No. 01-46

In the Supreme Court of the United States

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Eleventh Amendment or constitutional principles of state sovereign immunity preclude the Federal Maritime Commission from adjudicating a private party's claim that a state agency has violated the Shipping Act of 1984.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 243 F.3d 165. The opinion of the Federal Maritime Commission (Pet. App. 27a-38a) is not officially reported. The opinion of the Administrative Law Judge (Pet. App. 39a-62a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2001. On May 21, 2001, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 10, 2001. The petition for a writ of certiorari was filed on that date and was granted on October 15, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 28 U.S.C. 2350(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 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."

2. Section 11 of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. app. 1710, is reprinted as an addendum to this brief (App., *infra*, 1a-4a).

STATEMENT

1. The Shipping Act of 1916 was designed to strengthen the United States shipping industry. See, *e.g.*, *Puerto Rico Ports Auth.* v. *FMC*, 919 F.2d 799, 806 (1st Cir. 1990); *Plaquemines Port, Harbor & Terminal Dist.* v. *FMC*, 838 F.2d 536, 542 (D.C. Cir. 1988). Congress determined that it was necessary to grant antitrust immunity to shipping cartels in order to enable the domestic shipping industry to survive and prosper in an international climate dominated by such cartels. See *Puerto Rico Ports Auth.*, 919 F.2d at 807. To prevent abuses of that immunity, the 1916 Act prohibited carriers from engaging in discriminatory practices. See *ibid.* Congress chose to subject maritime terminal facilities to the same non-discrimination requirements in order to effectuate regulation of the carriers. See *ibid.*; *Plaquemines*, 838 F.2d at 542-543.

The Shipping Act of 1916 applied to, *inter alia*, "any person * * * carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities." *California* v. *United States*, 320 U.S. 577, 585 (1944). In *California* v. *United States*, this Court held that state and local instrumentalities

engaged in the operation of terminal facilities were "person[s]" subject to the Shipping Act's substantive requirements. *Id.* at 585-586. The Court explained that "with so large a portion of the nation's dock facilities * * * owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *Ibid.*

The Shipping Act of 1916 was subsequently replaced by the Shipping Act of 1984. Section 10(d)(1) of the 1984 Act, 46 U.S.C. app. 1709(d)(1), "tracks the language of § 17 of the 1916 Act except that it substitutes the term 'marine terminal operator' for 'other person subject to this chapter'. The legislative history to the 1984 Act explains that the description of 'marine terminal operator' was taken directly from the 1916 Act's definition of 'other person subject to th[is] chapter'." *Puerto Rico Ports Auth.*, 919 F.2d at 801 (citing H.R. Rep. No. 53, 98th Cong., 2d Sess. Pt. 1, at 29 (1984)). In light of Congress's evident intent to maintain in effect the scope of the prior Act's coverage, the courts of appeals in construing the scope of federal regulatory authority under the 1984 Act have recognized that "the intent behind, and prior interpretations of, the 1916 Act's provisions have continuing precedential force." *Plaquemines*, 838 F.2d at 542; accord *Puerto Rico Ports Auth.*, 919 F.2d at 801.

2. Enforcement of the Shipping Act of 1984 is entrusted to the Federal Maritime Commission (FMC or Commission). The Act provides that "[a]ny person may file with the Commission a sworn complaint alleging a violation of this chapter * * * and may seek reparation for any injury caused to the complainant by that violation." 46 U.S.C. app. 1710(a). "The Commission

shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order." 46 U.S.C. app. 1710(b) (emphasis added). The Act further provides that "[t]he Commission, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this chapter." 46 U.S.C. app. 1710(c). To aid in investigating alleged violations, the Act authorizes the FMC to issue subpoenas directing the attendance of witnesses and the production of documents. See 46 U.S.C. app. 1711(a). The Act also authorizes the FMC to bring suit in federal district court to enjoin violations during the pendency of the agency proceedings. See 46 U.S.C. app. 1710(h)(1).[1]

Whether an investigation is undertaken on the FMC's own motion or prompted by the filing of a complaint, the FMC must provide an opportunity for a hearing before issuing an order relating to a Shipping Act violation or assessing penalties for such a violation. See 46 U.S.C. app. 1713(a); see also 46 U.S.C. app. 1710(g) (Supp. V 1999). The FMC must furnish to all parties a written report of any such investigation that states the FMC's conclusions, decisions, findings of fact, and its order. See 46 U.S.C. app. 1710(f). If an investigation is prompted by the filing of a formal complaint, the investigation takes the form of an adjudication. The FMC has delegated to administrative law judges

[1] The Act likewise permits a private complainant to sue in federal district court to enjoin a Shipping Act violation during the pendency of the FMC proceedings. See 46 U.S.C. app. 1710(h)(2).

(ALJs) the authority to make initial or recommended decisions. See 46 C.F.R. 502.223. The hearing before the ALJ is conducted in accordance with the provisions of the Administrative Procedure Act that govern adjudications. See 46 C.F.R. 502.142.

The FMC may review an ALJ decision, either on its own initiative or in response to a party's request. See 46 C.F.R. 502.227. If exceptions to an ALJ decision are filed, the decision becomes inoperative until the FMC decides the matter. See 46 C.F.R. 502.227(a)(5). In reviewing an ALJ decision, whether in response to exceptions or on its own initiative, the FMC has all of the powers that it would have in making the initial decision. See 46 C.F.R. 502.227(a)(6). If the FMC finds that a violation has occurred, it may issue a nonreparation order. See 46 U.S.C. app. 1710(b) and (f), 1713(c). If the investigation was prompted by the filing of a formal complaint, the FMC may also direct payment of reparation to the complainant. See 46 U.S.C. app. 1710(g) (Supp. V 1999).

