Article III proceeding." Pet. App. 11a. However, even if certain Article I tribunals exercise the judicial power

(and some, like the Tax Court, do exercise this power), the Commission is unquestionably not such a tribunal.

This Court has never applied the doctrine of state sovereign immunity from suit to a federal tribunal without taking into account the language of the Eleventh Amendment, which specifically addresses "[t]he Judicial power." Moreover, this Court's holding in *Alden* examined proceedings before state courts, which apply the judicial power of their respective states; *Alden* did not involve an administrative agency.[4] In this case, the court of appeals refused to analyze whether state sovereign immunity from suit can apply to a body that does not exercise judicial power, instead finding such an inquiry "irrelevant." Pet. App. 11a.

B. An administrative adjudication before the Federal Maritime Commission is not a lawsuit

The Commission also argued to the court of appeals that administrative adjudications before the agency are not lawsuits. The Eleventh Amendment addresses "suit[s] in law and equity," and this Court in *Alden* was concerned with suits prosecuted in state or federal court. 527 U.S. 706, 745 (1999). Examining the Commission's reasoning that a privately-initiated complaint proceeding before the agency constitutes a form of regulation, not a lawsuit, the court of appeals focused on the role of the administrative law judge in an agency proceeding. Pet. App. 15a-17a. Relying on *Butz v. Economou*, 438 U.S. 478 (1978), which extended judicial immunity to administrative law judges, the court of appeals ruled that because an agency adjudication contains many of the same procedural safeguards as a court suit, it is functionally interchangeable

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[4] Thus, the Court's holding in *Alden* that sovereign immunity from suit applies "regardless of the forum" in which a complaint against an unconsenting state is filed, 527 U.S. at 749, does not also signify that the immunity is applicable regardless of the type of power exercised by a given forum. *Alden* assumed that a claim of sovereign immunity would be raised in a forum exercising judicial power.

with such a suit for sovereign immunity purposes. Pet. App. 15a-16a.

However, an administrative proceeding before the Commission is not a suit, despite the fact that such an adjudication employs procedures akin to those used in the district courts. "[A] proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions * * * is purely administrative in its character, and cannot, in any just sense, be called a suit." *Upshur County v. Rich*, 135 U.S. 467, 477 (1890).

Section 11(a) of the 1984 Act provides that any person may file a complaint "alleging a violation of this Act." 46 U.S.C. app. 1710(a). The complaint must be based upon the alleged commission of an act prohibited by statutory command, not on the vindication of a private right, and such a complaint invokes the Commission's executive power to enforce the law. Section 11(b), 46 U.S.C. app. 1710(b), states that a party against which a complaint is filed must either "satisfy the complaint or answer it in writing." Section 11(b) then mandates that "if the complaint is not satisfied [*i.e.*, not settled by the parties], the Commission shall investigate it in an appropriate manner and make an appropriate order." The Commission investigates the allegations in a complaint by holding hearings and issuing an order.

The Commission's order is not fungible with a court decision. It is a regulatory determination. The agency's findings and remedial orders carry out Congress' statutory objectives in regulating the nation's oceanborne foreign commerce. Such findings are not merely an *application* of the 1984 Act to a set of facts - they are a significant component of the Commission's obligation to *administer* the statute. In applying sovereign immunity from suit to proceedings before the Commission, the court of appeals declined to recognize the differences in both structure and purpose between a suit before a court and an administrative adjudication before an agency.

C. Authority over maritime commerce is a unique federal interest

The Commission further argued to the court of appeals that maritime regulation is an area of federal interest regarding which the Founders would have held sovereign immunity inapplicable. In *United States v. Locke*, 529 U.S. 89, 99 (2000), this Court recognized that maritime commerce is a field in which "the federal interest has been manifest since the beginning of our Republic and is now well established." Indeed, appreciation of the fundamental significance of maritime trade, and the role ports play in that trade, is long-standing. "The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest. These [t]erminals stand athwart the path of trade." *American Export-Isbrandtsen Line, Inc. v. Federal Maritime Comm'n*, 444 F.2d 824 (D.C. Cir. 1970).

This Court ruled in *Alden* that "the contours of sovereign immunity are determined by the Founders' understanding." 527 U.S. at 734. The Founders' understanding as to maritime commerce is thus relevant in deciding whether sovereign immunity applies to proceedings before the Commission. Addressing interstate maritime navigation in *Locke*, the Court held that the federal government must be free to regulate "without embarrassment from intervention of the separate States" and that this "was cited in the Federalist Papers as one of the reasons for adopting the Constitution." 529 U.S. at 99. The Commission argued to the court of appeals that it is essential to consider that the Founders' views on maritime commerce must pertain to the scope of state sovereign immunity from suit, where the "suit" in question is in fact an administrative adjudication used to effect maritime regulation.

