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

REPLY BRIEF FOR THE UNITED STATES

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Respondent asks this Court, for the first time, to extend the States' Eleventh Amendment and sovereign immunity into federal administrative proceedings. However, both the Eleventh Amendment and broader sovereign immunity principles traditionally have been understood to provide only an immunity from the invocation of the judicial power by private citizens in suits against the States. States enjoy no special immunity from the authority of the federal Executive Branch to investigate and prosecute violations of federal law. Indeed, the State has no immunity even when the federal government sues a State in court at the behest and for the benefit of private individuals.

The Federal Maritime Commission (FMC), like many other administrative agencies, enforces the law through self-initiated enforcement actions, rule-makings, and privately-initiated complaints. Respondent concedes, as it must, that it has no immunity when the FMC enforces the law through either of the first two mechanisms. Respondent's claim to

immunity when the agency exercises the last of those options rests on the mistaken premise that administrative adjudication of private complaints is actually an exercise of federal judicial power. Although agency adjudication bears some resemblance to traditional judicial proceedings, it remains an Executive Branch function designed to ensure that the laws are faithfully executed. Principles of sovereign immunity limit the means by which administrative orders may be enforced in court, but they have no effect on the administrative proceeding itself.

I. A STATE'S SOVEREIGN IMMUNITY FROM PRIVATE "SUITS" APPLIES ONLY IN JUDICIAL PROCEEDINGS AND DOES NOT EXTEND TO THE ADMINISTRATIVE ADJUDICATION AT ISSUE

A. Respondent's claim to an immunity from federal administrative adjudication ignores the fact that States remain subject both to the substantive commands of valid federal statutes and to the enforcement authority of Executive Branch officials within the federal government. As this Court recognized in *Alden* v. *Maine*, 527 U.S. 706, 754-755 (1999), "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law."

Respondent acknowledges that it is subject both to the substantive provisions of the Shipping Act of 1984 (Shipping Act) and to enforcement efforts undertaken by the FMC on its own initiative. See Resp. Br. 4. The FMC's power to administer the Act necessarily encompasses the authority to investigate possible violations in order to determine whether enforcement efforts are warranted in particular instances. As in other enforcement contexts, such investigations will often be triggered by private complaints. To determine whether a particular complaint has merit and whether the federal government should take any action in its own name,

Executive Branch officials will often hear from both the complainant and the alleged violator; those officials will then attempt to resolve any pertinent factual disputes and to interpret the relevant law. That process may in many respects resemble a court's resolution of private litigation, but the resemblance neither transforms the Executive Branch proceedings into a "suit" nor triggers the State's sovereign immunity. In attempting to "strike[] the proper balance between the supremacy of federal law and the separate sovereignty of the States," *Alden*, 527 U.S. at 757, this Court has accorded the States a broad immunity from private suits but has simultaneously emphasized the need for effective alternative mechanisms to ensure state compliance with valid federal law. See *id.* at 755-757; U.S. Br. 16-17. Respondent's proposed constitutional rule would subvert that balance by injecting sovereign immunity principles into the investigative and enforcement efforts of the Executive Branch.[1]

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[1] In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court concluded that

> [e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and *Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.*

Id. at 72-73 (emphasis added; footnote omitted). Respondent relies on the italicized language, apparently reading it to mean that no federal officer may be authorized to adjudicate a claim against an unconsenting State. See Resp. Br. 12, 14, 21. The passage as a whole, however—and, in particular, the statement that "[t]he Eleventh Amendment restricts the judicial power under Article III" (a clause that respondent omits from its own block quotation, see Br. 21)—*contrasts* Congress's limited power to confer jurisdiction on the federal *courts* with its otherwise plenary authority over particular subject matters. If under the "public rights" doctrine (see U.S. Br. 17-18) a particular determination is appropriately entrusted to a non-Article III adjudicator, nothing in *Seminole Tribe* suggests that an additional limitation on congressional power applies simply because a State is involved in the dispute.

