

# 09-1594-cv

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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THE STATE OF NEW YORK, ALEXANDER B. GRANNIS,  
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,  
*Plaintiffs,*

UNITED BOATMEN OF NEW YORK, INC., NEW YORK FISHING TACKLE  
TRADE ASSOCIATION, INC., FISHERMEN'S CONSERVATION ASSOCIATION,  
*Intervenor-Plaintiff-Appellees,*  
—against—

ATLANTIC STATES MARINE FISHERIES COMMISSION,  
*Defendant-Appellant,*

GARY LOCKE, THE UNITED STATES DEPARTMENT OF COMMERCE,  
CONRAD C. LAUTENBACHER, THE NATIONAL OCEANIC AND  
ATMOSPHERIC ADMINISTRATION, JAMES W. BALSIGER,  
*Defendants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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## REPLY BRIEF FOR DEFENDANT-APPELLANT

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## INTRODUCTION

In its opening brief, the Atlantic States Marine Fisheries Commission (ASMFC or Commission) demonstrated that Congress did not provide for a private federal right of review of the Commission's fishery management decisions; that settled law insists that any such right of action be created by Congress; that, contrary to the "quasi-federal agency" theory adopted by the district court, the Administrative Procedure Act (APA) may not be applied on an ad hoc basis to an interstate entity, which does not fall within the Act's express definition of "agency" as "authorit[ies] of the Government of the United States." 5 U.S.C. §§ 551(1), 701(b)(1). We explained, as well, that principles of federalism likewise prevent a court from recognizing such a right of action without a showing of clear congressional intent.

In their responsive brief, Appellees United Boatmen of New York, *et al.* (United Boatmen) present an array of alternative arguments for the claimed private right of action. They embrace the district court's "quasi-federal agency" rationale (Br. 22-40); then argue that the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101, *et seq.* (ACFCMA), "transformed" the Commission into a federal regulatory agency that, contrary to the conclusion of the court below, fits within the APA's "agency" definition (Br. 41-49); then maintain that the "presumption of

reviewability” applied in APA cases should govern here (Br. 53-58), and that the presumption operates to turn Supreme Court precedent insisting upon a clear statutory evidence that Congress intended to create a right of action into “irrelevant doctrine” (Br. 61) in this case. (Br. 59-62).

None of these arguments, however, has merit. The United Boatmen acknowledge “[t]he lack of an explicit review provision in ACFMCA or the Compact” (Br. 52), authorizing private parties to obtain judicial review of ASMFC decisions. They advance elaborate arguments why that “lack” should not matter, but in fact it does: A court “cannot ordinarily conclude that Congress intended to create a right of action when none was explicitly provided.” *Belikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116-17 (2d Cir. 2007) (citing *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001)).

The United Boatmen’s arguments all depend upon persuading the Court that that principle does not apply in this case. Their brief positively brims with arguments of “policy” and “compatib[ility] with the statute” of precisely the sort that, *Sandoval* specifically admonishes, do *not* support recognition of a right of action. *See* 532 U.S. at 536. And the “quasi-federal agency” theory – as construed by the court below to authorize APA review of the actions of an interstate entity that (as the court acknowledged) does not fit within the APA’s explicit definition of “agency” – is plainly

incompatible with settled precedent holding that the task of creating rights of action is for Congress, and contrary to rudimentary rules of statutory construction requiring adherence to explicit statutory definitions.

The gravamen of the United Boatmen’s argument is that a federal right of action has been created against a state entity – despite the conceded absence of any specific indication from Congress to that effect – because of factors such as the presence of a federal statutory “overlay” (Br. 20, 41), federal funding, and federal interests in the relevant subject-matter. Because all of these forms of federal involvement with state entities are extremely widespread, their position would not only disregard the principle that “private rights of action to enforce federal law must be created by Congress.” *George v. NYC Department of City Planning*, 436 F.3d 102, 103 (2d Cir. 2006), but would impose significant burdens on state and municipal entities -- without *any* evidence that Congress has “in fact faced” those consequences. *See United States v. Bass*, 404 U.S. 336, 349 (1971).

**I. THE “QUASI-FEDERAL AGENCY” DECISIONS PROVIDE NO VALID BASIS FOR THE RIGHT OF ACTION CLAIMED HERE**

The United Boatmen argue that this Court should uphold the district court’s application of “quasi-federal agency” theory “in its specific application under the facts of this case.” Br. 28.

