

In the Supreme Court of the United States

**DELMARVA FISHERIES ASSN., INC.,
MARYLAND CHARTER BOAT ASSN, INC
BRIAN NESSPOR; AND, KENNETH
JEFFRIES, JR.,**

Applicants

v.

**ATLANTIC STATES MARINE
FISHERIES COMMISSION,**

Respondent

To the Honorable John G. Roberts, Jr., Chief Justice of the United States
and Circuit Justice for the Fourth Circuit

**PETITIONERS' EMERGENCY APPLICATION FOR
A WRIT OF INJUNCTION FOR INTERIM RELIEF**

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PARTIES TO THE PROCEEDING

The Applicants are Maryland-based Delmarva Fisheries Association (“DFA”) and the Maryland Charter Boat Association (“MCBA”) which, along with two of their individual commercial fishing members were Plaintiffs for injunctive and declaratory relief in the U.S. District Court for the District of Maryland (No. 1:24-cv-00688) and on that before the U.S. Court of Appeals for the Fourth Circuit (Case No. 24-1388).

Respondent is the Atlantic States Marine Fisheries Commission (“ASMFC” or “Commission”), an Interstate Compact of 15 Atlantic coastal states ratified by the U.S. Congress on May 4, 1942, which was the Defendant in the U.S. District Court for the District of Maryland as well as the Appellee at the Fourth Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Applicants are natural persons or IRS § 501(c)(6) “not-for-profit” entities without parent companies or stock.

STATEMENT OF RELATED CASES

This case arose from the foregoing proceedings with respect to Applicants challenge on Fifth Amendment, Tenth Amendment, and Fourteenth Amendment and other violations of law, including 42 U.S.C. § 1983, as to the Striped Bass Fish Management Plan (“FMP” or “Plan”) prepared and adopted by Respondent on January 24, 2024.

That Plan imposed drastic, unwarranted, and illegal limitations on commercial and recreational fishing for Atlantic Striped Bass in the coastal Atlantic Ocean and, in particular, the Chesapeake Bay and its tributaries. This promulgation (hereafter referred to as the “2024 Striped Bass Addendum” or “Addendum II”) was adopted on a vote of 14-2 by ASMFC which purports

to be an Interstate Compact consisting of the 15 states bordering the Atlantic Ocean. The initial proceeding was filed on March 7, 2024.

On March 22, 2024, Plaintiffs submitted their Motion and Memorandum in support thereof for a Preliminary Injunction. On April 12, 2024, a hearing was held on the matter and on that same day an Order was issued denying the same (Exhibit A) notwithstanding the Court having acknowledged that the Applicants had amply demonstrated irreparable harm:

“Clearly your clients are harmed without injunctive relief... the balance of the equities is there’s more immediate irreparable harm on your clients than it is on the matter of the spawning grounds of the rockfish.”¹

During the hearing on Applicants’ motion, the Court disputed a right of private action and further that only the Office of the Maryland Attorney General had standing to contest an ASMFC action. (*Id.*, at p. 31, lines 3-4 and 17-21)

On April 15, 2024, Applicants sent a letter via electronic mail to the Governor and Attorney General of the State of Maryland requesting the state’s intervention in this case on their behalf. (Exhibit B). Follow-up telephone calls and other communications to these offices failed to produce any response from the State of Maryland until the May14, 2024 letter when the Maryland Office of Attorney General declined to “take any action.” (Exhibit C)

On April 22, 2024, the District Court issued a Memorandum Opinion (Exhibit D) regarding its prior Order specifying that “As Plaintiffs have failed to satisfy their burden on likelihood of success on the merits, this Court need not address the remaining three parts of the preliminary injunction test.”. That Order further observed that “even though the State of Maryland is authorized to sue the Commission to prevent enforcement of the addendum, it has not elected to do so. (*Id.*,6).

¹ District ECF No. 27, (Oral Hearing), p. 59, lines 18-23.

On April 29, 2024, Applicants filed a Notice of Appeal with the United States Court of Appeals for the Fourth Circuit to reverse the Court's Order on Applicants' Motion for a preliminary injunction. On May 3, 2024, Applicants also filed a Memorandum in Opposition to Respondent's Motion to Dismiss the case before the District Court enunciating, in particular, the unconstitutionality of the ASMFC structure under the anticommandeering doctrine. *New York v. United States*, 505 U.S. 144 (1992).

With the ASMFC Plan about to take effect, an application was filed by the Applicants on May 13, 2024 with the Supreme Court for an Emergency Writ of Injunction for Interim Relief. That Application was returned by letter dated May 21, 2024, citing Supreme Court Rule 23.2 regarding prior appellate review. (Exhibit E).