Like the court of appeals (see Pet. App. 15a-16a), respondent emphasizes that the FMC in adjudicating private complaints employs procedural rules very similar to those that govern civil litigation. See Resp. Br. 34-36. But if the FMC's investigation of a private complaint and its issuance of a reparation or nonreparation order at the conclusion of its investigation are otherwise appropriate exercises of executive power, the agency's use of a structured and formalized decisionmaking process cannot render those actions illegitimate. Cf. *Upshur County* v. *Rich*, 135 U.S. 467, 472 (1890) ("The fact that the board of appeal may swear witnesses does not make the proceeding a suit" because "[a]ssessors are often empowered to do this without altering the [administrative] character of their functions.").[2]

Any constitutional rule under which the relative formality of agency procedure triggers a State's sovereign immunity from private "suits" would likely prove unworkable in practice.[3] Such a rule would also create perverse incentives for

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[2] Some of the formalities and procedural rules that respondent and its amici identify simply underscore that, despite some superficial similarities to court actions, FMC adjudicative proceedings remain vehicles for executive enforcement of the Shipping Act. For example, the requirement that ALJs maintain their independence from the FMC's prosecuting functions, 5 U.S.C. 554(d), underscores that the FMC remains an interested party in the adjudication. That fact is made crystal clear by the FMC's ability to review an ALJ decision sua sponte, even if the parties to the proceeding do not wish to appeal (as was the case here, see Pet. App. 29a). Indeed, the fact that the original complaining party has played no role in the judicial proceedings in this case and that its interests are being served by the FMC demonstrates that the proceedings before the FMC are administrative, not judicial.

[3] Contrary to respondent's suggestion (Br. 36-37), the FMC's obligation to resolve the merits of every private complaint does not transform the adjudicative proceeding into a private "suit." "[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985); see *id.* at 831-832. Congress may, however, limit an agency's prosecutorial discretion by requiring it to decide the merits of particular private complaints and to take enforcement

Executive Branch decisionmakers to eschew procedures that have been found in other settings to be conducive to the accurate resolution of legal and factual disputes. Cf. U.S. Br. 32 n.12 (Professor Bator explains that "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"); F. Easterbrook, "*Success" and the Judicial Power*, 65 Ind. L.J. 277, 280 (1990) ("From the beginning, the Executive Branch has employed procedures we think of as 'judicial,' precisely because they are useful in finding facts.").[4]

B. Respondent contends that an FMC administrative adjudication is the practical equivalent of a private lawsuit because "[t]he Commission's adjudication of the private plaintiff's claim in this case would not differ in its effect upon the State from an Article III tribunal's adjudication of the same claim." Resp. Br. 12. That is incorrect. A suit brought in an Article III court culminates in a *judgment* that is enforceable by the court that entered it through the power of contempt. By contrast, any reparation or nonreparation order that might be entered by the FMC at the close of the agency adjudication at issue here (or any interim order to cease ongoing violations) could be enforced only through a subsequent judicial action. See U.S. Br. 18-20. If that judicial

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action if it finds a complaint to be meritorious. See *id.* at 833-835; *Dunlop* v. *Bachowski*, 421 U.S. 560, 562-563 & n.2, 567 n.7 (1975). Such statutory constraints do not transform the agency's ultimate determination that a violation has occurred into something other than an executive act.

[4] As Judge Easterbrook further explained, "Thomas Jefferson, who as Secretary of State was charged with the duty of awarding patents to useful inventions, may have entertained argument from applicants (and rivals opposed to monopoly) about what they had accomplished, without creating any greater danger that he was exercising judicial power than would the President's decision to entertain argument and receive evidence before deciding whether to issue a pardon." 65 Ind. L.J. at 280.

action is initiated by a private complainant, respondent may then invoke its constitutional immunity from private "suits"; if it is brought by the federal government, its prosecution will "require the exercise of political responsibility" by federal officials that has been found in other contexts to provide adequate protection for the State's sovereign prerogatives. *Alden*, 527 U.S. at 756. In either event, application of immunity principles to any judicial proceedings brought to enforce the FMC's orders will prevent the practical harm to the State's autonomy and fiscal integrity that unrestricted private suits potentially entail.[5]