But they have no persuasive defense of the fundamental and profound flaws of the “quasi-federal agency” theory, which boldly seeks to apply a federal statute, the APA, the reach of which is limited by express statutory definition to “authorit[ies] of the Government of the United States,” to entities that do not fall within that definition. As a matter of statutory construction, that move is flatly impermissible, for courts “must follow” such “explicit” statutory definitions. *Burgess v. United States*, 128 S. Ct. 1572, 1577 (2008). *See* Opening Br. 39 (citing cases). None of the decisions attempts to justify this unorthodox bypassing of an express statutory definition.

The theory violates the principle that it is for Congress to prescribe rights of action, one that reflects fundamental separation of powers concerns. *See Stoneridge Inv. Part., LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772-73 (2008). The quasi federal agency theory asks courts to engage in an avowedly fact-specific and policy-laden inquiry in order to decide whether to recognize a right of action – *i.e.*, precisely what the Supreme Court has described as not “a proper function . . . for federal tribunals.” *Sandoval*, 532 U.S. at 286.

Contrary to the United Boatmen’s suggestion, that the doctrine has “engendered so few opinions” (Br. 28) is a testament, not to the doctrine’s

fortitude, but to its frailty.<sup>1</sup> The decision that was the apparent genesis of the “quasi-federal agency” concept, *The Bootery, Inc. v. WMATA*, 326 F. Supp. 794 (D.D.C. 1970) (miscited in our Opening Brief), was handed down in an era when federal courts “implied” causes of action far more freely. *See Sandoval*, 532 U.S. at 287 (refusing to “revert \* \* \* to the understanding of private causes of action that held sway 40 years ago,” and quoting statement that actions should be recognized when it would “make effective the congressional purpose,” *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), as emblematic of the abandoned “*ancien regime*”); Opening Br. at 24. These “few” decisions’ at-best cursory treatment of the legal basis for the private right of action resulted in part from the fact that, in most of the cases, the issue was not squarely presented or the compact agency defendant did not raise it. *See* Opening Br. 36; *Elcon Enterprises v. WMATA*, 977 F.2d 1472, 1480 n.2 (D.C. Cir. 1992).

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<sup>1</sup> The United Boatmen seek not merely to apply the past decisions, but to extend significantly the “quasi-federal agency” theory’s previous scope. This action is not a narrow dispute over whether a compact agency properly rejected a bid for “failure to include an executed Buy American certificate,” *Seal & Co. v. WMATA*, 768 F. Supp. 1150, 1152 (E.D. Va. 1991); plaintiffs here seek broad review of the policy decisions of a deliberative body, with the prospect of an injunction broadly affecting fishery management coastwide.

Likewise, the pioneering cases – including the ones the United Boatmen claim supply the “best analytical framework” for this case – involved a single and significantly atypical interstate compact entity, the WMATA Compact. *See* Br. 28 (citing *The Bootery and Seal*). In finding “no reason why the general criteria for standing to challenge action under a federal statute not be employed,” the court in *The Bootery* attached central significance to the fact that the United States – which at the time (*i.e.*, prior to the 1973 District of Columbia Home Rule Act, Public Law 93-198 (1973)), had *direct*, unmediated authority over the District of Columbia – was a *party* to the WMATA Compact. The court’s conclusion that “[t]he Authority [was] . . . an agency of each of the signatory parties *including the United States*,” *id.* at 798-99, (emphasis added), is therefore an improbable basis for deriving a general quasi-federal agency “doctrine.”

The United Boatmen claim that this distinctive circumstance supports their claim here, on the ground that the District of Columbia is (they say, Br. 32) a party to the ASMFC Compact. In fact, however, the District of Columbia is *not* a party to the ASMFC Compact. *See* Compact, Arts. II, XII. The 45 ASMFC Commissioners represent the 14 states listed in Article II of the Compact, plus Pennsylvania, which became a party pursuant to

Article XII, Sec. 2.<sup>2</sup> Further, a compact agency formed, like the WMATA Compact at issue in *The Bootery and Seal*, to operate an interstate transit system is an entirely different animal from one formed to facilitate the coordinated exercise of member states' sovereign powers.

