No. 97-1485

In the Supreme Court of the United States

OCTOBER TERM, 1998

PHILIP COATES, DIRECTOR, MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL., PETITIONERS

v.

RICHARD MAX STRAHAN

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in upholding preliminary injunctive relief intended to bring petitioners into compliance with Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538.

2. Whether Section 9 of the ESA, 16 U.S.C. 1538, violates the Tenth Amendment to the United States Constitution if the prohibition against taking of endangered species applies to state officials' licensing of the use of gillnet and lobster pot gear in state waters, which are listed as critical habitat for the endangered Northern Right whale, in a manner that takes Northern Right whales. Pet. App. B50-B63.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent brought this action against petitioners, who are officials of the Massachusetts Division of Marine Fisheries, challenging their licensing of the commercial use of certain types of fishing equipment, *i.e.* gillnet and lobster pot gear, in Massachusetts waters. Respondent alleged that such use causes the death of, and injury to, Northern Right whales, in violation of Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538, and Section 102 of the Marine

Mammal Protection Act (MMPA), 16 U.S.C. 1372. Pet. App. B2-B5 & n.7, B18.

a. Section 9 of the ESA makes it unlawful for any "person" to "take" any species listed as endangered. 16 U.S.C. 1538(a)(1)(B) and (C). It also makes it "unlawful for any person * * * to attempt to commit, solicit another to commit, or cause to be committed, any offense" defined in Section 9. 16 U.S.C. 1538(g). "Person" is defined to include "any officer, employee, agent, department, or instrumentality" of a State, as well as "any State, municipality, or political subdivision of a State." 16 U.S.C. 1532(13). "Take" is defined to include killing, wounding, pursuing, or harming endangered species. 16 U.S.C. 1532(19); see *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-704 (1995).

Congress conferred primary responsibility for administration of the ESA on the Secretary of the Interior and the Secretary of Commerce, with the latter being responsible for, *inter alia*, various marine species, including the Right whale (Eubalaena spp.). 16 U.S.C. 1532(15); 50 C.F.R. 222.23(a). The Secretary of Commerce has delegated many of his responsibilities under the ESA to the National Marine Fisheries Service (NMFS). 50 C.F.R. 402.01(b).

Under the ESA, the responsible Secretary may permit the taking of an endangered species if the taking is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B). To obtain an incidental take permit, an applicant must submit a conservation plan to the Secretary. The Secretary may issue such a permit only if he makes certain findings regarding the impact of the take and the adequacy of the applicant's mitigation efforts. 16 U.S.C. 1539(a)(1) and (2).

b. The MMPA was enacted in 1972 in part to prevent the extinction or depletion of marine mammal stocks as a result of human activities. 16 U.S.C. 1361(1). Congress determined

that marine mammals "should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management," 16 U.S.C. 1361(6), recognizing that "there is inadequate knowledge of the ecology and population dynamics of such marine mammals." 16 U.S.C. 1361(3). The MMPA makes it unlawful, *inter alia*, for any person to take any marine mammal (whether or not it is listed under the ESA) in waters within the jurisdiction of the United States. 16 U.S.C. 1372(a)(2)(A); see 16 U.S.C. 1362(13) (MMPA definition of "take"), 1362(15). The Secretary may permit the taking of a marine mammal incidental to other activities in certain circumstances, 16 U.S.C. 1371(a)(5), although prior to 1994 that authority could not be exercised for takings incidental to commercial fishing. See p. 8, *infra*.

c. Right whales are listed as endangered under the ESA. 50 C.F.R. 17.11. They are, in fact, the most endangered of the large whales, with "only approximately 300 to 350 individual Right whales in the western North Atlantic, and the eastern North Atlantic population may be nearly extinct." Pet. App. B11. Northern Right whales are regularly present in Massachusetts waters during much of the spring, apparently for feeding purposes, with peak abundance occurring during April and with most leaving Cape Cod Bay by May 15. *Id.* at B12. In Cape Cod Bay, commercial use of gillnet and lobster pot gear is common and has entangled Northern Right whales and other whales. *Id.* at B21, B53-B54. Petitioners acknowledge that five Right whales have been found in Massachusetts waters entangled in fishing gear: "three in gill nets and two in lobster lines." *Id.* at B53 (citations omitted).