On August 5, 2024, the Department of Justice declined to enter the appellate case upon receipt of notice that the constitutionality of an Act of Congress was drawn into question. (Circuit ECF No.18)

A hearing was held before the Fourth Circuit Court of Appeals on December 11, 2024 and the Circuit Court issued an opinion on February 4, 2024 that "Because Plaintiffs lack standing to pursue an injunction of the striped-bass plan ... we remand with instructions to dismiss the case ... because "Plaintiffs sued the Commission, not Maryland." (Exhibit F). In doing so, the Circuit Court, as did the District Court, erroneously divided this fishery regulatory apparatus into "parts" instead of grasping the "whole," namely that the ASMFC, all its participating states, and, as will also be shown, its federal government partners are an integrated single regulatory and enforcement apparatus created by the Atlantic Striped Bass Conservation Act of 1984 (Pub. Law 98-613) ("Striped Bass Act").

Here are the very words by which the U.S. Fish and Wildlife Service (“USFWS”) unambiguously states that “The three partners which share management responsibility for Atlantic striped bass are the Atlantic States Marine Fisheries Commission, the National Marine Fisheries Service and the U.S. Fish & Wildlife Service.”²

As soon as the ASMFC’s publicly announced the Plan on January 25, 2024, Applicants’ charter boat businesses, which were highly successful up until 2024, have begun to attrit due to cancellations of previously scheduled reservations and the lack of new customers. *See* Declaration of Brian Hardman, President of Maryland Charter Boat Association, specifying that: (1) charter boat reservations and income declined by 75-85% from the equivalent amounts in 2023; (2) that the 2025 numbers are continuing to be off by the same ratios or worse; (3) that an unprecedented 53 charter boats have been sold or listed for sale since 2024; and, (4) that 43 “for hire” Charter Boat businesses have already been forced to close their doors with another eleven companies losing money at a rate that will soon bring about the same result. (Exhibit G)

Notwithstanding the Applicants having presaged these disastrous results and their actualization over the course of the 2024 fishing season, the ASMFC made no changes when it reconvened December 16, 2024 to consider updated Striped Bass Stock Projections with regard to any potential 2025 changes. (Exhibit H) This, despite the fact that the data distributed at the year-later meeting flatly contradicted the ASMFC data on which the 2024 fishing limitations which were premised on false data anticipating that the probability of rebuilding Striped Bass Stock Projections at the then targeted 2029 goal had dropped 97% to only 15%.³

² <https://www.fws.gov/law/atlantic-stripped-bass-conservation-act#:~:text=The%20three%20partners%20which%20share,U.S.%20Fish%20and%20Wildlife%20Service>

³ <https://asmfc.org/species/atlantic-stripped-bass/#:~:text=In%20May%202023%2C%20the%20Board,stock%20rebuilding%20to%20its%20biomass>

Also on this occasion, just one year after having destroyed Applicants’ businesses, the ASMFC announced that its Striped Bass projection model had suddenly risen to “a 50% probability” of being at or above the same 2029 target⁴. Atlantic Striped Bass Assessment Overview (Nov. 2024)

Thus, combining all three years, the ASMFC is maintaining striped bass continuum with a 97% favorable ratio in 2023, dropping to 15% in 2024 and then rising to just under 50% in 2025.

Fishing Year	Stock Assessment Year	Decision Date	Projection
2023	2022	Nov., 2022	97%
2024	“Updated” 2022	Jan., 2024	15%
2025	2023	Dec., 2024	50%

There are in excess of 240 million Striped Bass in U.S. waters and the annual number of fishing removals is approximately six million. Out of this magnitude, the ASMFC and its regulatory partners purport to be able to count that current level of fish by one-year size (just under two inches), add in fishing mortality levels and then project that estimate out five years to the adult female population in 2029. This is a preposterous claim on its face with their own results showing non-linear variances between 15-97 percent over just the last three years.

Despite the marked contrast between the Respondent’s clearly defective methodology and the Applicants’ predicted and actual results, the ASMFC and its member states, and federal participants failed to take any action at its year-later meeting to remediate the undisputed

⁴ https://asmfc.org/uploads/file/673b7d6dAtlStripedBassStockAssessmentOverview_2024.pdf.

destruction of the Applicants livelihood ahead of the 2025 fishing season scheduled to commence on May 16, 2025.

Without interim relief, which cannot occur within the timeframe of a standard petition for certiorari, Applicants' charter businesses and business properties (vessels and related equipment) will continue on the road to destruction. The constitutional violations consist of the 10th Amendment prohibition on the federal government commanding the States; a regulatory "taking" by federal and state governmental action with neither due process of law nor just compensation (5th Amendment); and the denial of the right of a private remedy at law (14th Amendment).