As we have noted, the “quasi-federal agency” theory has other basic flaws, including the decisions' failure to explain why an interstate entity should be treated as “quasi-federal,” and subject to the APA judicial review provisions, but not to the rulemaking and all the other provisions of that far-reaching statute. Opening Br. 41. And, as we noted, a doctrine in which the *availability of judicial review* turns on a “fact-intensive and case-specific” inquiry (*11/19/08 Order* at 28 (A 92)), and may require discovery, *see* Opening Br. 41-42 n.16 (discussing *Heard Communications, Inc. v. Bi-State Development Agency*, 18 Fed. Appx. 438 (8<sup>th</sup> Cir. 2001)), would have little to commend it even were it not foreclosed by Supreme Court precedent.

Vague concepts like “congressional intent to create a quasi-federal agency” (United Boatmen Br. 30), moreover, are anathema to the Supreme

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<sup>2</sup> See also <http://asmfc.org> (“Contacts, Commissioners) (listing commissioners). Under the Charter, representatives from the District of Columbia and the Potomac River Fisheries Commission (itself formed under the Maryland and Virginia Potomac River Compact of 1958) do sit on the Policy Board and some of the Commission's management boards. See Opening Br. n.1. But that is because the Commission has exercised its discretion to allow such representation for reasons of comity and sound fishery management.

Court’s admonitions that Congress is responsible for devising rights of action, *Stonebridge*, 128 S. Ct. at 772-73. If Congress wishes to provide for a right of action, it knows how to do so, as it has, for example, in legislation applicable to numerous interstate compact entities. *See* Opening Br. 27-28 & n.8. And allowing APA review on a “quasi-federal agency” theory is incompatible with decisions refusing to treat state and municipal entities as “agencies” for APA review purposes, notwithstanding claims that the entities received federal funding or were subject to extensive federal regulatory standards. *See* Opening Br. 32 (citing cases); p. 18, *infra*.

## **II. ACFCMA DOES NOT CREATE A RIGHT OF REVIEW OR STRIP THE COMMISSION OF ITS STATUS AS A STATE ENTITY EXERCISING AUTHORITY DELEGATED BY ITS MEMBERS**

Running throughout the responsive brief are claims that the enactment of the ACFCMA in 1993 effectively “transformed” (Br. 41, 42) the Commission into a federal entity. The United Boatmen assert that ACFCMA changed the “entire nature of Atlantic states shared fishery management” (Br. 6) and “imposed upon the States” a “holistic and coercive management program.” (Br. 10). They rely upon claims to support each of their alternative arguments for review – all turning on the proposition that the Commission is now, in some legally relevant sense, “federal.”

These arguments have at least two fatal flaws. *First*, they beg the question why Congress (especially if acting “holistically”) did not simply legislate a right of action against the Commission when it enacted the statute. That silence is all the more notable given that Congress provided expressly for a right to judicial review of federal fishery management decisions in the Magnuson-Stevens Act (MSA), 16 U.S.C. § 1855(f)(1)(A), and, in ACFCMA itself, provided an express, and detailed, mechanism for the Secretary of Commerce to review ASMFC management measures in the event of a member state’s noncompliance, *id.* § 5106. Because creating rights of action is a matter for Congress, the failure of any statute to provide for the right of action claimed here is dispositive.

*Second*, the United Boatmen’s rendition of ACFCMA overlooks the care Congress took to respect both the sovereignty of the Commission’s member states and their authority over managing coastal fisheries, and to respect the Commission’s role as the coordinator of member states’ police powers. *See Compact*, Art. IV. In ACFCMA, Congress expressly affirmed that “the responsibility for managing coastal fisheries rests with the States, which carry out a cooperative program of fishery oversight and management through the Atlantic States Marine Fisheries Commission,” and that “the responsibility of the Federal Government” is “to support such cooperative

interstate management of coastal fishery resources.” 16 U.S.C. § 5101(a)(4). Congress’s “purpose” in the statute was not to “federalize” the Commission, but to “support and encourage” the states’ ongoing efforts. *Id.* § 5101(b). As we pointed out, the entire history of ACFCMA’s enactment strongly affirms states’ continuing responsibility and authority – which was an essential reason for state and Commission support for the legislation. *See* Opening Br. 29-30 & n.9.