d. The ESA authorizes a person to bring a citizen suit "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who

is alleged to be in violation" of the ESA or the regulations issued thereunder. 16 U.S.C. 1540(g)(1)(A). The MMPA does not contain a citizen-suit provision. Pet. App. B30.

2. On April 21, 1995, respondent filed the instant suit alleging various violations of the ESA and the MMPA. On September 24, 1996, the district court dismissed respondent's claims under the MMPA for lack of jurisdiction because of the absence of a citizen-suit provision in the MMPA. Pet. App. B30. At the same time, the court granted preliminary injunctive relief against petitioners under the ESA. *Id.* at B1-B75. The court found it likely that respondent would succeed on his claim that petitioners were in violation of Section 9 of the ESA by licensing the commercial use of gillnet and lobster pot gear in Massachusetts waters in a manner that takes Northern Right whales. *Id.* at B50-B63. Massachusetts law prohibits commercial fishing (including the placement of gillnet and lobster pot gear) in Massachusetts waters without a permit. See Mass. Gen. Laws ch. 130, § 80 (1997). Petitioners licensed such use, with limited restrictions only in certain areas. The court found that continued licensing by petitioners of the use of such gear in that manner would lead to further takings of Northern Right whales and that respondent had "presented sufficient evidence that the [petitioners] know or should know that fishing gear injure or kill endangered whales." Pet. App. B58-B59.

The court fashioned a preliminary injunction that was intended to address respondent's claims and to bring petitioners into compliance with the ESA, through their own initiatives, taking into account respondent's pro se status and the significant fishing interests at stake. Pet. App. A2, B8, B65-B67. The injunction required petitioners to (1) apply to NMFS for an incidental take permit under the ESA for Northern Right whales; (2) apply for a permit under the MMPA with respect to Northern Right whales; (3) prepare a proposal (to be submitted to the court) to restrict, modify, or

eliminate the use of fixed-fishing gear in Massachusetts waters listed as critical habitat for the Northern Right whale in order to minimize the likelihood that additional whales will be harmed; and (4) convene a working group to discuss with respondent and other interested persons "modifications of fixed-fishing gear and other measures to minimize harm to Northern Right whales." *Id.* at B74-B75.

3. The court of appeals vacated the portion of the district court's order requiring petitioners to apply for a permit under the MMPA because the MMPA contains no citizen-suit provision. Pet. App. A8-A9. The court of appeals otherwise affirmed the district court's order, applying a deferential standard of review applicable to preliminary injunctions. *Id.* at A3, A7-A8. The court of appeals reasoned that the ESA prohibits not only the direct taking of an endangered species, but also acts of a third party that indirectly harm the species, and that such acts could include those of "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species." *Id.* at A16. Here, the court determined, "the state has licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in a violation of federal law," and the district court therefore properly entered a preliminary injunction to prevent the taking of Northern Right whales in violation of the ESA. *Id.* at A17-A22.

The court of appeals rejected petitioners' contention that the preliminary injunction violates the Tenth Amendment. Pet. App. A25-A34. The court recognized that, under *Printz* v. *United States*, 117 S. Ct. 2365 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), the federal government may not commandeer States into enacting or enforcing a federal regulatory program. Pet. App A25-A26. The court pointed out, however, that neither the ESA nor the district court's order requires Massachusetts to ban gillnet and

lobster-pot fishing, to regulate fisheries within its borders, or to assist in enforcing a federal regulatory program. *Id.* at A29, A31-A33. Rather, the court of appeals continued, the district court merely ordered petitioners to consider ways in which gillnet and lobster pot gear may be modified to avoid takings in coastal waters in violation of the ESA. *Id.* at A29. The court also noted that petitioners did not contend that Massachusetts' regulations governing commercial fishing could survive under the Supremacy Clause to the extent they may conflict with the ESA, *ibid.*, and that Congress had permissibly "offer[ed] States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation," *id.* at A33 (quoting *New York*, 505 U.S. at 167).