3. Orders issued by the FMC are enforceable only by federal court order. The Shipping Act sets out the mechanisms by which FMC orders may be enforced.

The Shipping Act authorizes private parties to bring specified types of enforcement actions. The Act provides that "any party injured" by a violation of a nonreparation order or FMC subpoena "may seek enforcement by a United States district court having jurisdiction over the parties," 46 U.S.C. app. 1713(c), and it authorizes "the person to whom [a reparation award] was made" to seek enforcement of the order "in a United States district court having jurisdiction of the parties," 46 U.S.C. app. 1713(d)(1). The Act also authorizes the Attorney General of the United States to bring an action in federal district court to enforce

various categories of FMC orders, including nonreparation orders and subpoenas. See 46 U.S.C. app. 1713(c). The Act further provides that "the Attorney General at the request of the Commission may seek to recover the amount [of civil penalties] assessed in an appropriate district court of the United States." 46 U.S.C. app. 1712(e). The Act does not authorize the Attorney General to bring an action to enforce a reparation order.[2]

4. a. This proceeding began when South Carolina Maritime Services, Inc. (Maritime Services), a private company that operates vessels used for (*inter alia*) casino gambling, filed a complaint with the FMC. See Pet. App. 39a-41a. The complaint alleged that respondent South Carolina State Ports Authority had refused to give berthing space to a vessel owned by Maritime Services, based on a purported policy of refusing to berth ships whose primary purpose is gambling, while

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[2] The private complaint proceeding authorized by the Shipping Act is not unique. A number of federal environmental statutes, for example, contain "whistleblower" provisions that prohibit retaliation against employees (including state employees, see note 10, *infra*) who commence or testify in proceedings, or who assist or participate in any manner in actions to carry out the purposes of the respective laws. See, *e.g.*, Federal Water Pollution Control Act, 33 U.S.C. 1367; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622. Those provisions are enforced by the United States Department of Labor, which receives and adjudicates administrative complaints filed by persons claiming to be the victims of violations. Unlike the Shipping Act, however, which authorizes suits by the Attorney General to enforce nonreparation orders but does not authorize government suits to enforce reparation orders, the environmental whistleblower provisions uniformly authorize the Secretary of Labor and/or the United States to file suit to enforce any order issued at the conclusion of the administrative process.

providing berthing space to other vessels offering comparable gambling services. See *id.* at 40a.

Maritime Services alleged that by refusing to give berthing space to its vessel, respondent had violated the non-discrimination requirements of Section 10(b)(10) and (d)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1709(b)(10) and (d)(4) (Supp. V 1999). See Pet. App. 41a. The complaint asked that the FMC issue an order compelling respondent to pay reparation and to cease and desist the alleged violations of federal law. See *ibid.* The complaint also asked the FMC to file suit against respondent to obtain a preliminary injunction. See *id.* at 41a n.1.

b. Respondent has previously been held to be an arm of the State of South Carolina protected by the State's sovereign immunity. Pet. App. 3a (citing *Ristow* v. *South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir.), cert. denied, 516 U.S. 987 (1995)). Respondent moved to dismiss the administrative complaint, invoking the State's Eleventh Amendment immunity. An ALJ granted the motion to dismiss. *Id.* at 39a-62a. The ALJ concluded that the principles of state sovereign immunity reflected in the Eleventh Amendment apply to private complaint proceedings against a state entity before a federal agency adjudicator. *Id.* at 59a-62a. The ALJ also suggested that a private complaint proceeding would in any event be futile, since a Shipping Act reparation order can be enforced only through a suit brought by "the person to whom the award was made," and a federal district court would lack jurisdiction if a private party brought such a suit against a state agency. *Id.* at 59a n.8. The ALJ noted, however, that "the Commission has the authority to look into allegations of Shipping Act violations and enforce the Shipping Act by means other than *private*

complaints," *id.* at 60a, including enforcement proceedings brought by the FMC itself, see *id.* at 60a-61a.

c. The FMC reversed. Pet. App. 27a-38a. The FMC stated that this Court "has defined the terms of state sovereign immunity, and this definition does not extend to administrative proceedings. All of the recent Supreme Court cases addressing state sovereign immunity involve proceedings against states in judicial tribunals, not before administrative agencies." *Id.* at 31a. After reviewing recent decisions of this Court addressing issues of state sovereign immunity, including *Alden* v. *Maine*, 527 U.S. 706 (1999), and *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the FMC concluded that

> [t]he 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 ALJ or [the Ports Authority] 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.

Pet. App. 33a.

The FMC also stated that "[a] private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court." Pet. App. 34a. It acknowledged that "[t]he Commission is also authorized to initiate investigations

on its own motion," but asserted that "Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act." *Ibid.*

The FMC also briefly addressed the question whether any reparation order it might issue at the conclusion of the administrative proceedings would be judicially enforceable in a suit brought by Maritime Services. The FMC expressed the view that the Eleventh Amendment would not bar such a suit because the action would be more analogous to a petition for review of an agency order than to a suit filed initially in the district court. Pet. App. 36a. The FMC also stated, however, that issuance of an order resolving the pertinent legal issues would be useful even if the order were ultimately held to be unenforceable, and that the ALJ therefore should not have dismissed the complaint based on the prediction that no enforceable order could result. *Id.* at 37a. The FMC explained, in that regard, that "Commission decisions in complaint cases, whether or not a reparations award is issued, serve as precedent in future complaint cases and investigations." *Ibid.*

5. Pursuant to the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, respondent filed a petition for review of the FMC's order in the United States Court of Appeals for the Fourth Circuit. The United States and the FMC filed separate briefs as parties in the court of appeals. See 28 U.S.C. 2344 and 2348.[3]

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[3] The United States and the FMC both argued in the court of appeals that the adjudicative proceedings before the FMC were not precluded by principles of state sovereign immunity. The federal parties disagreed, however, with respect to the enforceability of any reparation order that the FMC might ultimately enter. The United States took the position that the Eleventh Amendment would bar any attempt to enforce an FMC reparation

The court of appeals reversed the FMC's decision. Pet. App. 1a-25a. The court observed that, although the Eleventh Amendment refers specifically to "[t]he Judicial power of the United States," this Court in *Alden* had applied principles of state sovereign immunity to suits brought in state courts. *Id.* at 7a-8a. The court of appeals concluded that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states" is constitutionally impermissible "whether the forum be a state court, a federal court, or a federal administrative agency." *Id.* at 13a.