Respondent also contends that any FMC order would effectively bind state officials because those officials are obligated to obey federal law. See Resp. Br. 39. But that argument once again rests on the mistaken premise that an FMC order is an enforceable judicial order, rather than a statement of Executive Branch position. Respondent's obligation to obey the Shipping Act does not entail a duty to

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[5] The Shipping Act authorizes the Attorney General to bring an action in federal district court to enforce a nonreparation order, but the Act does not authorize any federal official to sue to enforce a reparation order. Compare 46 U.S.C. app. 1713(c), with 46 U.S.C. app. 1713(d); see U.S. Br. 5-6. Respondent's sovereign immunity from private suits would therefore effectively preclude judicial enforcement, over respondent's objection, of any FMC order directing the payment of money. Of course, even a reparations complaint could lead the federal government to seek injunctive relief that would redound to the benefit of the private party. In contrast to the Shipping Act, the whistleblower provisions of various environmental statutes 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, including one for monetary relief. See U.S. Br. 6 n.2. Because the States have consented to suit by the United States, even where the relief sought is the payment of money to the individual victim of a State's violation, see *Alden*, 527 U.S. at 755-756, 759-760, those whistleblower provisions are valid. But the absence in the Shipping Act of any comparable provision authorizing federal government suits to enforce the FMC's reparation orders further reduces the supposed coercive effect of the agency proceedings.

acquiesce in any FMC pronouncement that a Shipping Act violation has occurred. See U.S. Br. 30-31.

C. Amici National Governors Association, et al., contend (Br. 23-25) that a state entity in respondent's position would be subject to substantial monetary penalties if it failed to comply with an FMC reparation order and would therefore "have no practical choice but to pay the reparations award" (Br. 25). Amici identify no instance, however, in which the FMC has assessed civil penalties (against either a state or private entity) for failure to pay a reparation award. In light of the overall structure of the Shipping Act, under which neither the FMC nor the Attorney General is authorized to seek judicial enforcement of a reparation order (see note 5, *supra*), the FMC's statutory authority to impose civil penalties for violations of such orders is doubtful. Moreover, the constitutional questions raised by that interpretation would provide an additional basis for construing the statute not to confer such authority on the FMC. See, *e.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). If the FMC ever attempts to subject a state entity to civil penalties for failure to pay a reparations award, any constitutional questions posed by such a proceeding can be addressed at that time. See U.S. Br. 29-30 n.11.

Respondent and its amici also complain that the initiation of an FMC complaint proceeding creates practical pressure to participate in the adjudication and to comply with any FMC order. However, even outside the context of administrative complaints against state entities, submissions by private parties may initiate agency processes in which a State has a substantial practical incentive to participate. A private party might, for example, petition the agency to promulgate a regulation (see 5 U.S.C. 553; 46 C.F.R. 502.51(a)) that would significantly affect a State's interests, including fiscal interests. The resulting incentive for the State to submit comments during the course of any rulemaking would not raise any immunity concern, however, because a rule-

making is not a "suit." Similarly, FMC regulations governing complaint proceedings authorize intervention or amicus participation by persons whose interests may be affected by the FMC's disposition of the complaint. See 46 C.F.R. 502.72, 502.76. State entities may sometimes feel a strong practical incentive to participate as intervenors or amici in complaint proceedings involving private parties, since "Commission decisions in complaint cases * * * serve as precedent in future complaint cases and investigations." Pet. App. 37a. But that potential impact on a State's interests is an obviously insufficient basis for concluding that such complaint proceedings infringe the State's sovereign immunity.

Adjudication of private complaints serves not only to resolve disputes between discrete regulated entities, but also as a vehicle for the FMC to clarify its interpretation of the Shipping Act. See U.S. Br. 23-24. Respondent acknowledges that it has no immunity when the FMC interprets the Shipping Act through rulemaking or agency-initiated enforcement actions. Respondent likewise should have no immunity in the context of private complaints because the FMC's role remains the quintessentially executive function of law enforcement. "[T]he 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). The FMC should enjoy broad latitude to determine that particular interpretive and policy questions are better resolved within the framework of a concrete dispute than in the more abstract setting of an agency rulemaking. A constitutional rule that precluded the FMC from adjudicating a private complaint against an unconsenting state entity would unnecessarily hinder the agency's efforts to implement the Shipping Act in the manner that it believes will best serve the public interest.