ARGUMENT

This case does not warrant plenary review. It concerns the propriety of a preliminary injunction entered by the district court to prevent further harm to an endangered species pending final resolution of the case on the merits. The aspects of the preliminary injunction affirmed by the court of appeals have no continuing significance in light of subsequent actions taken both by the National Marine Fisheries Service (NMFS) and by petitioners to protect the Northern Right whale, and there is no circuit conflict on the questions presented. The Court may, however, wish to grant the petition, vacate the judgment below, and remand the case for further consideration in light of the regulatory action taken by NMFS, which occurred after the district court ruled and was not fully considered by the court of appeals.

A. 1. The preliminary injunction entered by the district court and the state regulations that were in effect at the time are of no continuing significance in light of regulatory action that has since been taken by NMFS under the MMPA.

a. Federal actions to protect Northern Right whales in Cape Cod Bay date back well before the instant suit was filed in April 1995. In 1992, NMFS prepared a Recovery Plan for the Northern Right whale pursuant to Section 4(f)(1) of the ESA, 16 U.S.C. 1533(f)(1). Pet. App. B19. One objective of the ESA recovery plan is to "[r]educe or eliminate injury and mortality caused by fisheries and fishing gear." *Id.* at B21. On June 3, 1994, pursuant to Section 4(a)(3) of the ESA, 16 U.S.C. 1533(a)(3), NMFS designated critical habitat for the Northern Right whale, including Cape Cod Bay, thereby providing notice that the species "is dependent on these areas and features for its continued existence." Pet. App. B26-B27; 59 Fed. Reg. 28,793, 28,797-28,798 (1994); 50 C.F.R. 226.13(b).

Of most immediate relevance to the instant case are NMFS' actions regarding incidental take permits under the MMPA. In 1994, the MMPA was amended "to establish a new regime to govern the incidental taking of marine mammals during the course of commercial fishing operations." H.R. Rep. No. 439, 103d Cong., 2d Sess. 21 (1994). The amendments' long-term objective is to reduce incidental mortalities and serious injuries of marine mammals occurring in the course of commercial fishing operations to insignificant levels, approaching a zero rate of mortality and serious injury by the year 2001. 61 Fed. Reg. 64,501 (1996); Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, § 11, 108 Stat. 546. The 1994 amendments added MMPA § 118, 16 U.S.C. 1387, which calls upon NMFS to develop and implement a take reduction plan (TRP) to assist in the recovery (and to prevent the depletion) of strategic stocks of mammals that interact with certain commercial fisheries, including those in Cape Cod Bay, according to certain 6-month and 5-year goals, taking into account the economics of the fisheries involved, existing technology, and state or regional fishery management plans.

The 1994 amendments also added MMPA § 101(a)(5)(E), 16 U.S.C. 1371(a)(5)(E), which provides a mechanism for NMFS, through the issuance of permits under the MMPA, to authorize incidental takes by commercial fishing operations of marine mammals listed as endangered or threatened under the ESA. Before the 1994 MMPA amendments, an incidental take statement could not be issued under the ESA for the taking of endangered or threatened marine mammals in the course of commercial fishing operations.[1] Under the 1994 amendments, an incidental take by commercial fishing operations may now be authorized if NMFS finds that the take will have a negligible impact on the marine mammal species or stock, that a recovery plan has been or is being developed under the ESA, and, where applicable, that a TRP has been or is being developed and a monitoring program has been established. 16 U.S.C. 1371(a)(5)(E).