The court of appeals observed that the FMC "investigation" that is triggered by the filing of a private complaint "takes the form of an adjudication" and is governed by rules very similar to those that apply to private lawsuits. Pet. App. 15a. The court stated that a complaint proceeding thus "walks, talks, and squawks very much like a lawsuit." *Ibid.* The court further observed that "the ALJ issues subpoenas, authorizes depositions, hears witnesses, and otherwise conducts the proceedings in a judicious manner," and it concluded on that ground that "[t]he ALJ is thus not merely an alternate means of policy implementation." *Id.* at 16a.

The court also rejected the contention that the FMC's lack of authority to enforce its own orders eliminated any Eleventh Amendment problem by giv-

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order through a suit filed by the private complainant. See U.S. C.A. Br. 26-27. The FMC, by contrast, argued that a private enforcement suit is analogous to a request for judicial review of an administrative order and as such would not be precluded by the State's sovereign immunity. FMC C.A. Br. 41-42.

Because the United States was a party to the proceedings in the court of appeals, it is a respondent in this Court. See S. Ct. R. 12.6.

ing a state defendant the practical ability to ignore the FMC proceedings. The court acknowledged that, "under the Act, a state may choose to ignore a subpoena, an order, or a judgment." Pet. App. 17a. The court concluded that sovereign immunity principles are nonetheless implicated because a judgment against a State "is a powerful thing, if not legally, then certainly politically." *Ibid.* The court stated that even an unenforceable default judgment might stigmatize the state entity; that the FMC's order could have tangible adverse effects on the State in a subsequent proceeding; and that state officials cannot properly be expected to ignore the directive of a federal official. *Id.* at 17a- 18a.[4]

SUMMARY OF ARGUMENT

A. This Court has understood the Eleventh Amendment to be illustrative of a broader constitutional principle, and has upheld claims of state sovereign immunity in situations falling outside the Amendment's literal coverage. The Court has made clear, however, that the States remain obligated to obey properly applicable

[4] Having concluded that the same principles of sovereign immunity that apply in court suits also apply in agency proceedings, the court of appeals determined that the administrative adjudication at issue in this case does not fall within any of the recognized exceptions to state sovereign immunity. See Pet. App. 19a-22a. Thus, the court explained that respondent had not consented to be sued, *id.* at 19a; that the complaint had not been brought by the United States or another State, *id.* at 19a-21a; that the proceeding was not one brought pursuant to Congress's enforcement authority under Section 5 of the Fourteenth Amendment, *id.* at 21a; and that Maritime Services' claim had been brought against respondent itself rather than against state officers acting either in their official or individual capacities, *id.* at 21a-22a (see pp. 32-34, *infra*). Neither the United States nor the FMC had contested those points.

federal law and are immune only from a particular means of enforcement. The Court has consistently described the States' sovereign immunity as an immunity from private "suits" or from "judicial" action. The term "suit" has traditionally been used with reference to court proceedings and has not historically encompassed administrative adjudications.

B. The court of appeals erred in treating the FMC adjudication at issue here as the practical and constitutional equivalent of a suit in court. In decisions applying the "public rights" doctrine, this Court has long distinguished between controversies that must be decided by courts and those that may properly be committed to the Executive Branch. Although a court possesses inherent authority to punish contempts so as ensure compliance with its orders, administrative agencies have traditionally lacked the contempt power. Because the FMC lacks authority to enforce its own orders, its assertion of jurisdiction over Maritime Services' complaint does not pose the same threat to the State's financial integrity as a comparable exercise of jurisdiction by a federal court. Rather, application of immunity principles in any subsequent judicial proceeding adequately protects the State's ultimate authority to allocate public resources in the manner it sees fit. And unlike a court, whose essential function is to determine the rights of individuals, an Executive Branch agency's adjudication of private claims is simply one means by which it protects the public interest in faithful execution of the laws. The FMC's use of adjudication to further public ends does not cause the affront to state dignity that might be thought to follow from judicial proceedings whose underlying purpose is the vindication of a private right.

C. Before this Court's decision in *Alden*, the courts of appeals had consistently held that States enjoy no immunity in administrative proceedings because administrative tribunals do not exercise the "Judicial power." Nothing in *Alden* calls that understanding into question. *Alden* reflects the Court's determinations that (1) suits brought in state court can pose the same threat to a State's financial integrity as suits brought in federal court, and (2) recognition of a federal power to commandeer state courts over the State's objection would be a distinct affront to the State's sovereignty. Those concerns are inapplicable to proceedings before a federal administrative agency that lacks power to enforce its own orders.