This Application renews the request for imposition of injunctive relief along with a remand of the case for a decision on the merits. As such, it would accord the Applicants their deserved *status quo ante* and an opportunity for the appropriate exercise of their remedial rights in the face of this abuse of both federal and state police powers through the means of a purported interstate compact.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1651, and 28 U.S.C § 2403 may apply.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE STATEMENT ii

STATEMENT OF RELATED CASES ii

JURISDICTION vii

TABLE OF CONTENTS viii

TABLE OF AUTHORITES ix

TABLE OF EXHIBITS xiv

INTRODUCTION..... 1

URGENT NEED FOR EMERGENCY RELIEF 3

 A. Immediate, Irreparable and Ongoing Harm to Applicants 3

 B. No Cognizable Injury to Respondent from Emergency Interim Relief 5

THE INTERSTATE COMPACT AND FEDERAL FISHERY STATUTES 7

 A. ASMFC is Charged under Federal Law with Rulemaking Powers 7

 B. Lack of Subsequent Ratification of Regulatory Powers 13

 C. Violation of the Anticommandeering Principle 17

 D. Standing and Due Process Issues 18

 E. Takings Clause Is Fully Applicable 22

CONCLUSION 24

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Am. Sugar Refining Co. v. Waterfront Comm’n of N.Y. Harbor</i> , 432 N.E.2d 578 (N.Y. 1982)	16
<i>Bond v. United States</i> , 564 U.S. 211 (2011)	17
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	19-20
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985)	24
<i>Delaware River Joint Toll Bridge Commission v. Oleksiak</i> , 612 F. Supp. 3d 428 (E.D. Pa. 2020)	15
<i>Del. River Joint Toll Bridge Comm'n v. Secy' Pa. Dep't of Lab. & Indus.</i> , 985 F.3d 189 (3rd Cir. 2021)	16
<i>Dept. of Commerce v. New York</i> , 139 S. Ct. 2551 (2019)	20
<i>Gonzaga Univ. v Doe</i> , 536 U. S. 273 (2002)	21
<i>Health and Hospital Corp. v. Talevski</i> , 143 S. Ct. 1444 (2023)	21
<i>Horne v. Dep’t of Agriculture</i> , 576 U.S. 351 (2015)	22
<i>Int’l Broth. of Teamsters v. Dept. of Transp.</i> , 724 F.3d 206, 211 (D.C. Cir. 2013)	1
<i>Int’l Union of Operating Eng’rs, Local 542 v. Del. River Joint Toll Bridge Comm’n</i> , 311 F.3d 273 (3d Cir. 2002)	16
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	20
<i>Lebanon Valley Auto Racing v. Cuomo</i> , 478 F. Supp.3d 389 (N.D.N.Y. 2020)	23

<i>Leadbeater v. Port Auth. Trans-Hudson Corp.</i> , 873 F.2d 45 (3d Cir. 1989)	16
<i>Lofstad v. Raimondo</i> , 2024 U.S. Dist. LEXIS 34112 (D. NJ)	19-20
<i>Lucas, v. South Carolina Coastal Council</i> 505 U.S. 1003 (1992)	24
<i>Lutter v. JNESO</i> , 86 F.4th 111 (3d Cir. 2023)	20
<i>Maine Lobstermen’s Association v. National Marine Fisheries Service</i> , No. 22-5238 (DC Cir. 2023)	8
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	20-21
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	24
<i>Michigan v. EPA</i> , 576 U.S. 743 (2015)	8
<i>Morgan v. U.S.</i> , 304 U.S. 1 (1938)	22
<i>Murphy v National Collegiate Athletic Association</i> 584 U.S. 453 (2018)	18
<i>New York v. Atlan. States Marine Fisheries Comm'n</i> , 609 F.3d 524 (2 nd Cir. 2010)	8
<i>New York v. United States</i> , 505 U.S. 144 (1992)	iii, 17, 26
<i>North Carolina Fisheries Ass'n v. Daley</i> , 27 F. Supp. 2d 650 (E.D. Va. 1998)	24
<i>O'Donnell v. Clinton, 463</i> , 14 N. E. 747 (1884)	16
<i>Penn Central Transp. Co. v. New York City</i> , 438 U. S. 104 (1978)	22

<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U. S. 393 (1922)	22
<i>Petty v. Tennessee-Missouri Bridge Comm'n</i> , 359 U. S. 275 (1959)	15, 25
<i>Printz v. United States</i> 521 U.S. 898 (1997)	17
<i>Tarrant Regional Water Dist. v. Herrmann</i> , 569 U. S. 614 (2013)	15
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021)	18
<i>West Virginia v. Environmental Protection Agency</i> , 90 F.4 th 323 (4 th Cir. 2024)	8
<i>Will v. Michigan Dep't of State Police</i> , 491 U.S. 58 (1989)	25

CONSTITUTIONAL PROVISIONS

Maryland Const. Declaration of Rights	21
U.S. Const., Fifth Amendment	ii, 22-24
U.S. Const., Tenth Amendment	ii, 18, 23-24
U.S. Const., Fourteenth Amendment	ii, 22

STATUTES

5 U.S.C. §§ 551-559 (Administrative Procedure Act)	21
12 U.S.C. § 5551(a)(2))	12
14 U.S.C. §§ 1 <i>et seq.</i> (U.S. Coast Guard Act)	13
16 U.S.C. §§ 1801-1883 (Magnuson–Stevens Act)	12, 14
16 U.S.C. §§ 1851, 1853	13
16 U.S.C. § 1853	13
16 U.S.C. §§ 5101-5108 (Atlantic Coastal Fisheries Cooperative Management Act)	8, 11, 14