As an initial step in implementing the 1994 MMPA amendments, NMFS issued interim incidental take permits on August 31, 1995, for those commercial fisheries that interact with certain endangered or threatened marine mammal species or stocks for which the required determinations could be made under Section 101(a)(5)(E)(i), including that the take would have only a negligible impact on the species or stock. 60 Fed. Reg. 45,399, 45,401 (1995). In addition, as required by ESA § 7, NMFS conducted an internal consultation with respect to its issuance of MMPA permits for those fisheries and concluded that the permits would not jeopardize the continued existence of endangered or threatened species under NMFS' jurisdiction. NMFS

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[1] ESA § 7(b)(4)(C), 16 U.S.C. 1536(b)(4)(C), provides that an incidental take statement may be issued under the ESA only if the take is also authorized under MMPA § 101(a)(5), 16 U.S.C. 1371(a)(5). Before 1994, the MMPA did not contain a provision that permitted such authorization in the course of commercial fishing operations.

therefore issued an incidental take statement for the authorized takes pursuant to ESA § 7(b)(4). 60 Fed. Reg. at 45,400; compare *Bennett* v. *Spear*, 520 U.S. 154, 169-170 (1997). NMFS could not, however, make the requisite finding under the MMPA that a take incidental to commercial fishing operations would have a negligible impact on several other marine mammals stocks, including the Western North Atlantic stock of the Northern Right whale, and it therefore did not issue an incidental take permit under the MMPA for those mammals. 60 Fed. Reg. at 45,400.

Following further extensive review, however—and after the district court had entered the preliminary injunction and this case had been briefed and argued in the court of appeals—NMFS promulgated the Atlantic Large Whale Take Reduction Plan (ALWTRP) and implementing regulations as an interim final rule, effective on November 15, 1997. 62 Fed. Reg. 39,157-39,188 (1997). Those regulations establish fishing restrictions to avoid the taking of Northern Right whales incidental to certain commercial fishing operations, including those in Cape Cod Bay. Among other things, the regulations prohibit lobstering in the Cape Cod Bay critical habitat, including both state and federal waters, between January 1 and May 15, unless it is conducted in compliance with specified requirements necessary to protect Northern Right whales from entanglement. 62 Fed. Reg. at 39,185-39,186. During other parts of the year, lobster pot gear must comply with at least two features from a list of possible modifications. *Ibid.* Fishing with anchored gillnet gear in the Cape Cod restricted area is prohibited from January 1 through May 15, unless NMFS specifies appropriate gear modifications or alternative fishing practices in the future. *Id.* at 39,186-39,187. During other parts of the year, anchored gillnet fishing in the area must comply with at least two features from a list of possible modifications. *Ibid.* NMFS conducted the necessary ESA § 7 consultation pro-

cess on the ALWTRP regulations, which yielded the conclusion that the regulations are not likely to jeopardize the continued existence of any species of large whales listed under the ESA. 62 Fed. Reg. at 39,183; see *id.* at 39,157-36,158.[2]

b. The regulations recently issued by NMFS fundamentally alter both the circumstances that led the district court to enter a preliminary injunction and the significance of the injunction itself. First, the regulations greatly undermine the factual predicate for the injunction. The district court's action was based on its finding of a likelihood that petitioners' continued licensing of the then-current manner of using certain gear in connection with commercial fishing in Cape Cod Bay would lead to further takings of Northern Right whales. Pet. App. B66-B67.[3] The restrictions

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[2] The ALWTRP seeks to eliminate serious injuries and mortalities not only by requiring gear modifications, but also by establishing a reporting system that encourages and trains commercial fishermen to report entanglements, provides for disentanglements by trained professionals, and includes an early warning system to fishermen of the presence of endangered whales in their immediate vicinity. See 62 Fed. Reg. at 39,159-39,162. Recently, an entanglement of a Northern Right whale was reported by a commercial fisherman off the coast of Cape Cod and professionals responded and managed to untangle the gear. See *Boston Globe*, Sept. 15, 1998, at B2, *available in* 1998 WL 9153277.