D. The possibility that state officials might experience political pressure to comply with an adverse FMC order does not support the State's claim of immunity from the administrative proceeding. Consistent with principles of sovereign immunity, federal Executive or Legislative Branch officers may attempt to persuade or cajole state officials to govern in desired ways—just as state officials may similarly attempt to influence the operation of the national government. So long as state officers retain ultimate authority over the allocation of state resources, the possibility that the views or determinations of federal officials will influence political discourse within the State creates no constitutional infirmity. The court of appeals also erred in concluding that principles of federalism would effectively require state officials to comply with an FMC order. Although state officers are bound to obey federal *law*, they need not invariably accede to the views of the federal Executive Branch regarding the nature and extent of their legal obligations. Until any disagreement between state and federal Executive

Branch officers has been finally resolved by a court having jurisdiction over the parties, no constitutional principle bars state officials from acting on the basis of their own understanding of federal law.

E. Even if principles of state sovereign immunity precluded the FMC from issuing a reparation order against respondent, it would be inappropriate to order dismissal of Maritime Services' administrative complaint, which sought an order compelling cessation of alleged ongoing violations as well as monetary relief for prior economic losses. The State's sovereign immunity does not bar private suits in federal court seeking prospective injunctive relief against individual state officers alleged to be acting in violation of federal law. Although the plaintiff in such a suit must name individual officers (rather than the State or state agency itself) as defendants, there is no persuasive reason to import that pleading requirement into the administrative setting.

ARGUMENT

NEITHER THE ELEVENTH AMENDMENT NOR RELATED PRINCIPLES OF STATE SOVEREIGN IMMUNITY PRECLUDE THE FEDERAL MARITIME COMMISSION FROM ADJUDICATING A PRIVATE PARTY'S CLAIM THAT A STATE AGENCY HAS VIOLATED THE SHIPPING ACT OF 1984

A. The State's Sovereign Immunity Is An Immunity From Suit In Court And Does Not Extend To Adjudicative Proceedings Conducted By Non-Judicial Bodies

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." This Court has viewed that constitutional provision as illustrative of a broader principle, and "has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment." *Alden* v. *Maine*, 527 U.S. 706, 727 (1999); see also, *e.g.*, *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890). Thus, the Court has found constitutional principles of state sovereign immunity to be applicable to federal-question suits against States brought by citizens of the defendant State, federal corporations, foreign nations, and Indian Tribes. See *id.* at 727-728. Most recently, this Court in *Alden* held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Id.* at 712; see *id.* at 712-757.

Although the Court has recognized state sovereign immunity in contexts falling outside the Eleventh Amendment's literal terms, the text still illuminates the focus of the Framers' concern. The Amendment's reference to "judicial Power" and to "any suit in law or equity" clearly mark it as an immunity from judicial process. The term "suit" has traditionally been used with reference to court proceedings. See, *e.g.*, *Weston* v. *City of Charleston*, 27 U.S. (2 Pet.) 449, 464 (1829) (Marshall, C.J.) ("The term ['suit'] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him."). In *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821) (Marshall, C.J.), the Court stated, with specific reference to the Eleventh Amendment, that

"[b]y a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court." The term has not historically encompassed administrative adjudications. To the contrary, this Court has observed that "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 character, and cannot, in any just sense, be called a suit." *Upshur County* v. *Rich*, 135 U.S. 467, 477 (1890).

This Court in its sovereign immunity jurisprudence has endeavored to "strike[] the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Alden*, 527 U.S. at 757. In articulating that balance, this Court has consistently described the States' sovereign immunity as an immunity from "suits" or from "judicial" action. See, *e.g.*, *id.* at 712 (Congress lacks power "to subject nonconsenting States to private suits for damages in state courts"); *id.* at 713 ("the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution"); *id.* at 715 (Framers "considered immunity from private suits central to sovereign dignity"); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 58 (1996) (Eleventh Amendment serves in part to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties"); *id.* at 72 ("the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States"). The Court has thus accorded the States an immunity from a mode of enforcement deemed particularly disruptive of state sovereignty, but it has emphasized both the States' obligation to obey valid federal law, *id.* at

754-755, and the need for alternative enforcement mechanisms sufficient to ensure compliance, *id.* at 755-757. Recognition of a state immunity from privately-initiated Executive Branch adjudications would abandon the text of the Eleventh Amendment altogether and would disrupt the balance between state and federal interests reflected in this Court's current jurisprudence.

B. An FMC Adjudication Differs Significantly, In Respects Directly Relevant To The Sovereign Immunity Inquiry, From A Suit In Court

Despite this Court's consistent characterization of the States' sovereign immunity as an immunity from "suits," the court of appeals concluded that "[w]hether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter." Pet. App. 14a. Rather, the court found dispositive the fact that the FMC proceeding at issue here "requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state." *Ibid.* The court's apparent view was that no practical or constitutional distinction (or, at least, no distinction relevant to the sovereign immunity inquiry) exists between judicial proceedings and adjudications conducted by administrative bodies. That view is erroneous.

1. In decisions applying the "public rights" doctrine, this Court has long recognized that administrative adjudication may share some features of a judicial proceeding without becoming judicial action.[5] The public

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[5] Cf. *Freytag* v. *Commissioner*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment) (explaining that federal agencies commonly "'adjudicate,' *i.e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a de-

rights doctrine is grounded "in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently * * * judicial.'" *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). Application of the doctrine involves examination of the law of the States and of England at the time of the framing of the Constitution to identify those disputes that can properly be resolved only by a tribunal wielding judicial power. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-285 (1855). The distinction between controversies that must be decided by courts and those that may properly be committed to the Executive Branch is thus as old as the Constitution itself.[6]

2. The Framers' particular concern that private "suits" might disrupt state activities reflects distinctive features of the judicial power. A defining characteristic of a judicial proceeding is that it culminates in a *judgment* enforceable by the court that entered it. "The

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cision. But there is nothing 'inherently judicial' about 'adjudication' ").