D. Respondent repeatedly suggests that this Court's decision in *Alden* requires a finding of immunity here. But this Court's holding that state sovereign immunity principles apply to all judicial proceedings, state or federal, does not support respondent's claim of immunity from federal administrative proceedings. *Alden* held that constitutional principles of sovereign immunity preclude Congress from subjecting unconsenting States to suit in their own courts. In rejecting the contention that "immunity from suit in federal court suffices to preserve the dignity of the States," 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 (emphasis added; citations and internal quotation marks omitted).

Respondent repeatedly invokes the italicized language (see Br. 10, 22, 32, 40, 48), but the context in which the phrase appears makes clear that respondent's reliance is misplaced. Although the Court in *Alden* held that States possess a broad immunity from private "suits" in any judicial forum, whether federal or state, it did not purport to extend the immunity to non-judicial settings. To the contrary, the Court's unqualified assertion that "[p]rivate suits" subject the defendant "to the coercive process of judicial tribunals," 527 U.S. at 749, reflects an apparent understanding that "suits" are by their nature prosecuted before *judicial* bodies. That understanding is consistent both with traditional usage (see U.S. Br. 15-16) and with the purpose of sovereign immunity, which protects against the "coercive process of judicial tribunals" and safeguards the public fisc. The Court's recognition that the States retain immunity from suit "regardless of the forum" thus has no relevance to the administrative proceeding at issue here, which is conducted before a non-judicial body and therefore is not a "suit."

The *Alden* Court's repeated references to the potentially disruptive effects of private "suits" before "judicial" tribunals is consistent with the text of the Eleventh Amendment, which is in terms a limit on "[t]he Judicial power" to entertain "suit[s] in law or equity" against a State. Respondent correctly observes that the States' sovereign immunity has been held to extend beyond the literal terms of the Eleventh Amendment. Resp. Br. 15, 32; see U.S. Br. 15, 27. *Alden*, for example, recognized an immunity in state courts, even though the Eleventh Amendment addresses only federal courts. It does not follow (as respondent appears to believe, see Br. 32), however, that the text of the Amendment is irrelevant, or that its invocation is an illegitimate form of argument. To the contrary, the text of the Eleventh Amendment reflects a specific application of a broader immunity principle. And as the Amendment's text makes clear, the broader principle is one of immunity from "suit" in the courts, not an immunity from all process, and especially not an immunity from the law enforcement power of the federal government.

E. Relying principally on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), respondent attempts to bring its claimed immunity closer to the terms of the Eleventh Amendment and the spirit of sovereign immunity, arguing that "[w]hen adjudicating a private complaint, federal administrative agencies exercise the judicial power of the United States." Resp. Br. 32; see *id.* at 13, 32-34. Respondent's reliance on *Freytag* is misplaced.

Freytag might well be relevant if this case involved a suit by a private party against a State in the Tax Court (of course, no such suit lies within the Tax Court's jurisdiction). *Freytag* held only that the Tax Court, although not an Article III court, is a "Court[] of Law" for purposes of the Appointments Clause, Article II, Section 2. See 501 U.S. at 888-892. The Court in *Freytag* took pains to limit its discussion to the Tax Court, which, unlike entities such as the

FMC, "exercises judicial power to the exclusion of any other function" and "has authority to punish contempts." *Id.* at 891. The Court noted that the "Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions." *Id.* at 892.