[3] That conclusion was, of course, based on Massachusetts law as it stood at the time and did not take into account the regulations subsequently promulgated by Massachusetts pursuant to state regulatory authority. See p. 15, *infra*. In fact, the ALWTRP regulations applicable to Cape Cod Bay essentially mirror those new Massachusetts regulations. 62 Fed. Reg. at 39,170. In response to a comment that it would be better to apply the federal regulations only to federal waters and to allow Massachusetts to implement its own then-pending plan for the critical habitat within its waters, NMFS noted that it was aware of difficulties in having both state and federal regulations in the same area. NMFS explained, however, that "[t]he Federal Government has the responsibility of implementing the MMPA," and that NMFS intends to work with

imposed by the ALWTRP regulations on the use of lobster pot and gillnet gear in Cape Cod Bay are intended to eliminate the likelihood of any such incidental takes.

Second, since the November 15, 1997, effective date of the ALWTRP regulations (which was after the date of the court of appeals' opinion), any Massachusetts regulations regarding the use of lobster pot and gillnet gear that are less restrictive than the ALWTRP regulations have no independent practical force, because persons fishing in the protected areas must comply with the more stringent federal standards in any event.

Third, Massachusetts apparently will no longer have less restrictive regulations. The MMPA contains a preemption provision, § 109(a), 16 U.S.C. 1379(a), which states:

> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1).[4]

The courts below did not consider what effect this preemption provision might have on the Massachusetts regulations that respondent originally challenged. Any preemption inquiry would in turn have to take account of the fact that NMFS and Massachusetts entered into a cooperative agreement under Section 6(c) of the ESA, 16 U.S.C. 1535(c) (on July 8, 1996, after the instant suit was filed but before entry

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Massachusetts "to ensure that both sets of regulations are consistent and responsive." *Id.* at 36,171.

[4] The Secretary has not transferred authority to Massachusetts for the conservation or management of Northern Right whales.

of the preliminary injunction), in which Massachusetts specifically agreed that "[a]ll activities affecting endangered and threatened marine mammals shall be consistent with" the MMPA and the ESA. Cooperative Agreement 1(g) at 4. Congress did not intend the preemption provision in Section 109(a) of the MMPA to affect such cooperative agreements with States. Pub. L. No. 97-58, § 4(b), 95 Stat. 986 (16 U.S.C. 1379 historical note). But quite aside from questions of preemption, Massachusetts has voluntarily *agreed* in the Cooperative Agreement that its activities affecting endangered species will be consistent with the MMPA, presumably including NMFS' Right whale regulations under the MMPA.

c. The courts below should be given the opportunity to consider in the first instance what preemptive or other legal impact NMFS' regulations and the cooperative agreement under the MMPA have on Massachusetts' regulatory efforts. That consideration may show that legal issues concerning ESA § 9 no longer have any meaningful bearing on this case. If so, the basis for petitioners' Tenth Amendment argument would also be eliminated.

The district court could, of course, consider the impact of the ALWTRP regulations in the future, in the context of either a motion by petitioners to vacate or modify the preliminary injunction or a request by respondent for a permanent injunction. The new MMPA regulations were not yet in effect, however, even at the time the court of appeals rendered its decision partially affirming the preliminary injunction, and the regulations were not fully considered by that court, which erroneously believed that they did not have any impact on this case. Pet. App. A15. In a case such as this, where intervening events were not fully considered below and may substantially affect the propriety of an outstanding injunction and the ultimate resolution of the case, it would be appropriate for this Court to vacate the judgment of the court of appeals and remand for further

consideration. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). That disposition would be particularly appropriate here, because the intervening events involve federal regulatory developments, and the responsible federal agency did not participate in the litigation below.