[6] The public rights doctrine is not limited to disputes in which the government is a party. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 54 (1989) ("In our most recent discussion of the 'public rights' doctrine as it bears on Congress' power to commit adjudication of a statutory cause of action to a non-Article III tribunal, we rejected the view that a matter of public rights must at a minimum arise between the government and others.") (citations and internal quotation marks omitted); see also *CFTC* v. *Schor*, 478 U.S. 833 (1986) (upholding power of the Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings).

award of execution * * * is a part, and an essential part, of every judgment, passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it." *ICC* v. *Brimson*, 154 U.S. 447, 484 (1894) (quoting Chief Justice Taney's memorandum in *Gordon* v. *United States*, 117 U.S. 697, 702 (1864)); see *Northern Pipeline*, 458 U.S. at 86 n.38 (plurality opinion). "From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt." *Brimson*, 154 U.S. at 489; accord, *e.g.*, *International Union* v. *Bagwell*, 512 U.S. 821, 831 (1994) (describing the contempt power as an "inherent" power of all courts "necessary to the exercise of all others"); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987); *Michaelson* v. *United States*, 266 U.S. 42, 65-66 (1924); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874).

By contrast, administrative agencies have traditionally lacked authority to utilize the contempt power to compel obedience to their orders. The Court in *Brimson* explained that

> the question of punishing the defendants for contempt could not arise before the [Interstate Commerce] Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court.

154 U.S. at 488-489. Consistent with that traditional principle, neither the FMC nor its delegees possess the

contempt power, and their decisions can be enforced only in a federal district court "having jurisdiction over the parties." 46 U.S.C. app. 1713(c) and (d).[7]

That distinction between judicial and administrative proceedings is directly relevant to the practical concerns that underlie the States' immunity from private suits, and highlights the impropriety of extending that immunity to administrative tribunals. The Court in *Alden* explained that a State if subject to suit without its consent "must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." 527 U.S. at 749. The Court further observed that "[w]hile the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc." *Id.* at 751. It concluded that "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Ibid.*

Because the FMC lacks authority to enforce its own orders or to hold parties in contempt, its assertion of jurisdiction over Maritime Services' administrative

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[7] Administrative orders also differ from court judgments in that the former, but not the latter, may be superseded by Congress even after the time for appeal has expired. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995); *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 381 & n.25 (1940).

complaint does not pose the same threat to the State's financial integrity as a comparable exercise of jurisdiction by a federal court. Any directive the FMC might issue could be enforced only by an order of a federal court; and any suit to obtain such an order would of course be subject to the limitations imposed by the Eleventh Amendment and related principles of state sovereign immunity. Application of those principles in any subsequent court proceeding adequately protects the State's ultimate authority to allocate public resources in the manner it sees fit. Because the Eleventh Amendment would preclude a district court from exercising jurisdiction over a nonconsenting State in an enforcement action brought by a private party, the FMC's determination that a state entity has violated the Shipping Act cannot be used in furtherance of a private suit for monetary relief.

Permitting the FMC to entertain private complaints against state-operated terminal facilities would not, as the court of appeals believed, allow Congress to effectuate an "end-run around the Constitution." Pet. App. 13a. We may assume, arguendo, that state sovereign immunity principles would apply to proceedings before a body formally located within the Executive Branch but possessing the attributes—*e.g.*, a purely adjudicative function, coupled with the power to punish contempts—traditionally associated with courts. But where (as here) the administrative agency adjudicates private complaints as part of a larger regulatory mission, and lacks the power to enforce its own orders, the concerns that underlie state sovereign immunity from private suits are not implicated.[8]

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[8] In *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), the Court concluded that the Tax Court should be regarded, for purposes of

3. Under Article III of the Constitution, "Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights." *Stark* v. *Wickard*, 321 U.S. 288, 310 (1944).

> "The province of the court," as Chief Justice Marshall said in *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803), "is solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.

Lujan v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992). Although judicial action may indirectly serve public purposes, as by clarifying the applicable law and deterring future violations of it, such effects are incidental byproducts of the courts' performance of their core function.

The administrative adjudication at issue in this case rests on a quite different constitutional footing. A federal agency may rely on the filing of a private complaint to inform it of a possible violation and to trigger its investigative machinery, and it may utilize an adversary process to develop the evidence that allows it to determine whether a violation has occurred. Resolution of disputes between discrete regulated entities,

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the Appointments Clause, as one of the "Courts of Law." The Court explained that the Tax Court "exercises judicial power to the exclusion of any other function," *id.* at 891, and it stressed that "[t]he Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions," *id.* at 892. The Court further emphasized that the Tax Court has the power of contempt. See *id.* at 891; compare *CFTC* v. *Schor*, 478 U.S. 833, 853 (1986) (concluding that agency was not wielding judicial power because, *inter alia*, the agency's orders were "enforceable only by order of the district court").

however, is not the FMC's overriding objective, but simply one means by which the agency fulfills the responsibility of the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. See Pet. App. 34a (FMC explains that "Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act.").

This Court has recognized that an administrative agency "must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective," and that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). In the context of administrative adjudications, the distinction between privately initiated actions and actions prosecuted by the government itself—a distinction that is crucial in determining the scope of a State's susceptibility to suit in court, see, *e.g.*, *Alden*, 527 U.S. at 755-756—is unilluminating. Because an adjudication forms part of the agency's responsibility to enforce the law, an agency may conduct such a proceeding only where the private right to be enforced "is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

In the present case, for example, the FMC acknowledged the possibility that any effort to enforce a reparation order against respondent by means of a private suit might ultimately be held to violate the Eleventh Amendment. Pet. App. 36a-37a. It determined, however, that "even if a court were to rule that a Com-

mission reparations award is unenforceable, the issuance of an order finding violations of the Shipping Act is not futile." *Id.* at 37a. The FMC observed in that regard that "Commission decisions in complaint cases, whether or not a reparations award is issued, serve as precedent in future complaint cases and investigations." *Ibid.* That precedent would guide the FMC not only in adjudicating future private complaints, but also in other contexts, such as FMC-initiated enforcement actions, where the FMC has an undisputed ability to regulate the conduct of States. Unlike an Article III court, which may issue pronouncements of law "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)), an Executive Branch agency may self-consciously employ the resolution of individual disputes as a means of furthering the public interest in the clarification and long-term enforcement of statutes entrusted to its administration. The FMC's use of adjudication to further those public ends does not cause the affront to state dignity that might be thought to follow from judicial proceedings whose underlying purpose is the vindication of a private right.