The court of appeals rejected the Commission's argument, concluding that this Court's opinion in *Seminole Tribe* "made clear that a strong federal interest in a particular subject matter cannot determine the application of sovereign immunity to a lawsuit." Pet. App. 22a. However, *Seminole Tribe* addressed

"the judicial power under Article III," and held that "Article I cannot be used to circumvent the constitutional limitations placed upon" such Article III jurisdiction. 517 U.S. at 72-73. As explained above, the Commission *cannot* exercise the judicial power, as this Court made clear in *Freytag*. Citation to *Seminole Tribe* merely raises the question whether the principles that apply to Article III court proceedings also apply to administrative adjudications.[5] It may be further noted that *Seminole Tribe* did not involve maritime commerce.

The Commission's concern with ensuring continued observation of the federal interest in maritime regulation reflects the immediate consequences the court of appeals' decision could unleash. If some ports become immune from privately-initiated complaint proceedings, this will undermine the Commission's ability to regulate ports uniformly throughout the United States. In *United States v. American Union Transp., Inc.*, 327 U.S. 437, 443 (1946), the Court, addressing the 1916 Act, recognized that it is critical not to "divide persons 'furnishing wharfage, dock, warehouse, or other terminal facilities' into regulated and unregulated groups." Yet this is the practical result of the court of appeals' decision. Because some ports are arms of their respective states, while others are municipal corporations or private marine terminal operators, the Commission's regulation by administrative adjudication would apply unevenly if state sovereign immunity from suit were applicable to the agency's proceedings. The Commission explained that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." Pet. App. 33a. The Commission's administration of the 1984 Act will be greatly, and adversely, affected if the court of appeals' decision stands. See *United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (the Court

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[5] It has generally been thought that the principles applicable to Article III court proceedings do not apply to administrative adjudications. See, *e.g.*, *National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n*, 59 F.3d 1281, 1289 (D.C. Cir. 1995) ("Article III does not apply to an agency adjudication").

may grant certiorari to review matters important to the effective administration of a federal statute).

This Court should grant the Commission's petition in order to review the court of appeals' holding that non-judicial tribunals established by Congress to hear administrative complaints are barred by the Eleventh Amendment from adjudicating cases initiated by private persons against state entities. The particular federal interest in maritime commerce and its importance in the origin of the Constitution further support granting the writ.

III. The Court of Appeals' Application of State Sovereign Immunity From Suit to Administrative Adjudications Conflicts With the Opinions of the Sixth, Eighth, and Ninth Circuits

While the importance of this issue is reason enough to grant the writ, there is a conflict in principle between the circuits as well. The existence of a conflict in principle is particularly important in the context of a nationwide regulatory scheme like the 1984 Act, where opposing views in the courts of appeals could lead to differing levels of regulation based solely upon the geographic location of the parties involved. This is ordinarily considered detrimental to any nationwide regulatory scheme; it should be of even greater concern when, as here, it involves international trade, and interferes with "a uniformity of regulation for maritime commerce." *Locke*, 529 U.S. at 108.

A. The courts of appeals are now in conflict

In *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998), the Ninth Circuit addressed the issue of the applicability of sovereign immunity to the administrative setting. The statute at issue in *Premo*, the Randolph-Sheppard Vending Stand Act, created a cooperative program providing employment opportunities to blind persons, and required states participating in the program to submit to the adjudication of disputes through arbitration panels convened by

the Secretary of Education. Any award granted by such a panel "is reviewed as agency action under the standards set forth in the Administrative Procedure Act." 119 F.3d at 768. Examining the State of California's contention that proceedings before administrative tribunals are barred by the Eleventh Amendment, the Ninth Circuit ruled that sovereign immunity does not apply to arbitration panels because the doctrine applies only to entities exercising the judicial power of the United States. 119 F.3d at 769.[6] The court thus found California's claim of immunity "wholly unsupported." *Id.* The Ninth Circuit also observed that the Eleventh Amendment "does not purport to affect proceedings in tribunals established by statute." *Id.* The Commission, it should be noted, was established by statute, 75 Stat. 840, for the purpose of administering several maritime statutes, now including the 1984 Act. It is also significant that *Premo* was decided subsequent to this Court's opinion in *Seminole Tribe*; the Ninth Circuit's decision thereby indicates an understanding that *Seminole Tribe* applies to Article III federal courts, not to administrative agencies.

The Sixth Circuit addressed the scope of state sovereign immunity from suit in a similar case under the Vending Stand Act involving the State of Tennessee, and held that "the Eleventh Amendment does not bar an Article I body from awarding retroactive damages against a state." *Tennessee Dep't of Human Serv. v. United States Dep't of Education*, 979 F.2d 1162, 1168 (6th Cir. 1992). The Sixth Circuit found that state sovereign immunity from suit applies only to judicial bodies, not to administrative tribunals. The court observed that Ten-

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[6] The Vending Stand Act also provided a mechanism for enforcement of agency awards in federal district court. The Ninth Circuit found that the State of California had waived its immunity from such enforcement proceedings by voluntarily participating in the cooperative program. However, the court's determination that the Eleventh Amendment does not apply to administrative adjudications was not premised on the state's purported waiver of its immunity, but instead was grounded on a conclusion that sovereign immunity from suit applies only to tribunals that exercise judicial power. 119 F.3d at 769.

nessee's argument that the immunity applies "to executive branch adjudicatory bodies, is unsupported by any authority and runs counter to the interpretation consistently given the [Eleventh] amendment by the Supreme Court." 979 F.2d at 1166.