Indeed, the only Justices to address the constitutional status of ALJs in entities like the FMC concluded that such officers wield executive rather than judicial power. See 501 U.S. at 908-914 (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in part and concurring in the judgment). Those Justices observed that administrative law judges who conduct adjudications under the Administrative Procedure Act "are all *executive* officers." *Id.* at 910. They explained that "there is nothing 'inherently judicial' about 'adjudication.' To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power." *Id.* at 909. In any event, whatever the scope of the Appointments Clause's reference to "Courts of Law," the history and purpose of the Eleventh Amendment and this Court's precedents make quite clear that the Amendment's reference to "judicial power" refers to the judicial power of Article III courts. See *Hans* v. *Louisiana*, 134 U.S. 1, 11 (1890); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 64 (1996) (describing as "well established" that "the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction *under Article III*") (emphasis added); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 97-98 (1984).[6]

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[6] The reliance of amici National Governors Association, et al. (see Br. 3, 16-17) on *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512 (1984), is also misplaced. The Court in *Franchise Tax Board* held that the "sue-and-be-sued" clause contained in 39 U.S.C. 401(1) waived the Postal Service's immunity from garnishment orders issued by a state administrative body. See 467 U.S. at 516-525. The Court did not suggest, however, that an administrative enforcement proceeding is *typically*—or has been *historically*—regarded as a "suit." Rather, consistent with its usual practice when addressing issues of federal sovereign immunity, the

II. STATE ENTITIES HAVE LONG BEEN SUBJECT TO SIMILAR ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

Respondent contends (Br. 18-19) that for the bulk of our country's history, States and state agencies were understood to be immune from administrative enforcement proceedings of the sort at issue here. Respondent suggests (Br. 19) that statutes authorizing such proceedings have been enacted only "in the last generation." That claim is mistaken.

A. Although the prevalence of administrative adjudication has increased dramatically over the nation's history, the principle that legal and factual disputes may be resolved by executive officers is as old as the Constitution. "The first Patent Board, which consisted of Thomas Jefferson, Henry Knox, and Edmund Randolph in their capacities as Secretary of State, Secretary of War, and Attorney General, respectively, adjudicated the patentability of inventions, sometimes hearing argument by petitioners." *Freytag*, 501 U.S. at 910 (citation omitted) (Scalia, J., concurring in part and concurring in the judgment); see note 4, *supra*; R. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 915, 919 (1988).[7] The Framers authorized

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Court focused on the statute before it and explained that "Congress intended the Postal Service to be treated similarly to other self-sustaining commercial ventures." *Id.* at 525. In order to effectuate that intent, the Court "liberally construe[d] the sue-and-be-sued clause" to ensure "that the Service's liability is the same as that of any other business." *Id.* at 520.

[7] Professor Fallon explains that

> [i]n its first session, the first Congress—whose decisions often are viewed as a repository of insight into the historical intent underlying article III—vested responsibilities in executive officers of the Treasury Department that might instead have been assigned to constitutional courts. Among the disputes committed to nonjudicial resolution were claims to veterans' benefits and controversies surrounding customs duties.

101 Harv. L. Rev. at 919 (footnotes omitted).

Executive Branch officials to perform such functions notwithstanding their recognition that administrative adjudication bears a functional resemblance to judicial action. Thus, in debate on the bill establishing the Treasury Department, James Madison observed that under the bill the responsibilities of the Comptroller would "partake of a judiciary quality as well as executive" because the Comptroller's "principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and the particular citizens." G. Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 238 (1989). The law as enacted preserved the Comptroller's adjudicative function. See Act of Sept. 2, 1789, ch. 12, § 5, 1 Stat. 66-67. Respondent cites no instance in which any member of the Founding generation sought or received an assurance that Executive Branch officers would not adjudicate disputes involving unconsenting States. Compare *Alden*, 527 U.S. at 715-727.

B. The Shipping Act itself was enacted in 1916. The Act in its original form was authoritatively held by this Court to apply to state terminal facilities. *California* v. *United States*, 320 U.S. 577, 585-586 (1944); see U.S. Br. 2-3. The 1916 Act contained provisions, not meaningfully different from those in the current law, authorizing the submission of private complaints for resolution by the United States Shipping Board. Compare Act of Sept. 7, 1916, ch. 451, §§ 22-23, 39 Stat. 736, with 46 U.S.C. app. 1710. Thus, the very statutory scheme at issue in this case has *for nearly a century* authorized the FMC and its predecessor to resolve private complaints against state entities. See also Brief of Amici United States Maritime Alliance Limited, et al., at 17 n.6 (collecting reported cases involving private complaints against state entities).