C. This Court's Decision In *Alden* Does Not Suggest That States Are Immune From Adjudicative Proceedings Of A Non-Judicial Character

Before this Court's decision in *Alden*, the courts of appeals had consistently held that States enjoy no immunity in administrative proceedings because administrative tribunals do not exercise the "Judicial power." See *Premo* v. *Martin*, 119 F.3d 764, 769 (9th

Cir. 1997) (Eleventh Amendment "does not purport to affect proceedings in tribunals established by statute"), cert. denied, 522 U.S. 1147 (1998); *Tennessee Dep't of Human Servs.* v. *United States Dep't of Educ.*, 979 F.2d 1162, 1167 (6th Cir. 1992) ("[c]ourts have found no eleventh amendment bar to actions brought by federal administrative agencies pursuant to complaints of private individuals") (quoting *Ellis Fischel State Cancer Hosp.* v. *Marshall*, 629 F.2d 563, 567 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981)); *Ellis Fischel*, 629 F.2d at 567 ("The eleventh amendment bars *judicial* action, not action by Congress or the executive branch."); *Delaware Dep't of Health & Soc. Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (rejecting, in dictum, the contention that the Eleventh Amendment has "any possible application to proceedings before arbitrators"); but see *Hensel* v. *Office of Chief Admin. Hearing Officer*, 38 F.3d 505, 510 (10th Cir. 1994).[9] Since *Alden*, however, the court

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[9] The claimant in *Hensel* alleged employment discrimination on the part of a state agency, received an adverse ruling from a federal ALJ, and sought judicial review in the court of appeals. The state agency argued that the Eleventh Amendment precluded both the ALJ and the court of appeals from exercising jurisdiction. 38 F.3d at 508. The court's Eleventh Amendment analysis appeared to focus primarily on the state agency's immunity from suit in court. *Id.* at 508-509; see *id.* at 509 ("States and state agencies retain their immunity against all suits in federal court. Consequently, no federal jurisdiction exists and [Hensel's] claim * * * is barred.") (citation and internal quotation marks omitted). In the penultimate paragraph of its opinion, however, the court stated that "[t]he ALJ lacked jurisdiction to hear [Hensel's] claim[]" because the state agency was "protected by the doctrine[] of Eleventh Amendment immunity." *Id.* at 510. The court did not otherwise discuss the question whether principles of state sovereign immunity apply to administrative adjudications. The court of

of appeals in this case and several district courts have concluded that constitutional principles of state sovereign immunity bar Executive Branch officials from adjudicating claims brought by private parties against unconsenting States.[10] In the present case, the court of appeals read *Alden* to bar "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states." Pet. App. 13a.

In *Alden*, this Court held that Congress may not require a State to submit to private suits for money damages brought in the State's own courts. The Court explained that "[p]rivate suits against nonconsenting States * * * present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' * * * regardless of the forum." 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). The Court further observed that "[i]n some ways * * * a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal

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appeals also stated that sovereign immunity barred the ALJ from exercising jurisdiction over Hensel's claim against a federal agency, see *ibid.*, because Hensel "ha[d] not demonstrated that the [relevant statute] contain[ed] explicit and unambiguous language that waives the immunity of the United States," *id.* at 509.

[10] See *Connecticut Dep't of Envtl. Protection* v. *OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001), appeal pending, No. 01-6217 (2d Cir.); *Florida* v. *United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001), appeal pending, No. 01-12380-HH (11th Cir.); *Ohio Envtl. Prot. Agency* v. *United States*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000), appeal pending, No. 01-3215 (6th Cir.); *Rhode Island Dep't of Envtl. Mgmt.* v. *United States*, 115 F. Supp. 2d 269 (D.R.I. 2000), appeal pending, No. 01-1543 (1st Cir.); see also note 2, *supra*.

forum," because "[a] power to press a State's own courts into federal service to coerce the other branches of the State * * * is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Ibid.* It also noted that "[p]rivate suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States," and that "an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States * * * could create staggering burdens." *Id.* at 750.

In sustaining Maine's claim of immunity from suits brought in its own courts, which do not exercise "[t]he Judicial power of the United States," the Court in *Alden* reaffirmed the established principle (see p. 15, *supra*) that the scope of a State's immunity from private suits is not defined solely by the literal terms of the Eleventh Amendment. Rather, the Court has understood the Eleventh Amendment as illustrative of a broader constitutional "postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." *Alden*, 527 U.S. at 730 (internal quotation marks omitted). Nothing in *Alden* suggests, however, that the Eleventh Amendment or the sovereign immunity principles reflected therein limit something other than the "judicial power" to decide "suit[s]."