The United Boatmen’s zeal to impose a “federal” brand on the ASMFC should not obscure certain basic institutional realities, none of which were changed by ACFCMA: The Commission – which bears ultimate responsibility for all of the ASMFC’s decisions – is today, as it was pre-ACFCMA, composed *entirely of state representatives*. *See* Compact, Art. III.<sup>3</sup> These representatives, moreover, are chosen from, or are directly responsible to, the highest levels of state government: they are state natural

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<sup>3</sup> The United Boatmen observe (*e.g.*, Br. 8) that representatives of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service sit on ASMFC management boards and on its Policy Board. However, their participation (like that of representatives from the District of Columbia and the Potomac River Fisheries Commission) proceeds at the Commission’s discretion and its recognition that management of species that do not respect political boundaries should be coordinated among jurisdictions. (For similar practical reasons, *state* representatives sit on *federal* bodies under the Magnuson-Sevens Act. *See* Opening Br. 47 n.19). But nothing in the ACFCMA mandates that the Commission provide for such federal representation.

resource agency administrators; state legislators; and citizens with fisheries expertise (often selected from states' fishing communities) chosen by state Governors. *Id.* These state representatives are not paid by the ASMFC or the federal government for their Commission work. See Opening Br. 45 n.17. They exercise authority that the member states have chosen to delegate through the Compact, and the management measures they adopt are implemented through the administrative apparatus of each member state. States retain their right to withdraw from the Compact. *See* Art. XII.

The United Boatmen also err in portraying the ACFCMA as closely analogous to the Magnuson-Stevens Act. Putting aside the very salient difference that the MSA, but not ACFCMA, contains a judicial review provision,<sup>4</sup> the broader analogy is weak: ACFCMA leaves the coastal

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<sup>4</sup> The United Boatmen dismiss the express MSA review provision, 16 U.S.C. § 1855(f)(1)(A), as best viewed “not as a grant, but as a limitation on review,” Br. 52, given that the Secretary of Commerce’s actions would in any event be subject to the APA. But the significance of the MSA provision – which combines an express right to review with time limits and a prohibition on injunctive relief – is that it demonstrates that Congress had a ready, and recent model if it had wished to provide for review under ACFCMA. It is most implausible to maintain that Congress, having spoken directly in the MSA to judicial review and imposed limitations to protect the annual cycles of fishery management, would have established a (highly extraordinary) regime of federal court review of the decisions of an interstate compact agency composed entirely of state appointees by means of complete legislative silence -- *and* that Congress would have denied the state entity the practical protections against disruption and delay the MSA provision provides.

states broad discretion to manage fisheries in accordance with their own policies and objectives, and leaves in place their institutional mechanism for doing so. The Commission is not obligated to manage particular fisheries at all, and ASMFC plans can be more stringent or lenient than federal plans governing the same species.<sup>5</sup> Moreover, in the debates preceding enactment of ACFCMA, Congress specifically considered and rejected proposals to subject Commission's management plans to the MSA National Standards, on the ground that "impos[ing] Federal requirements on the development of State fishery management plans \* \* \* would contradict the intent of the legislation." H.R. Rep. No. 103-202 at 9 (1991); see *id.* at 6 (noting that prior legislation had failed to pass due to "controversy" over proposal "to give the Federal Government a substantial role" in managing fisheries in state jurisdictional waters).

Nor, of course, does the similarity of terms and "concept[s]" (Br. 9 & n.7) appearing in both the MSA and ACFMA have the significance the United Boatmen claim. Concepts like "conservation" and long-term

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<sup>5</sup> The particular fishery involved in this case, summer flounder, is (unlike most species the Commission manages) subject to a management plan that is jointly developed by the Commission and federal fisheries managers. But that approach was selected chosen for reasons of practical fishery management, not under legal mandate, and the measures are separately developed through the Commission's own procedures, and implemented by the respective member States.

management did not originate with the MSA and the fact that they would appear in a statute concerned with states' regulation of fisheries within their jurisdiction is no proof whatsoever that "federalization" is somehow at work.