2. Actions taken by petitioners themselves since the preliminary injunction was entered reinforce the conclusion that the injunction has little or no continuing practical importance and that a remand for further proceedings would be appropriate. Specifically, petitioners did not obtain a stay of the preliminary injunction, and they therefore have already complied with that injunction in a way that would be largely unaffected by any ruling by this Court on the merits of their ESA arguments.

a. On October 17, 1996, the Director of the Massachusetts Division of Marine Fisheries submitted to NMFS an application for authorization under the ESA to allow the taking of Northern Right whales incidental to commercial fishing activities in Cape Cod Bay from February through May of each year. 61 Fed. Reg. at 64,500. NMFS notified the public of its receipt of the application and requested public comments on its preliminary determinations, suggestions and issues related to the application. See *id.* at 64,500-64,504. On February 5, 1997, NMFS declined to process the application further, concluding that such an application by Massachusetts was unnecessary. NMFS reasoned that any authorization by NMFS to take endangered or threatened marine mammals must comply with both the ESA and the MMPA, and that any issuance of a permit under MMPA § 101(a)(5)(E), for the incidental taking of an endangered species in connection with commercial fishing operations would be a federal action that requires consultation with NMFS (in its capacity as administrator of the ESA) under Section 7 of the ESA, 16 U.S.C. 1536. An incidental take *statement* would have to be issued to NMFS pursuant to

Section 7(b)(4) of the ESA in conjunction with its issuance of an MMPA permit (see *Bennett* v. *Spear*, 520 U.S. at 169-170), thereby rendering the issuance of a separate incidental take *permit* to petitioners under Section 10 of the ESA unnecessary. 62 Fed. Reg. at 5386.

Petitioners also applied to NMFS for incidental take authorization under the MMPA for the same species and activity. 61 Fed. Reg. at 64,503.[5] NMFS declined to process the MMPA application as well because, on its own initiative under MMPA § 101(a)(5)(E), it already had considered authorizing the incidental taking of Right whales by commercial fisheries but was unable to make the requisite determination that any taking of Northern Right whales would have a negligible impact on the species. See 60 Fed. Reg. at 45,399; pp. 8-9, *supra*.

The portions of the preliminary injunction requiring petitioners to apply to NMFS for incidental take permits under the ESA and MMPA appear to have been designed principally to clarify for the district court the legal and regulatory position of NMFS under those two Acts. See Pet. App. B69-B70 n.45. Because of the way in which the MMPA and ESA interact (see pp. 8-9, *supra*), NMFS declined to act on the application under either statute, and the court-ordered applications therefore did not yield a definitive statement of what measures NMFS itself intended to undertake. The recent regulations issued by NMFS under the MMPA, by contrast, do serve to inform the district court of NMFS' regulatory approach.

b. Petitioners also complied with the other two requirements of the preliminary injunction: that they form a working group to discuss steps to minimize the take of Northern

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[5] The court of appeals subsequently vacated the portion of the preliminary injunction requiring petitioners to submit an application under the MMPA. Pet. App. A9-A10.

Right whales, and that they submit a report to the district court proposing ways to minimize such takes. Pet. 6-7; see C.A. Rec. App. 362-403. Moreover, petitioners explained to the district court that Massachusetts was "implement[ing] the measures contained in the proposed plan [that had been submitted to the court] pursuant to the Commonwealth's regulatory authority." C.A. Rec. App. 406; see *id.* at 411, 419-428 (notifying court that Massachusetts adopted emergency regulations regarding gear restrictions and disentanglement efforts for Northern Right whales and stating intentions regarding additional regulations). As we have pointed out above (see note 3, *supra*), the new Massachusetts regulations largely mirror the new NMFS regulations. Because the new Massachusetts regulations were promulgated pursuant to state regulatory authority and their adoption was not ordered by the district court, an order setting aside the preliminary injunction would not alter Massachusetts' current regulatory scheme regarding Northern Right whales in Cape Cod Bay.[6]