The court of appeals therefore erred in reading *Alden* to establish a rule of immunity so broad as to cover every adjudicative proceeding involving an unconsenting State. *Alden* reflects the Court's determinations that (1) suits brought in *state court* can pose

the same threat to a State's financial integrity as suits brought in federal court, and (2) recognition of a federal power to commandeer *state courts* over the State's objection would be a distinct affront to the State's sovereignty. *Alden* extended Eleventh Amendment principles vertically (on the federalism axis) to cover *state* court proceedings. *Alden* did not in any way extend Eleventh Amendment principles horizontally (on the separation-of-powers axis) to suggest that non-judicial proceedings would be covered. Because the FMC proceedings at issue here differ in significant respects from suits brought in court (see pp. 17-24, *supra*), there is no basis for concluding that the rule announced in *Alden* properly applies to the present context. And to the extent that *Alden* rested on the impropriety of commandeering a State's own courts over the State's objection, its reasoning is wholly inapplicable to proceedings before a federal administrative agency.

D. Because State Officials Retain Legal Authority Over The Allocation Of State Funds Unless And Until An FMC Order Is Enforced By A Court, The Administrative Proceeding Does Not Infringe The State's Sovereign Immunity

The court of appeals acknowledged that "under the [Shipping] Act, a state may choose to ignore a subpoena, an order, or a judgment." Pet. App. 17a. It concluded, however, that the FMC proceedings nevertheless effect an impermissible intrusion on the State's sovereignty because "a judgment or a subpoena against a state is a powerful thing, if not legally, then certainly politically. All parties, and certainly political entities such as states, have an interest in avoiding the stigma

that attaches even to an unenforceable default judgment." *Ibid.*

That analysis is misconceived. Consistent with principles of sovereign immunity, federal Executive Branch officers may attempt to persuade or cajole state officials to govern in desired ways—just as state officials may similarly attempt to influence the operation of the national government. A Presidential declaration that particular state conduct disserves the national interest, for example, would surely be "a powerful thing * * * politically," Pet. App. 17a, but no one would contend that such a declaration infringes the State's immunity. The same analysis would apply to a joint resolution of Congress condemning a State's activities. The rule announced in *Alden* serves in part to ensure that decisions regarding the allocation of state resources will "be reached after deliberation by the political process established by the citizens of the State," rather than mandated "by judicial decree." 527 U.S. at 751. But so long as state officers retain ultimate authority in such matters, the possibility that the views of federal officials will influence political discourse within the State is fully consistent with the constitutional design. See *id.* at 755 (noting that the federal government may, "subject to constitutional limitations, * * * seek the State's voluntary consent to private suits").[11]

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[11] The court of appeals also expressed concern that if the FMC were permitted to issue a reparation order in a private complaint proceeding against a state entity, it might then attempt to induce payment by imposing civil penalties for non-compliance. Pet. App. 17a; see 46 U.S.C. app. 1712(a) (authorizing FMC to impose civil penalties for violations of its orders); 46 U.S.C. app. 1712(e) (authorizing Attorney General to file suit to enforce penalties). But while the FMC has taken the view that a reparation order against a state entity would be enforceable by means of a private

Likewise, when a federal court grants prospective injunctive relief against individual state officials under *Ex parte Young*, 209 U.S. 123 (1908), the practical import of its decision often is to declare unlawful an ongoing course of state conduct. Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 662-678 (1974) (federal court may compel future compliance with federal public benefits law, even where compliance necessarily entails the expenditure of state funds, but may not compel state officials to pay benefits that ought to have been paid in the past). Such a ruling could in turn create political pressure on state officials to provide remedies to prior victims of the illegal practice. But so long as the relief legally compelled by judicial order is limited to appropriate prospective remedies, the possibility of such indirect effects on state behavior implicates no constitutional concern.

The court of appeals likewise erred in concluding (Pet. App. 18a) that principles of federalism would effectively require state officials to comply with an FMC order. The court of appeals correctly observed that "[s]tate officers, no less than federal ones, take an oath to support and defend the Constitution and the laws of the United States." *Ibid.*; see U.S. Const. Art. VI, Cl. 3; *Alden*, 527 U.S. at 754-755. The fact that state officials must obey federal *law*, however, does not mean that they must invariably accede to the views of federal *officers* regarding the nature and extent of the

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suit, see Pet. App. 36a-37a, it has not indicated whether a penalty proceeding against a State for non-compliance with a reparation order would be either a permissible or an appropriate exercise of administrative authority. The theoretical possibility of such a proceeding—which can separately be addressed when and if it occurs—is a wholly inadequate basis for pretermitting the FMC's investigative process at its inception.

State's legal obligations. In observing that the States have consented to suits brought by the federal government, see, *e.g.*, *Alden*, 527 U.S. at 755-756, this Court has necessarily contemplated that state and federal officials might have divergent understandings of the State's legal duties, and that States might legitimately decline to acquiesce in the pronouncements of the federal Executive Branch. Until such a disagreement has been finally resolved by a court having jurisdiction over the parties, no constitutional principle bars state officials from acting on the basis of their own interpretation of federal law.

The court of appeals also attached significance to the fact that in resolving private complaints, the FMC employs an adversary process bearing a significant formal resemblance to a lawsuit. See Pet. App. 14a-16a. But if an FMC reparation or nonreparation order against a state entity is an otherwise appropriate exercise of executive power, the agency's use of a structured decisionmaking process that facilitates input from interested persons cannot render the order unconstitutional. If federal officials contemplated the filing of a lawsuit against a State, for example, they could surely invite submissions (including legal argument) from the State and others addressing the question whether such a suit should be brought. Neither the federal government's use of such a process, nor the State's strong practical incentive to participate, would infringe the State's immunity or transform the ultimate decision to file the lawsuit into something other than an executive act.[12]

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[12] As Professor Bator explained:

> Every time an official of the executive branch, in determining how faithfully to execute the laws, goes through the process of

E. Even If Principles Of State Sovereign Immunity Precluded The FMC From Issuing A Reparation Order Against Respondent, The Administrative Complaint Filed In This Case Would Not Be Subject To Dismissal