16 U.S.C. § 5104(a)(1)	13
16 U.S.C. § 5104(a)(4)	9
16 U.S.C. § 5104(b)	9
16 U.S.C. §§ 5151-5158 (Atlantic Striped Bass Conservation Act)	iv, 2, 9, 11, 14
16 U.S.C. § 5152(10)	9
16 U.S.C. § 5153(a)(1))	13
16 U.S.C. § 5152(c)	13, 17
16 U.S.C. § 5154	13
28 U.S.C. § 1651	vii
28 U.S.C § 2403	vii
Public Law 77-539 (May 4, 1942) (Not classified to the U.S. Code) (Ratification I)	9, 10 13
Public Law 81-721 (Aug. 19, 1950) (Not classified to the U.S. Code) (Ratification II)	10

REGULATIONS

65 Fed. Reg. 36905 (June 12, 2000)	4-5
Financial Accounting Standards Board Statement No. 95	4

ASMFC DOCUMENTS

Compact Rules and Regulations	25
Draft Addendum II to Amendment 7 to the Interstate FMP for Atlantic Striped Bass	7
Addendum II to Amendment 7 to the Interstate FMP for Atlantic Striped Bass	4
Fish Habitat of Concern Designations for Fish and Shellfish Species	4
News Release: Striped Bass Board Approves Addendum II (Jan. 25, 2024)	4
Review of the Interstate FMP for Atlantic Striped Bass (Aug., 2023)	5
Testimony of Robert Beal, U.S. House of Representatives (April 4, 2017)	11

Testimony of Robert Beal, U.S. Senate (March 19, 2013) 11

2023 Annual Report 12, 23

AUTHORITIES

Stein, Josh: North Carolina Office of Attorney General Advisory Opinion: Constitutionality
Of the Atlantic Coastal Fisheries Cooperative Act (Mar. 26, 1996) 10-11, 16

Williston on Contracts 15

OTHER

Am. Bar Ass’n: Developments in Interstate Compact Law and Practice (July 7, 2020) 14

Bay Journal (Feb. 26, 2024) 3

Cape Cod Times (Oct. 4, 2017)14

Marine Fish Conservation Network (Nov. 28, 2023) 14

U.S. Fish and Wildlife Service Website v

TABLE OF EXHIBITS

Exhibit A: District Court Letter Order on Motion for Preliminary Injunction	iii
Exhibit B: Applicants Letter to Maryland Governor and Attorney General	iii
Exhibit C: Maryland Office of Attorney General Response to Applicants	iii
Exhibit D: District Court Opinion Denying Motion for Preliminary Injunction	iii
Exhibit E: Supreme Court Letter of Return	iv
Exhibit F: Circuit Court Opinion Dismissing the Case	iv
Exhibit G: Declaration of Brian Hardman	v
Exhibit H: Meeting Overview of Atlantic Striped Bass Management Board	v
Exhibit I: <i>Bay Journal</i> Article (Feb. 26, 2024)	3
Exhibit J: ASMFC News Release: Striped Bass Board Approves Addendum II	4
Exhibit K: Addendum II to Amendment 7 to the Interstate FMP for Atlantic Striped Bass	4
Exhibit L: ASMFC Fish Habitat of Concern for Fish and Shellfish Species	4
Exhibit M: Letter from Maryland Association of Counties, <i>et al.</i>	5
Exhibit N: ASMFC Review of the Interstate FMP for Atlantic Striped Bass	5
Exhibit O: Draft Addendum II to Amendment 7 to the Interstate FMP for Atlantic Striped Bass .	7
Exhibit P: Congressional Ratification I (1942)	10
Exhibit Q: Congressional Ratification II (1950)	10
Exhibit R: North Carolina Office of Attorney General Advisory Opinion	10-11, 16
Exhibit S: ASMFC Annual Report	13, 25
Exhibit T: Letter of East Coast Fishing Coalition	26

INTRODUCTION

On January 24, 2024, ASMFC adopted drastic, unwarranted, and unconstitutional limitations on commercial and recreational fishing for Atlantic Striped Bass in the coastal Atlantic Ocean and, in particular, the Chesapeake Bay and its tributaries. This promulgation was adopted on a vote of 14-2 by the ASMFC which was established in 1942 as an Interstate Compact consisting of the 15 states bordering the Atlantic Ocean. Three of those states (South Carolina, Georgia and Florida) were ineligible to vote due to the lack of sufficient correlation to the Striped Bass species; Maryland and New Jersey were the opposition votes. [The improper and illegal aspects as to how an organization with 15 compacting states, with three members abstaining or two voting “no” resulted in a 14-2 vote are addressed *supra*.]