As the text and language make clear, Congress's objective was to make state management *more* effective by providing a mechanism for ensuring that measures cooperatively developed by and collectively agreed to by the ASMFC states were in fact implemented by the states. To be sure, Congress declared that this new regime would serve the "the interests of fishermen and the Nation as a whole," see Br. 13 (quoting § 5101(a)(3)), in the sense that fishery conservation is in their *long term* interests – and rapid depletion through un-regulated (or under-regulated) over-fishing is not. See Opening Br. 4-5.

The responsive brief also mistakes the significance for this case of the moratorium mechanism Congress did enact, whereby the Secretary of Commerce may determine that a state has failed to implement management measures, and that the measures are "necessary for conservation of the fishery in question." 16 U.S.C. § 5106(a)(2). First, the evident care with which that provision is crafted belies any suggestion that Congress's omission of a broad right of private enforcement was a mere oversight.

Second, this provision, like other aspects of the statute attests to Congress's awareness of and respect for the state-federal balance. Rather than requiring that states enforce given federal rules, *FERC v. Mississippi*, 456 US 742 (1982), Congress instead prescribed a careful remedy by which the federal government steps in (and adopts its own regulations, *see* § 5106(d)) only upon an independent determination of conservation need by a federal cabinet Secretary.

There is no merit to unsubstantiated assertions that this process is somehow “*pro forma*” (United Boatmen Br. 11), and that the Secretary would pronounce “necessary” any measure, no matter how poorly conceived, that had the effect of promoting conservation. The United Boatmen offer no instance when such rubber-stamping actually occurred; and, of course, no exercise of secretarial authority is at issue here. Of course, if the Secretary did exercise his authority in the manner the Boatmen describe (or any other), that federal agency action would of course be reviewable under the APA at the behest of any aggrieved person, 5 U.S.C. § 704, and presumably could be attacked on the ground that the statutory term “necessary” incorporates the “best available” requirement. The Secretary is obligated to make specific findings before approving a moratorium – after

providing an opportunity for the state “to meet with and present its comments directly to the Secretary.” 43 U.S.C. § 5106(b).

ACFCMA requires that ASMFC plans “promote the conservation of fish stocks throughout their ranges and [be] based on the best scientific information available,” and provide opportunities for public participation. § 5104(a)(2). Those provisions might well bear on the Secretary’s decision to impose a moratorium – the Secretary would surely consider information flowing from the public comment process and the quality of the science underlying management measures – but there is no sign that Congress provided for these provisions to be enforced in federal court at the behest of private parties. The only mechanism for federal review of the Commission’s decisions is described in § 5106’s provisions for Secretary of Commerce determination.

The ACFCMA regime reflects a carefully crafted means of providing federal “support” for the Commission’s interstate fishery management efforts, while respecting the sovereignty of the member states and the independence of the Commission. It is inconceivable that, had Congress wished to add to this carefully crafted regime an entirely novel right to federal judicial review of ASMFC management plans – a right that surely would have been very controversial, and that would have raised difficult

questions of federalism, of potential disruption of the time-sensitive fishery management process, and of administrative finality (given that ASMFC plans are not self-executing, but are implemented by regulations adopted by the member states) – that Congress would have done so *sub silentio*.

### **III. THE COMMISSION IS NOT AN APA “AGENCY”**

Arguing in the alternative, and for the first time on appeal, the United Boatmen maintain that “ACFCMA \*\*\* converted the ASMFC into a federal ‘agency’, as the APA defines that term.” Br. 41. As demonstrated above, this assertion is inconsistent with the expressed intent, and actual operation of ACFCMA. Congress describes the Commission as carrying out fishery management by delegation from the member states. Preserving state authority was a central theme in the legislative history as well. And any argument that a Commission composed entirely of state officials, and including state executive officials and state legislators is an “authority of the Government of the United States” is simply not tenable as a matter of ordinary usage – even before getting to federalism-based rules that would require far more clarity before recognizing such a right.