C. The Shipping Act of 1916 was based upon an even earlier model, the Interstate Commerce Act (ICA), Act of

Feb. 4, 1887, ch. 104, 24 Stat. 379, which was enacted three years before this Court's decision in *Hans* v. *Louisiana*. The ICA authorized the Interstate Commerce Commission (ICC) to adjudicate private complaints alleging violations of the Act by any "common carrier." §§ 13-15, 24 Stat. 383-384. In *California* v. *Taylor*, 353 U.S. 553 (1957), this Court noted with apparent approval that the ICC "has treated * * * state-owned interstate rail carriers as subject to its jurisdiction" under the ICA. *Id.* at 561-562. The Court invoked that enforcement history in support of its conclusion that state-owned railroads are covered by the Railway Labor Act, which "defines generally the carriers to which it applies as 'any carrier by railroad, subject to the Interstate Commerce Act.'" *Id.* at 561 (Court's emphasis omitted); see *id.* at 561-568; see also *United States* v. *California*, 297 U.S. 175, 185-186 (1936) (invoking the same ICC enforcement history as support for the Court's conclusion that the Safety Appliance Act, which likewise uses the term "common carrier," applies to state-owned railroads). Among the ICC decisions cited by the *Taylor* Court (see 353 U.S. at 562) was *California Canneries Co.* v. *Southern Pacific Co.*, 51 I.C.C. 500 (1918), which involved the ICC's adjudication of a private complaint against a state-owned carrier. See *id.* at 503 (in determining whether a belt line is a "common carrier" covered by the ICA, "[t]he fact that the belt line is owned and operated directly by the state is of no importance"). The ICC's enforcement practice, and this Court's reliance on it, further refute respondent's suggestion of a longstanding consensus that principles of sovereign immunity bar Executive Branch adjudication of private complaints against unconsenting state entities.

III. THE FMC'S JURISDICTION OVER MARITIME SERVICES' COMPLAINT IS CONSISTENT WITH THE PRINCIPLES GOVERNING THE SOVEREIGN IMMUNITY OF THE UNITED STATES

Respondent contends (Br. 24-31) that the federal Executive Branch has asserted, and that the courts have recognized, a federal governmental immunity from administrative adjudications that is inconsistent with the FMC's exercise of jurisdiction here. That claim is incorrect.

A. Respondent relies in part (see Br. 28-31) on two Executive Branch documents—a published opinion of the Justice Department's Office of Legal Counsel (OLC), see Resp. Br. App. 4a-21a, and the government's brief (No. 93-9551) in *Hensel* v. *Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994)—addressing application of the antidiscrimination provision of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1324b(a)(1) (Antidiscrimination Provision), to the activities of the federal government. That provision prohibits various forms of employment discrimination by any "person or other entity" based on national origin or citizenship status, and it is enforced through administrative proceedings brought by the Special Counsel for Immigration Related Unfair Employment Practices, subject to judicial review. See Resp. Br. App. 5a.

The OLC opinion and the government's brief in *Hensel* are inapposite here. The thrust of both documents was that an agency of the federal government is not a "person or other entity" within the meaning of the Antidiscrimination Provision and therefore is not subject to that Provision's *substantive* requirements. See Resp. Br. App. 8a, 20a (OLC opinion); 93-9551 Gov't C.A. Br. (*Hensel*) at 21-28. Neither the OLC opinion nor the brief in *Hensel* contemplated a regime in which a government agency is subject to a statute's substantive provisions yet exempt from the

administrative enforcement mechanisms that apply to other entities.[8]