Applicants’ trade association members consist of approximately 500 “for hire” vessels — primarily medium-sized, family-run boats — employing 1,500-1,600 operators and crew in Maryland coastal waters, the Chesapeake Bay and the tributaries of the latter from the Virginia to Delaware state lines. As § 501(c)(6) non-profit membership organizations, these entities share standing with their named members and on behalf of their other adversely affected members. *International Broth. of Teamsters v. Dept. of Transp.*, 724 F.3d 206, 211 (D.C. Cir. 2013).

Applicants, as association members and individuals are citizens and residents of Maryland conducting business completely within the state of Maryland and, pursuant thereto, exercising their U.S. and state constitutional powers solely in the land and territorial waters of the state of Maryland. Nonetheless, ten other states with no personal jurisdiction over Applicants; and acting illegally through an unconstitutional and unratified Interstate Compact have deprived Applicants’ members of their property rights and livelihood over the negative vote of the State of Maryland where they do reside, conduct business, and are citizens thereof.

Subsequently, Maryland, under threat of coercion from the ASMFC acting in concert with its other participating states as well as its federal government “partners,” did adopt Addendum II rather than risk the retribution accurately described by the Maryland Attorney General (in the previously referenced Exhibit C) as follows:

Please be aware that under the Striped Bass Conservation Act ... if ASMFC finds that a State fails to comply with ASMFC’s Interstate Fishery Management Plan for Atlantic Striped Bass, or any amendment or addendum under the Plan, the Secretaries of the Department of Commerce and the Department of the Interior may impose a federal moratorium on *all* striped bass fishing in that State ... Based on the aforementioned considerations, our Office declines to take any action... (Citations omitted.) (Emphasis in original.)

On April 2, 2024, the Maryland Dept. of Natural Resources published regulations reducing the recreational fishery daily permissible limit, size limitations, and other requirements set forth in Addendum II which it had voted against but, as noted above, believed it was constrained to adopt. *See* “This action is *necessary* to implement the Atlantic States Marine Fisheries Commission’s Interstate Fishery Management Plan for Atlantic Striped Bass. (MDNR, Public Release, May 15, 2024 Chesapeake Bay Recreational and Charter Boat Striped Bass Summer and Fall Fishery Size Limits (5/16/2024). (Emphasis added);⁵ *also Eastern Shore Undercover*: “If you’re wondering why this change is happening, it’s all part of implementing the Atlantic States Marine Fisheries Commission’s Interstate Fishery Management Plan for Atlantic Striped Bass.”⁶

Not only did Maryland oppose the adoption of Addendum II, but when confronted with having to cut the catch limitation in half, Michael Luisi, the Asst. Director and Fisheries Manager at the Maryland Department of Natural Resources and its permanent proxy to the ASMFC, specifically warned the Commission that limiting Maryland’s charter boat clients’ catch to one fish

⁵ The original version of this Press Release appears to have been deleted from the DNR Website.

⁶ <https://www.easternshoreundercover.com/news2/2024-chesapeake-bay-recreational-and-charter-boat-striped-bass-size-limits.htm#:~:text=Starting%20on%20May%2016%2C%202024,bass%20summer%20and%20fall%20season>

a day “will put people out of business.” *Bay Journal*: “Striped bass harvest restrictions trigger widespread impact” (Feb. 26, 2024). (Exhibit I) He was pointedly correct in this assessment but the ASMFC and its federal and other illegally voting partners as well as other member states, including Maryland at that point, decided that its guesstimate on fish-spawning futures five years into the future was more important than the impending demise of these family-run, small businesses.

URGENT NEED FOR EMERGENCY RELIEF

A. Immediate, Irreparable and Ongoing Harm to Applicants

In addition to Mr. Luisi, Applicants had stressed at the outset that the proceeding leading to the promulgation of Addendum II would not simply inflict merely limited nor even substantial harm to Plaintiff’s business. Applicants consistently represented that the full destruction of their business, their property and their livelihood beginning was at stake from the date the ASMFC made clear its intent to adopt Addendum II.

The significance of this is that the devastation wreaked upon the Applicants’ businesses was by no means an unanticipated consequence. It was made very clear even during the extremely limited ASMFC public participation process and thereafter as to the clear and immediate threats posed by the Addendum II fishing limitations:

- “100% of my customers are drawn to the Chesapeake Bay due to the fishing opportunities for Striped Bass”
- “Taking away our ability to catch two fish per person is a clear sign you are trying to completely shut down our businesses and deny us the right to make a living.”
- “We cannot survive with the new regulations.”
- “This means that business failures are the inevitable result.”
- “No one is going to pay that amount of money to catch ONE FISH.”