B. 1. Especially in light of the intervening developments discussed above, the interlocutory posture of this case, and

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[6] The district court ordered petitioners to convene an endangered whale working group to discuss with respondent and other interested persons "modifications of fixed-fishing gear and other measures to minimize harm to the Northern Right whales." Pet. App. B72. The district court specifically directed that it be modeled after the take reduction teams and the regional scientific review groups required under the MMPA. *Id.* at B72-B73. Whether or not that aspect of the preliminary injunction was warranted as an initial matter, it certainly is no longer necessary in light of Massachusetts' new regulations and NMFS' promulgation of the Atlantic Large Whale Take Reduction Plan, the interim final rule implementing that plan, and the ongoing responsibilities of the MMPA take reduction team under the plan. See 62 Fed. Reg. at 39,157, 39,159, 39,161. We also note that respondent apparently refused to participate in the court-ordered working group. See C.A. Rec. App. 294-296.

the unique circumstances of the case resulting from the predominant role of the MMPA in protecting the Northern Right whale, the ESA issues petitioners seek to present do not warrant plenary review by this Court.

The ESA makes it unlawful for a person not only to "take" an endangered species, but also to "cause" a take to be committed. 16 U.S.C. 1538(a)(1)(B) and (C), and (g). Petitioners urge application of a proximate cause standard for liability under the ESA, drawn from the common law and Justice O'Connor's concurring opinion in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. at 712. See Pet. 25-28. But the court of appeals agreed with petitioners, even in the context of a preliminary injunction, that it should look to common law principles of causation to determine whether petitioners' manner of licensing certain fishing gear constitutes a take of Northern Right whales in violation of the ESA, and thus whether respondent was likely to succeed on the merits of his Section 9 claim. The court of appeals did not hold, as petitioners imply (Pet. 25-27), that a preliminary injunction was appropriate solely because the taking would not occur "but for" petitioners' authorization. Instead, the court of appeals reviewed the district court's detailed factual findings, Pet. App. A19-A22, and determined that the requisite degree of causality was present here under common law standards because "the state has licensed commercial fishing operations in specifically the manner that is likely to result in a violation of federal law," *id.* at A17.[7]

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[7] Petitioners are mistaken in characterizing the court of appeals' decision as outside the bounds of common law principles. Pet. 25-28. For example, some state courts have ruled that a state agency may be liable in tort for the issuance of a driver's license in violation of a statute mandating nonissuance or suspension of the license when a foreseeable injury results from the improperly licensed driver's operation of a motor vehicle. See, *e.g.*, *Oleszczuk* v. *State*, 604 P. 2d 637 (Ariz. 1979); *Pendergrass* v. *State*, 702 P. 2d 444 (Ct. App.), *review denied*, 707 P. 2d 584 (Or. 1985);

Such a claim limited to application of a legal standard to a particular set of facts does not warrant review by this Court. Sup. Ct. R. 10.

Moreover, the decision of the court of appeals on this point is consistent with the decisions of several other courts of appeals that have upheld injunctions against governmental regulatory action that was found to cause the death or injury of a listed species by expressly authorizing specific conduct that is reasonably likely to kill or injure members of the species, especially where the agencies are managing or protecting public resources. See, *e.g.*, *Sierra Club* v. *Yeutter*, 926 F.2d 429 (5th Cir. 1991) (U.S. Forest Service's manner of permitting clear-cutting in certain areas of federal timberland impaired endangered species' essential behavioral patterns resulting in take in violation of ESA § 9, which district court was authorized to enjoin pending formulation of a proper timber management plan); *Loggerhead Turtle* v. *County Council of Volusia County*, 148 F.3d 1231, 1249-1253 (11th Cir. 1998) (harm to endangered turtles caused by artificial beachfront lighting was fairly traceable for standing purposes to county's inadequate regulations governing beachfront lighting), pet. for reh'g No. 97-2083 (filed Aug. 21, 1998); cf. *Ramsey* v. *Kantor*, 96 F.3d 434, 442 (9th Cir. 1996) (holding that Oregon and Washington could lawfully promulgate fishing regulations that would result in incidental takes of threatened and endangered species without first obtaining an incidental take permit under ESA § 10 only if "the actions in question are contemplated by an incidental take statement issued under [ESA §7] and are