Respondent's reliance (Br. 27-28) on *West* v. *Gibson*, 527 U.S. 212 (1999), is also misplaced. The question presented in that case was "whether the Equal Employment Opportunity Commission (EEOC) possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII of the Civil Rights Act of 1964." *Id.* at 214. It was undisputed that the Civil Rights Act, as amended in 1991 (Pub. L. No. 102-166, 105 Stat. 1071), renders the federal government liable for compensatory damages for violations of the Act; the only question was whether that liability could be enforced through administrative proceedings brought before the EEOC. See 527 U.S. at 215-216, 222. The Court observed that "[b]ecause the relationship of this kind of administrative question to the goals and purposes of the doctrine of sovereign immunity may be unclear, ordinary sovereign immunity presumptions may not apply." *Id.* at 222. The Court, therefore, expressly *declined* to determine whether entrustment to the EEOC of authority to enforce an acknowledged legal obligation raised distinct sovereign immunity concerns. "If we must apply a specially strict standard in such a case, *which question we need not decide*, that standard is met

[8] The OLC opinion stated that application of the Antidiscrimination Provision to federal agencies would raise separation-of-powers concerns, because the Special Counsel is authorized to file suit in federal court to enforce an administrative order finding a violation, and "[s]uch intra-executive branch litigation likely would contravene Articles II and III of the Constitution." Resp. Br. App. 16a. The OLC opinion did not suggest, however, that subjecting federal agencies to *administrative* enforcement mechanisms would itself be constitutionally problematic. To the contrary, OLC "assume[d] for purposes of this opinion that sovereign immunity would not bar administrative proceedings in which one executive agency would press charges against another executive agency and final decisional authority would be vested in the Executive." *Id.* at 8a n.3.

here." *Ibid.* (emphasis added). *West* therefore does not further respondent's position.

B. *Hensel* and *West* provide little assistance to respondent because in the context of federal sovereign immunity, the question for the Court is typically one of statutory construction. With rare exceptions (see, *e.g.*, note 8, *supra*), Congress possesses unquestioned *power* to subject federal agencies to whatever enforcement mechanisms it deems appropriate to ensure compliance with valid federal law. Thus, when the United States invokes principles of sovereign immunity, it typically argues that a statute's terms do not reach it. Respondent, by contrast, concedes that it is covered by the plain terms of the Shipping Act, but disputes Congress's *authority* to establish an administrative complaint procedure that applies to unconsenting state entities. Respondent thus asserts not reciprocal rights, but a broader immunity from federal administrative enforcement mechanisms than federal agencies possess.

C. Respondent's claim that States must enjoy an immunity that parallels that of the federal government also cannot be reconciled with the basic constitutional structure reflected in the Supremacy Clause. Although the States are "invested with that large residuum of sovereignty which ha[s] not been delegated to the United States," *In re Ayers*, 123 U.S. 443, 505 (1887), the federal and state governments are not coequal sovereigns. The Constitution and valid federal statutes are "the supreme Law of the Land," U.S. Const. Art. VI, § 2, and supersede inconsistent state laws, even where those laws would otherwise be appropriate exercises of state authority. The States have consented *generally* to suits brought by the federal government, see, *e.g.*, *Alden*, 527 U.S. at 755-756, but the United States has given no overarching reciprocal consent to suit by the States (though it has consented to particular categories of suits). Under Section Five of the Fourteenth Amendment, Congress may authorize private suits against the States as a

means of enforcing the Amendment's substantive provisions, see, *e.g.*, *Alden*, 527 U.S. at 756; but no constitutional provision permits state legislatures to authorize private suits against the United States. Perhaps most significantly, while Congress possesses broad authority to subject state instrumentalities to the substantive requirements of federal law, see, *e.g.*, *Reno* v. *Condon*, 528 U.S. 141, 148-151 (2000), States possess no corresponding power to impose their law on federal agencies.[9] Thus, insofar as respondent's position rests on a supposed equivalence between the sovereign prerogatives of the state and federal governments, it reflects a basic misunderstanding of the constitutional plan.[10]