The 2024 Striped Bass Addendum reduced Applicants' fishing opportunities by: (1) shortening the fishing season; (2) reducing size of removable fish; (3) lowering commercial quotas; and (4) in the case of "for hire" charter boats, limiting each recreational fisher to one fish as opposed to the prior two fish per person. ASMFC News Release: Striped Bass Board Approves Addendum II (Jan.25, 2024). (Exhibit J) All these actions were taken despite Respondent's own data concluding that the Striped Bass stock is "no longer experiencing overfishing." ASMFC Addendum II to Amendment 7 to the Interstate Fishery Management Plan for Atlantic Striped Bass (Jan., 2024, p. 2). (Exhibit K)⁷ If Striped Bass are not being overfished, how can more fishing limitations which are the gravamen of the Complaint, be the answer to anything?

A revenue attrition rate of up to 85% of business revenue is a staggering amount which no business can survive and makes a mockery of ASMFC's observation in its Opposition Brief to Applicants' Motion for a Preliminary Injunction that the "**alleged** economic harms are **incidental** effects of the sort that could be alleged for almost any regulation."⁸ Alleged? Incidental?

Added to this is the marked devaluation of Plaintiffs' boating vessels which in many instances serve as collateral for loans. The rules of the federal banking agencies are very clear on this point: "For most small business loans, the primary source of repayment is the cash flow of the business." *See, e.g.*, FDIC Financial Institution Letter 90-2010: Underwriting Standards for Small Business Loans (65 *Fed. Reg.* 36905; June 12, 2000). *See also* FASB Statement No. 95: "This Statement encourages enterprises to report cash flows from operating activities directly by showing major classes of operating cash receipts and payments (the direct method)" (Nov. 1987)).

⁷ ASMFC also acknowledges that Striped Bass habitats to include inland waterways such as the Chesapeake Bay are not deemed a "Fish Habitat of Concern." https://asmfc.org/files/Habitat/FHOC_Designations_January2024.pdf. (Exhibit L)

⁸ District ECF No. 13, p. 28.

Applying these requirements to Plaintiff’s business property, the estimated 75-85 percent decline in their 2024 business revenues would be the *pro rata* devaluation of their boating vessels and related property. Federal banking regulations are also clear that if collateral deteriorates, a loan deemed “underperforming” even if payments are current. 65 *Fed. Reg.* 36905 (June 12, 2000)

The “fire sale” prices at which Applicants’ vessels can only draw buyers is further demonstration of continuing to irreparable harm as every day elapses in the absence of a preliminary injunction. These injuries flow likewise, of course, to their families and employees, but also the communities in which they do business as demonstrated from letters of opposition to Addendum II emanating from the Maryland Association of Counties and the major County Councils bordering the Chesapeake’s Eastern Shore (Exhibit M).

B. No Cognizable Injury to Respondent from Emergency Interim Relief

On the other hand, no reasonable voice is known to contend that Striped Bass fishing in the Chesapeake Bay, or throughout all their coastal and inland waterways is anything but plentiful at this time, as it has been for at least 3-5 years. Secondly, ASMFC’s own data show that Striped Bass fishing in the Chesapeake Bay, where Addendum II is specifically aimed, has been steadily declining over the last five years due to previously imposed at various governmental levels:

Chesapeake Bay Recreational Removals in Numbers of Fish for 2017 and 2020-22⁹

Year	Recreational Removals	% Change from 2017	Total Removals	% Change from 2017
2017	2,014,068	-	2,493,615	-
2020	1,503,357	-25%	2,030,024	-19%
2021	1,051,766	-48%	1,648,080	-34%
2022	1,022,212	-49%	1,573,732	-37%

⁹ ASMFC Review of the Interstate FMP for Atlantic Striped Bass (Aug., 2023, p. 36). (Exhibit N)

In 2023, the population numbers for Striped Bass improved even further according to the Respondent’s own published data for total Atlantic striped bass fishing removals (commercial and recreational) falling to 5.6 million fish. This represented an 18% decrease from 2022, driven primarily by a decrease in recreational removals. <https://asmfc.org/species/atlantic-stripped-bass/>

In other words, there was never a current problem in general to be addressed in this area, and certainly nothing by way of serious relative impact by way of the “for hire” charter boat business. Here are the official fishing numbers just released by the Maryland Department of Natural Resources during the last three years:

Electronic Harvest Reporting by Charter Boat Captains
Chesapeake Bay & Tributaries
(through Nov. 15, 2024)

	Number of Striped Bass Kept	Percentage Decline
2022	100,997	
2023	92,880	
2024	26,595	-73%

Thus, the effect of this action which was disproportionate by design functioned not just to destroy the Appellants’ boat rental business, but served no rational purpose since a reduction of 66,000 fish is a minuscule 0.5% of ASMFC’s own estimate that there are almost six million striped bass fishing removals on an annual basis. It is actually more absurd than that since the focus of this entire exercise is spawning bass so that would reduce the charter take to 0.025 of females Striped Bass.