The United Boatmen make no serious effort to grapple with the text of the APA definition. They assert the definition is “far from clear” and has “engendered endless litigation.” Br. 36 (citing cases involving the APA

status of Amtrak, the United States Sentencing Commission, the Bureau of Prisons, and the Federal Home Loan Mortgage Corporation), but none of the cases in any way supports the proposition that the APA definition is in the slightest ambiguous with respect to coverage of entities exercising delegated state power or composed of state officials.<sup>6</sup>

The United Boatmen fail to show any ambiguity that is *relevant here*, *i.e.*, in the definition's requirement that an entity be an authority of "Government of the United States." Courts have uniformly held that the definition in 5 U.S.C. §§ 551(1) and 701 "does not encompass state agencies or bodies." *Sowell's Meats and Services, Inc. v. McSwain*, 788 F.2d 226, 228 (4<sup>th</sup> Cir. 1986). See also *Old Town Trolley Tours of Washington, Inc. v. WMATA*, 129 F.2d at 201, 204 (D.C. Cir. 1997) (compact entity not within APA definition).

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<sup>6</sup> Indeed, *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), could hardly be less helpful precedent to plaintiffs. The Supreme Court did not hold that an entity could be an "agency" for some APA purposes but not others; or that an entity that did not meet the APA definition was nonetheless subject to the APA. On the contrary, the Court recognized that Congress's determination, as expressed in a statute, was "assuredly dispositive" for purposes of the APA and all other statutes "that impose obligations or confer powers upon Government entities," but then held that a statutory definition could not prevent courts from reaching an independent judgment that Amtrak was a government actor for constitutional purposes. *Id.* at 392.

And Courts have invariably rejected arguments that state or municipal entities' subjection to federal regulatory standards, or receipt of federal funds, or both, brings them within the APA definition. Thus, in *St. Michael's Convalescent Hospital v. State of Cal.*, 643 F.2d 1369, 1373 (9<sup>th</sup> Cir. 1981), the court held that a California agency's receipt of federal funds and obligations to comply with "Medicaid's pervasive statutory and regulatory scheme" did not make it a "federal agency" for purposes of the APA definition, and noting that federal funding and "extensive federal regulations," are present for "a countless number of activities of local and state governments." *See also Delaware County Safe Drinking Water Coalition, Inc. v. Hanger*, 304 Fed. Appx., 961, 963-964 (3d Cir. 2008) (state agency that administered federal Clean Water Act "is not an 'agency' as defined by the APA") (unpublished); *Hunter v. Underwood*, 362 F.3d 468, 477 (8<sup>th</sup> Cir. 2004) (municipal housing agency that "provides federally subsidized public housing to low income families," was "not a federal agency whose actions are governed by the APA"); Opening Br. 32 (citing additional cases).

In addition, in arguing that the Commission has been "converted" into "a federal agency" with a federal "mission," *see* Br. 41-42, the United Boatmen ascribe to Congress a purpose that is both problematic and

unlikely. Under the Appointments Clause, any “appointee [who] exercise[s] significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’” and must be appointed in the manner prescribed in Article II, Sec. 2, cl. 2, of the Constitution. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). As we have noted, the members of the Commission are all *state* officials and appointees; none is appointed by the President or the Heads of Departments. A court would strain to avoid a constitutionally problematic reading like the United Boatmen’s, even if it had a colorable basis. In fact, Congress did not purport to delegate federal lawmaking power to the state appointees who compose the ASMFC, and there is no basis to classify the Commission as an APA “agency.”<sup>7</sup>

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<sup>7</sup> Nor is there anything inconsistent between the Commission’s position here, and its positions in *Medeiros v. Vincent*, 431 F.3d 25 (1<sup>st</sup> Cir. 2005), *cert denied sub nom. Medeiros v. Sullivan*, 548 U.S. 904 (2006), and *Rhode Island Fishermen’s Alliance v. Rhode Island Dep’t of Env’l Management*, 2008 WL 4467186 (D.R.I. 2008), appeal pending No. 08-2390 (1<sup>st</sup> Cir.). In those cases, both removed from state court, the ASMFC intervened to support a member State’s defense of its implementation of the Commission’s fishery management plan for lobster against challenges from private parties. No question of a federal right of action against the ASMFC was presented in those cases; in RIFA, plaintiffs asserted state causes of action against the state agency and officials, and in *Medeiros* the plaintiffs also asserted, in addition to state law claims, federal constitutional claims against both the state defendants and the ASMFC. The Commission has consistently recognized that disputes arising under the Compact arise under federal law, see 28 U.S.C. § 1331 – but that jurisdictional issue is entirely distinct from the question whether Congress conferred a right of action on any particular private party.