For the foregoing reasons, constitutional principles of state sovereign immunity would not foreclose the FMC from issuing a reparation order against respondent. But even if such an order were precluded, the court of appeals' disposition of this case would be incorrect. Maritime Services' administrative complaint requested "an order compelling [respondent] to cease and desist from the * * * alleged violations" in addition to monetary relief for prior economic losses. Pet. App. 41a. If Maritime Services had filed suit in federal district court, the Eleventh Amendment would not have barred its request for a cease-and-desist order so long as individual state officers rather than the state agency itself had been named as defendants. Under the doctrine of *Ex parte Young*, official-capacity suits arising under federal law and seeking prospective injunctive

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> finding facts and determining the meaning and application of the relevant law, he is doing something which functionally is akin to the exercise of judicial power. * * * Of course, many such executive determinations are informal. But it is only a step—and one quite consistent with the ideal of "faithful" execution of the laws—from informal, implicit adjudication to the notion that in making these determinations the official should hear the parties, make a record of the evidence, and give explicit formulations to his interpretation of the law.

P. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 264 (1990). The court of appeals' observation that the FMC proceeding at issue in this case "walks, talks, and squawks very much like a lawsuit," Pet. App. 15a, is therefore not helpful in resolving the constitutional question presented here.

relief are permitted to go forward against state officers, notwithstanding the fact that such suits "generally represent only another way of pleading an action against the entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985).[13]

Notwithstanding Maritime Services' request for prospective non-monetary relief, the court of appeals ordered that the administrative complaint be dismissed in its entirety. The court of appeals' disposition of the case necessarily reflects the view that the pleading requirements (as well as the limitations on substantive relief) governing lawsuits against state entities apply with equal force in administrative adjudications. That view is incorrect. In *Seminole Tribe*, the Court explained that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity" because the Eleventh Amendment serves in part "to avoid 'the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of

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[13] The original rationale for the rule announced in *Ex parte Young* was that a state official who behaves in an unconstitutional manner is thereby "stripped of his official or representative character," and that a suit to compel compliance with the Constitution is for that reason properly regarded as one against the individual officer rather than against the State. *Ex parte Young*, 209 U.S. at 160. The Court has since recognized, however, that in official-capacity suits the distinction between the officer and the State posited in *Ex parte Young* is essentially a fiction, see *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269-270 (1997); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 114 n.25 (1984), and that the more persuasive justification for permitting suits for prospective relief to go forward is that they play a crucial role in ensuring the supremacy of federal law, without imposing costs on state treasuries for past violations. See *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst*, 465 U.S. at 104-105; see also *Coeur d'Alene*, 521 U.S. at 293 (opinion of O'Connor, J.).

private parties.'" 517 U.S. at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Because the FMC is not a "judicial tribunal[]" and does not exercise "coercive process," that concern is inapplicable here. There is, accordingly, no persuasive reason why the state entity that is subject to the Commission's regulatory authority may not itself be made a party to the administrative proceeding. Thus, even if the court of appeals were correct in holding that principles of state sovereign immunity bar the FMC from issuing a reparation order against a state entity, the court's order directing dismissal of the administrative complaint would be erroneous.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

46 U.S.C. app. 1710 provides:

§ 1710. Complaints, investigations, reports, and reparations

(a) Filing of complaints

Any person may file with the Commission a sworn complaint alleging a violation of this chapter, other than section 1705(g) of this Appendix, and may seek reparation for any injury caused to the complainant by that violation.

(b) Satisfaction or investigation of complaints

The Commission shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order.

(c) Commission investigation

The Commission, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this chapter. Except in the case of an injunction granted under subsection (h) of this section, each agreement under investigation under this section remains in effect until the Commission issues an order under this subsection. The Commission may by order disapprove, cancel, or modify any agreement filed under section 1704(a) of this Appendix that operates in violation of this chapter. With respect to agreements inconsistent with section

1705(g) of this Appendix, the Commission's sole remedy is under section 1705(h) of this Appendix.

(d) Conduct of investigation

Within 10 days after the initiation of a proceeding under this section, the Commission shall set a date on or before which its final decision will be issued. This date may be extended for good cause by order of the Commission.

(e) Undue delays

If, within the time period specified in subsection (d) of this section, the Commission determines that it is unable to issue a final decision because of undue delays caused by a party to the proceedings, the Commission may impose sanctions, including entering a decision adverse to the delaying party.

(f) Reports

The Commission shall make a written report of every investigation made under this chapter in which a hearing was held stating its conclusion, decisions, findings of facts, and order. A copy of this report shall be furnished to all parties. The Commission shall publish each report for public information, and the published report shall be competent evidence in all courts of the United States.

(g) Reparations

For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation

of this chapter plus reasonable attorney's fees. Upon a showing that the injury was caused by activity that is prohibited by section 1709(b)(5) or (7) of this Appendix or section 1709(c)(1) or (3) of this Appendix, or that violates section 1709(a)(2) or (3) of this Appendix, the Commission may direct the payment of additional amounts; but the total recovery of a complainant may not exceed twice the amount of the actual injury. In the case of injury caused by an activity that is prohibited by section 1709(b)(6)(A) or (B) of this Appendix, the amount of the injury shall be the difference between the rate paid by the injured shipper and the most favorable rate paid by another shipper.

(h) Injunction

(1) In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business.

(2) After filing a complaint with the Commission under subsection (a) of this section, the complaint may filed suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to

exceed 10 days after the Commission has issued an order disposing of the complaint. Any such suit shall be brought in the district in which the defendant has been sued by the Commission under paragraph (1); or, if no suit has been filed, in a district in which the defendant resides or transacts business. A defendant that prevails in a suit under this paragraph shall be allowed reasonable attorney's fees to be assessed and collected as part of the cost of the suit.