But the ASMFC nevertheless undertook a program resulting in massive “here and now” damage to Chesapeake Bay fishing businesses and fishing communities. Making matters worse, Addendum II was so futuristic in nature that even the ASMFC technical staff could not explain in any words other than guesswork:

These **estimates** of **preliminary** 2022 removals and updated stock **projections** were presented to the Board in May 2023... Since striped bass catch and **[mortality] rates vary from year-to-year** (even under the same regulations), the average [mortality rates] from 2019-2022 (excluding 2020 due to **uncertainty** associated with COVID-19 impacts) was applied to 2023-2029 in the **new projections**. Under this [mortality] rate, the **new projections estimate the probability** of rebuilding SSB (Spawning Stock Biomass) to its target by 2029 drops from 97% to 15% (Draft Addendum II to Amendment 7 to the Interstate FMP for Atlantic Striped Bass, p.3) (Exhibit O)

This is a stunning level of qualifying verbiage contained within this single, most important “scientific” paragraph pertaining to Addendum II: “*estimates,*” (twice) “*preliminary,*” “*projections,*” “*mortality rates vary from year-to-year,*” “*uncertainty*” “*new projections,*” (twice); and “*probability.*” An yet this verbal mishmash served as the basis for the ASMFC regulation already destroying businesses and threatening the livelihood of hundreds of Maryland small and mostly family-owned fishing companies.

So, on the one hand, there are small, family-run businesses already operating on low margins suddenly confronted with a 75-85% drop in revenue and on the other side, there is ASMFC’s above incomprehensible guesswork about the five-year future of a now-abundant fish species. This should not have been a difficult “balancing of interests.” And yet, the District and Court of Appeal cut off this process even before the science fiction recited above could be subjected to cross-examination, let alone evaluated in view of Justice Breyer’s admonition as

references by Judge Ginsburg in *Maine Lobstermen's Association v. National Marine Fisheries Service*, No. 22-5238 (DC Cir. 2023):

The presumption in favor of the species...significantly expands the Service's veto power, prevents the agency from "paying attention to the advantages and the disadvantages" of the action, and invites the unnecessary economic dislocation wrought by **worst-case thinking**. *Michigan v. EPA*, 576 U.S. 743, 753 (2015). A presumption also ignores that worst-case scenarios lie on all sides. It is not hard to indulge in one here: ropeless fishing technologies, weak links, inserts, and trawls may not work; permanent fishery closures may be the only solution. **The result may be great physical and human capital destroyed, and thousands of jobs lost, with all the degradation that attends such dislocations.** See, e.g., Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 23 (1993) ("[D]eprivation of real income itself has adverse health effects, in the form of poorer diet, more heart attacks, more suicides."). pp. 28-29; June 16, 2023) (Emphases added.)

In doing so, both courts ignored a very similar request for limited relief as per a concurrent Fourth Circuit decision in *West Virginia v. Environmental Protection Agency* where the Appellate Court fairly concluded that "a few more months of previously EPA-approved practices would have a relatively minor effect." 90 F.4th 323, 332 (4th Cir. 2024).

THE INTERSTATE COMPACT AND FEDERAL FISHERY STATUTES

A. The ASMFC is Now Charged Under Federal Law with Rulemaking Powers

In numerous other cases,¹⁰ as well as before both the District and the Appellate Court in the matter of this Application, Respondent insists that it is only endowed with "the power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions...." (District ECF No. 13, p. 10) That was an accurate statement of the Commission's powers from its formation and its congressional ratifications in 1942 and 1950. That changed radically, however, in 1984 with the post-ratification passage of the Atlantic Striped Bass Act, followed by the Atlantic Coastal Fisheries Cooperative Management Act in 1993 (Pub.

¹⁰ E.g., *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524 (2nd Cir. 2010).

L. 103–206) (“Coastal Fisheries Act”), extending ASMFC management authority to a total of 27 nearshore migratory fish species.

Perhaps the best place to start in appreciating this 40-year pretense is with the ASMFC Press Release of January 24, 2024, announcing the approval of Addendum II, which asserted that: “States **must** submit implementation plan[s] by March 1, 2024, for Board¹¹ review and approval... All Addendum II measures **must be implemented** by May 1, 2024.” (Exhibit I, *supra* at 2) (Emphases added). “Must” as used in the foregoing, and in commonplace usage, does not denote optionality and certainly does not comport with the word “recommend.”

A news release, of course, is not federal law, but here is the precise language of the Striped Bass Act delegating rulemaking powers to ASMFC in the following terms:

The Commission **shall prepare and adopt** coastal fishery management plans to provide for the conservation of coastal fishery resources” (16 U.S.C. § 5104(a)(1)) and to be even more specific the “term ‘Plan’ means a plan for managing Atlantic striped bass, or an amendment to such plan, that is **prepared and adopted** by the Commission. *Id.* § 5152(10) (Emphases added).

Again, as above, “prepare and adopt” are far from unambiguous terms and distinctly different than “recommend” which is repeatedly invoked in the Respondent’s judicial submissions as its mission over the last 40 years despite its federal mandate to “prepare and adopt” MPFs. This same federal law then mandates that each state “implement and enforce” the MPF. *Id.*, § 5104(b). These are undeniably regulatory functions.