#### **IV. THE REQUIREMENT OF A CONGRESSIONALLY- CONFERRED RIGHT OF ACTION IS NOT ONLY “RELEVANT,” BUT DISPOSITIVE**

Only in the waning pages of their brief do the United Boatmen actually confront the principle, reiterated in recent Supreme Court and Second Circuit precedent, that a congressionally conferred cause of action is required. They then seeks to divide the many decisions announcing and giving effect to this principle into three “general,” ad hoc categories – all of which are declared to be “non-analogous.” Br. 59.

Plaintiffs argue that the principle exists only to weed out “tenu[ous]” cases involving “third parties” and that where regulatory action is challenged the requirement is inapplicable or “irrelevant,” – or that the established “presumption of reviewability of administrative action” operates to shift the burden to the defendant. Br. 58-61.

This entirely misunderstands both the rule demanding a congressionally conferred cause of action and presumption of reviewability. They are not competing, alternative principles that apply to separate categories of cases. Rather, as the Supreme Court’s cases make clear, the right of action requirement applies in all federal cases – including those where executive action is challenged; and the presumption of reviewability operates in cases where the requirement of a cause of action has been

satisfied, to determine an agency’s claim that Congress nonetheless intended to place a particular kind of agency action beyond judicial review.

The Supreme Court has never stated that requirement that a plaintiff identify a right of action before proceeding in federal court only applies to certain categories of cases, let alone hinted that it is inapplicable to claims like this one. The Court’s reasoning suggests no such limitation: Cases like *Sandoval* and *Stoneridge Investment Partners* emphasize that Congress, not the judicial branch, must decide how federal law is to be enforced.

In fact, Supreme Court precedent makes clear that the requirement applies fully to cases like this one. Thus, in *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986) – a suit charging unlawful action by the Secretary of Commerce and other federal officials, the Court rejected the Secretary’s suggestion that “no private cause of action [was] available” – but not because the requirement is waived when administrative action is challenged. *Id.* at 230 n.4. Rather, the Court explained that plaintiffs are held to the requirement, but meet it when establishing their entitlement to “avail themselves of the right of action created by the APA,” a showing that depends on their first that the challenged “actions constitute the actions of an agency. *See* [5 U.S.C.] § 551(1).” *Id.* *See id.* (“The ‘right of action’ in such cases is expressly

created by the Administrative Procedure Act (APA)”). Once plaintiffs have established that they have crossed that definitional threshold, the Court explained, the presumption of reviewability applies – and no “separate indication of congressional intent to make agency action reviewable” is required. *Id.*

The presumption in favor of judicial review applies when plaintiffs sue a federal agency that is subject to the APA. It requires clear showings before the APA’s broad right to judicial review of federal agency action may be defeated under the APA’s exceptions for statutory preclusion of review and commitment of action to agency discretion, *see* 5 U.S.C. § 701(a). *See Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967); *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (quoting 5 U.S.C. 702 and explaining that “we have read the APA as embodying a ‘basic presumption of judicial review’”) (quoting *Abbott Labs*, 387 U.S. at 140)).

Plaintiffs point to no case from the Supreme Court or this Court where the APA presumption was applied in the manner they urge here, *i.e.*, as a basis for reviewing the actions of an entity that did not fall within the APA “agency” definition (let alone a case involving a state or multi-state entity).<sup>8</sup>

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<sup>8</sup> Two decisions applying the “quasi-federal agency” theory in dispute in this appeal did rely on such reasoning. The court below relied on the presumption of reviewability despite its conclusion that the Commission did

Rather, the only “presumption” cases they cite involved claims against federal government entities where the APA “agency” definition was undeniably met – and the presumption figured in deciding an agency’s defense that a particular action was nonetheless unreviewable, as statutorily precluded or as committed to its discretion. They cite no case in which a court has upheld *Abbott*’s “presumption of reviewability” to authorize application of the APA to an entity that does not fall within the APA’s definition of “agency.” The presumption does not apply to that threshold question of statutory coverage.<sup>9</sup>

Plaintiffs’ attempt to cabin off the cases insisting that rights of action be created by Congress into three “general” categories is exceedingly strange. The Supreme Court cases cited have never referenced these

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not fall within the APA’s agency definition, see *3/9/09 Order* at 7, 8 (A-145, A-146). And *Seal* did the same thing, relying on the *Japan Whaling Ass’n* footnote to “presume” review of a compact entity’s actions, while overlooking the footnote’s observation that plaintiffs in *Japan Whaling* enjoyed the presumption because they qualified for the APA’s “express[]” right of review. 768 F. Supp. at 1153 n.6 (citing 478 U.S. at 230 n.4).