Similarly, the Eighth Circuit in *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981), declined to apply sovereign immunity in the administrative setting. While not specifically addressing agency adjudications like those heard by the Commission, but instead considering a Department of Labor investigation prompted by a private complaint against an arm of the State of Missouri, the Eighth Circuit nevertheless broadly held that "[t]he eleventh amendment bars *judicial* action, not action by Congress or the Executive Branch." 629 F.2d at 567 (original emphasis).

These three cases demonstrate that the Sixth, Eighth, and Ninth Circuits have declined to apply the Eleventh Amendment and the doctrine of state sovereign immunity to administrative bodies that do not exercise judicial power.[7] While these cases do not involve the 1984 Act, they all construe the Eleventh Amendment in relation to non-judicial administrative tribunals like the Commission.[8] The court of appeals in the present proceeding found that the doctrine of state sovereign immunity

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[7] In *Delaware Dep't of Health & Social Services v. United States Dep't of Education*, 772 F.2d 1123, 1138 (3rd Cir. 1985), the Third Circuit rejected, in *dicta*, the notion that the Eleventh Amendment has "any possible application to proceedings before" administrative panels.

[8] Although the decisions from the Sixth and Eighth Circuits pre-date this Court's ruling in *Seminole Tribe*, it is important to observe that *Seminole Tribe* addressed Congress' ability to vest in the Judicial Branch of the federal government the authority to hear private lawsuits against states. 517 U.S. at 72-73. The case did not involve Congress' authority to permit the Executive Branch to regulate certain state activities through the use of privately-initiated administrative adjudications. It is therefore doubtful whether *Seminole Tribe* would have had any effect on the decisions of the Sixth and Eighth Circuits, both of which recognize a clear distinction between Judicial Branch authority and Executive Branch power.

from suit does apply to "the adjudicative apparatus of federal agencies and commissions." Pet. App. 25a. This holding clearly conflicts with the above-described cases from the Sixth, Eighth, and Ninth Circuits.

We are aware of only one other case from a court of appeals in which sovereign immunity was discussed as having possible application to an administrative adjudication. That case is *Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994), where the Tenth Circuit addressed an appeal from an administrative hearing in a discrimination complaint against a state-run health center in which the sovereign immunity issue had been raised by the parties but had not been ruled upon by the Executive Office for Immigration Review's administrative law judge. Reliance on *Hensel* as precedent for finding sovereign immunity applicable to administrative proceedings is not compelling, because the Tenth Circuit assumed, with no discussion, that the administrative proceeding under the Immigration Reform and Control Act ("IRCA") was actually a lawsuit. The court used "suit" and "court" language despite the fact that the proceeding was held before an administrative law judge. *Hensel*, 38 F.3d at 508 (examining whether the IRCA "intended to subject the state to suit in federal court"). Thus, the existence of a conflict in principle as to the application of state sovereign immunity to non-judicial administrative tribunals may be demonstrated without reliance on the Tenth Circuit's ruling in *Hensel*.

B. *Alden v. Maine* should have no effect on the conflict in principle between the circuits

It might be argued that no circuit split exists because the above-described cases were decided before *Alden*. But this Court in *Alden* held that the doctrine of state sovereign immunity extends beyond the walls of Article III, not beyond the walls of a courtroom. In finding states immune from suit in their own courts, the Court based its reasoning on the fact that states had historically enjoyed immunity from such suits, and ruled

that the Constitution did not require them to surrender this immunity. 527 U.S. at 731. The Court in *Alden* made no reference to administrative adjudications, but instead applied sovereign immunity to a judicial body, albeit a judicial body not specifically mentioned in the Eleventh Amendment. 527 U.S. at 754. This simply does not address the application of sovereign immunity to an administrative agency like the Commission. The cases from the Sixth, Eighth, and Ninth Circuits should not be seen as having been overruled by *Alden*, and the Court should grant certiorari to resolve this important conflict.[9]

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.[10]

Respectfully submitted.

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[9] Furthermore, though it is difficult to see *Alden* as applying on its terms to this question because it addressed state courts and made no mention of administrative tribunals, the uncertainty around the issue would alone be reason to grant the petition for certiorari. See, *e.g.*, *Securities and Exchange Comm'n v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967) (the Court may grant certiorari to clarify the implications of a previous decision).

[10] This petition is filed pursuant to the Commission's independent litigation authority, 28 U.S.C. 2350(a). Additionally, by letter dated July 5, 2001, the Solicitor General authorized the Commission to file a petition for writ of certiorari on its own behalf in this case.