IV. RESPONDENT HAS NO BASIS FOR CLAIMING IMMUNITY FROM THE NON-MONETARY RELIEF SOUGHT IN THE ADMINISTRATIVE COMPLAINT

The administrative complaint filed by Maritime Services requested that the FMC "bring suit in a district court of the United States to enjoin conduct in violation of the Shipping Act." J.A. 15. Specifically, the administrative complaint "re-

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[9] "This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). Absent a contrary congressional directive, "state law may be incorporated as the federal rule of decision." *Id.* at 728. But if "application of state law would frustrate specific objectives of the federal programs," the federal courts "must fashion special rules solicitous of those federal interests." *Ibid.* The crucial point is that state law applies to federal agencies not of its own force, but only insofar as it is incorporated as federal law.

[10] Federal and state sovereign immunity principles also differ in that the former are informed by separation-of-powers considerations that reflect the Constitution's express conferral to Congress of the power of appropriations and property disposition. See U.S. Amicus Br. at 18 n.6, *Lapides* v. *Board of Regents of Univ. of Ga. Sys.*, No. 01-298. Of course, just as the Appropriations and Property Clauses inform the scope of the federal government's sovereign immunity, the Eleventh Amendment informs the scope of the immunity of the States.

quest[ed] that the Commission file suit against [respondent] in the United States District Court for the District of South Carolina, Charleston Division, and seek a temporary restraining order and preliminary injunction." *Ibid.*; see also J.A. 16. Maritime Services identified its request that the FMC seek injunctive relief as a ground for denying respondent's motion to dismiss the administrative complaint, see J.A. 51-52, but the ALJ rejected that argument. See Pet. App. 41a n.1. The Act authorizes the FMC to seek such relief, see 46 U.S.C. app. 1710(h), and respondent would enjoy no immunity in such a suit. A private party is free to request that federal officials authorized to conduct litigation on behalf of the government file suit in a particular instance; the fact that such a request is contained in a document styled a "complaint" does not implicate the State's sovereign immunity. Thus, even if principles of sovereign immunity precluded the FMC from issuing a reparation order against respondent, the court of appeals erred in dismissing Maritime Services' administrative complaint in its entirety.

Respondent's only argument on this point (see Br. 21-22 n.7) is that the pleading rule of *Ex parte Young*, 209 U.S. 123 (1908) should apply in FMC proceedings, and that the administrative complaint filed by Maritime Services is therefore subject to dismissal because it named a state agency rather than a state officer as respondent. It is entirely unclear why that should be the case. The complainant requested that the FMC seek injunctive relief in federal district court, and in such a suit the FMC could name respondent as the defendant. Moreover, if Maritime Services itself sought interim injunctive relief in court (as authorized by the Act, 46 U.S.C. app. 1710(h)(2)), it could adjust the caption of its complaint to comply with *Ex parte Young*.

The administrative complaint also sought a cease-and-desist order from the FMC itself, but even with respect to that (not self-executing) relief, there is no reason to extend *Ex parte Young* pleading requirements to FMC proceedings.

In holding that private suits against the States are barred regardless of the relief sought, this Court has explained that the Eleventh Amendment not only protects the State's fiscal integrity, but "also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe*, 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 cannot issue "coercive process" enforceable through the power of contempt, that justification is inapplicable by its terms.

Moreover, to the extent that naming a State or state agency as the defendant in a lawsuit might be thought to impose dignitary harms over and above whatever more tangible impacts the litigation entails, that concern is substantially reduced in the context of administrative enforcement mechanisms. Specification of the person(s) whom the plaintiff seeks to hold legally liable is an integral feature of a complaint filed in court. But private parties may and often do inform Executive Branch officials of apparent violations of law without identifying the wrongdoers. There is no principled reason why the resultant agency process should not proceed directly against the state entity that is subject to the substantive regulatory authority that the agency administers. Accordingly, even if the Court were to recognize a new immunity for States in FMC reparation proceedings, that immunity would not properly extend to efforts to obtain non-monetary relief, and the court of appeals' judgment ordering dismissal of the administrative complaint in its entirety would be subject to reversal.

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For the foregoing reasons and those stated in the opening brief for the United States, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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