<sup>9</sup> Indeed, the presumption was not even cited, let alone considered adequate to confer a right of review, in cases where the plain statutory language was far more supportive of the claimants than it is here. See *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (acknowledging that APA definition does not preclude statute’s application to presidential action, but holding that President should not be deemed an “agency” absent a clear statement from Congress). And the presumption has never been a barrier in the many decisions confirming the APA’s inapplicability to state and local agencies (despite extensive federal entanglements). See p. 18, *supra*.

particular categories – or the idea of categories at all. But far from demonstrating selective or context-sensitive application, the diversity of plaintiffs’ own debatable and ad hoc categories only reinforces the opposite conclusion: that the Court has applied the same cause of action requirement – in every situation where the issue has arisen, including in cases where the plaintiff’s claims are extraordinarily compelling.

In particular, the decisions the United Boatmen cite themselves refute the strange thesis that the requirement is a judge-made rule, designed to winnow out particularly marginal cases, *i.e.*, those brought by “third parties” (Br. 60) and involving “attenuated relationships between the other parties and the statute under which the right is claimed,” Br. 61. On the contrary, the rule has been relied upon to dismiss claims by individuals whose privacy rights were breached against defendants who were alleged to violate the obligations of federal educational privacy laws (*Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)); claims by the victims of unlawful discrimination against the agency that discriminated against them (*Sandoval*); and on behalf of voters against a state official alleged to be in violation of federal voting law concerning the administration of voter rolls (*Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008)). *See also George v. NYC Department of City Planning*, 436 F.3d at 104. (upholding dismissal of claims that city agency’s

grant of building permits violated environmental review provisions of the Coastal Zone Management Act, 16 U.S.C. §§ 1451, *et seq.*, because “text and structure” of CZMA did not support right of action) (citing *Sandoval*).

## **V. CONGRESS HAS NOT ABROGATED THE COASTAL STATES’ SOVEREIGN IMMUNITY**

The United Boatmen maintain that our sovereign immunity argument is foreclosed by *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). As explained in our opening brief, however, *Hess*, which was decided at a relatively low ebb in the Supreme Court’s state sovereignty case law, *see, e.g., Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and arose from personal injuries caused by the commercial activities of a limited-purpose bi-state entity, involved a very different sort of immunity issue than the one presented here. In *Hess*, the issue was whether the compact entity enjoyed Eleventh Amendment immunity against a federal right of action that Congress had specifically intended to apply to states (and had been held to have the power to apply to them). *See* Opening Br. 50-51.

Here, there is not the slightest inclination that Congress took the step of subjecting the Commission to a federal action, and it is altogether unlikely that the Eleventh Amendment – or the Tenth – would permit Congress to subject states themselves to APA-like judicial review in federal court, even

if state coffers were not threatened. It is not clear why the same concerns should not apply identically to suits against the Commission – whose membership includes state legislators and high executive officials, and which coordinates core state police powers. But even if *Hess* supports some distinction between the immunity of the Commission and that of its members and even if APA suits against the Commission constitutionally *could* be authorized by Congress, considerations of state sovereignty should at least preclude a *court* from allowing such a suit to go forward absent explicit instruction from Congress. *E.g.*, *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) (requiring “unmistakably clear” statutory language to abrogate Eleventh Amendment immunity).

## CONCLUSION

The District Court’s *3/9/09 Order* should be vacated, and the case should be remanded with instructions to dismiss the claims against the Commission.

Respectfully submitted,

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/s/

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September 30, 2009

## **CERTIFICATE OF COMPLIANCE**

I certify that the foregoing Reply Brief is printed in proportionally spaced 14-point font and that, according to the word-count function of Microsoft Word, it contains 6027 words.

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Sean H. Donahue

## CERTIFICATE OF SERVICE

I certify that on this 30<sup>th</sup> day of September, 2009, I caused copies of the foregoing brief to be served, by first-class United States mail, postage prepaid, on the following counsel:

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