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Trewin v. *State*, 198 Cal. Rptr. 263 (Ct. App. 1984). In those circumstances, as in this case, the agency has authorized the specific conduct that presents a significant risk of harm, the operation of a motor vehicle by a person with a physical or mental condition that makes a future accident particularly likely.

conducted in compliance with the requirements of that statement").[8]

Those cases, like the present one, turned on specific facts. As this Court explained in *Sweet Home*, "[i]n the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree * * * *. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication." 515 U.S. at 708. The court of appeals below, in a subsequent case, specifically recognized that different facts result in different causation determinations under ESA § 9. *Strahan* v. *Linnon*, No. 97-1787, 1998 U.S. App. LEXIS 16314 at *13 (1st Cir. July 16, 1998). There, the court held that the Coast Guard was not responsible under Section 9 of the ESA for takings by non-Coast Guard vessels to which it issued certificates of documentation, which are analogous to automobile and driver licenses. The court cited the court of appeals opinion in the instant case (see Pet. App. A17), which contrasted such general licensing that allows use of a vehicle in a manner that does not risk violation of law with the State's licensure of the commercial use of gillnet and lobster pot gear in "specifically the manner that is likely to result in a violation of federal law."

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[8] See also *Defenders of Wildlife* v. *EPA*, 882 F.2d 1294, 1298, 1301 (8th Cir. 1989) (injunction against EPA's continued registration of certain pesticides that allowed others to distribute and use them in a manner that resulted in death of endangered species); *United States* v. *Town of Plymouth*, 6 F. Supp. 2d 81, 90-91 (D. Mass. 1998) (preliminarily enjoining town's continued permitting of off-road vehicles at certain times on certain areas of beach owned in part by town and in part by private individuals without appropriate precautions based on finding that use of vehicles causes prohibited ESA § 9 take of endangered bird species that nests on beach).

2. Review of petitioners' Tenth Amendment claim likewise is not warranted, especially in view of the "fundamental and longstanding principle of judicial restraint requir[ing] that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). Here, any necessity of deciding the constitutional challenge to the preliminary injunction could well be eliminated as the result of further consideration by the courts below of NMFS' regulations under the MMPA.

Moreover, there is no circuit conflict on the application of the Tenth Amendment in this setting, and that issue does not otherwise warrant review. The Tenth Amendment and constitutional principles of federalism prohibit the federal government from ordering States to enact or enforce a federal regulatory program or conscripting state officers to enforce such a program. *Printz* v. *United States*, 117 S. Ct. 2365, 2384 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). Contrary to petitioners' assertions, the court of appeals did not interpret Section 9 of the ESA to create "[a] federal obligation requiring a State to regulate to eliminate all risk of private ESA violations." Pet. 17. As petitioners themselves note (*ibid.*), the ESA creates no obligation for States to regulate commercial fishing, and the courts below agreed. Pet. App. A33, B41. The gravamen of the Commonwealth's violation of the ESA as found by the district court was not insufficient regulation, but the affirmative licensing by the State of commercial fishing operations to use gillnet and lobster pot gear specifically in a manner that was likely to cause a take of a Northern Right whale.

This Court has noted the difference between congressional commands that a State implement a federal program and judicial orders to state officials requiring them to comply with federal law. *New York*, 505 U.S. at 179. Congress does not violate the Tenth Amendment by requiring States to

comply with generally applicable requirements of federal law. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC* v. *Wyoming*, 460 U.S. 226 (1983). Section 9 of the ESA, as interpreted by the court of appeals, is not a command to States to regulate, but rather a generally applicable prohibition on activities by States and others that cause harm to endangered species.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the regulations of the National Marine Fisheries Service that became effective on November 15, 1997. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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