To reemphasize, at the time of ASMFC’s creation, the Atlantic coastal states, through their individual legislative and other governmental capacities, had agreed to the terms of a non-regulatory interstate compact. After the participating states ratified that agreement, it was then ratified by the U.S. Congress in 1942 as a non-regulatory body. (Pub. L. 77-539) (“Ratification I”)

¹¹ “Board” means the ASMFC Atlantic Striped Bass Board.

(Exhibit P). To be even more specific, the Commission had only the “power to **recommend** the coordination of the exercise of the police powers of the several states within their respective jurisdictions ... to the governors and legislatures of the various signatory states.” (Art. IV) Ratification I further stated that the “Commission shall consult with and **advise** the pertinent administrative agencies in the states party hereto with regard to problems connected with the fisheries and **recommend** the adoption of such regulations as it deems advisable. *Id.* (Emphases added).

In 1950, Congress adopted the second and last ratification of ASMFC for the principal purpose of eliminating the initial 15-year limit on the Commission’s authorization (Pub. L. 81-721) (“Ratification II”) (Sec. 3) (Exhibit Q). The 1950 amendment of the Compact also allowed, but did not require, states to individually designate the ASMFC as a joint regulatory agency for their own purposes (*Id.*, Sec. 1), but even in that latter capacity, ASMFC could only exercise the regulatory authority of the consenting states and was granted no independent regulatory power. *See, e.g.*, North Carolina Office of Attorney General Advisory Opinion: Constitutionality of the Atlantic Coastal Fisheries Cooperative Act (Mar. 26, 1996) (Exhibit R, p. 1).

As noted, however, that prior status underwent a “seismic shift” in 1984 with the post-ratification passage of the Striped Bass Act and the Coastal Fisheries in 1993 extending ASMFC FMP management authority to all 27 nearshore migratory fish species.

After these two post-ratification Acts of Congress, here is how the North Carolina Attorney General then described the ASMFC:

The enlarged powers and duties granted to the ASMFC ... effectively amended the Compact by **converting an advisory body with regulatory powers by consent into a regulatory body which required no consent** to regulate the states. Our

research discloses no case which determined the law concerning the power of the Congress to unilaterally amend a compact. (*Id.*, at 4) (Emphasis added.)¹²

In apparent concurrence with Applicants, the North Carolina Attorney General as to the significance of the 1984 and 1993 statutory language is Robert Beal, the Executive Director of ASMFC who in testimony before the U.S. House of Representatives Committee on Natural Resources, said this about both these Acts of Congress:

Congress authorized the Commission in 1942 and granted us management authority over Atlantic striped bass **in 1984** through the Atlantic Striped Bass Conservation Act. Congress then **expanded our management authority** to include all Commission fishery management plans (FMPs) with the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act) in 1993. (April 4, 2017) (Emphases added).

Again, and even more explicitly, in testimony before the U.S. Senate Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard, Mr. Beal said this:

These two laws provide the Commission with unique management authorities and responsibilities relative to the other two interstate marine fisheries commissions in the Gulf of Mexico and Pacific regions ... Congress recognized a need for action and gave the Commission the authority to **require** states to implement **mandatory** provisions of each FMP. If the Commission determines that a state is not fully implementing and enforcing the **mandatory** measures for an FMP, the law provides a mechanism whereby the Secretaries of Commerce and the Interior (for Striped Bass) could declare a complete moratorium on the fishing for that species in that state's waters. (Emphases added.) Hearing on "Developments and Opportunities in U.S. Fisheries Management" (March 19, 2013). (Emphases added.)

ASMFC is not entitled to have it both ways. It cannot tell the U.S. Congress that it has the post-1984 "authority to require states to implement mandatory provisions of each FMP" and then come before the federal courts and say that its own promulgation, namely "Addendum II itself does not regulate fishing." (District ECF No. 13, p. 21)

¹² Second sentence is also to be noted regarding no known case "concerning the power of the Congress to unilaterally amend a contract."

Petitioners, on the other hand, have throughout all their submissions emphasized the underlying fallacy as to this entire rulemaking function stemming from the failure to acknowledge that the Striped Bass Act altered the ASMFC “from an advisory body into a regulatory authority.” A careful reading of the Respondent’s document in this very case admits as much: “ASMFC plans establish a minimum or “floor” for state conservation efforts. Each member state subject to an ASMFC plans remains free to adopt “additional conditions and restrictions to conserve its fisheries.” (*Id* at 11)

Applicants fully concur that under the relevant statutes, ASMFC establishes a minimum or “floor” for state conservation efforts. In fact, that is our precise point and it is the ASMFC that sets the regulatory floor under threat of a federal moratorium for noncompliance. That is a core function of federalism common to almost every congressionally-established regulatory apparatus,¹³ but that doesn’t render either side into a non-regulatory entity.

It is also essential to appreciate in this context the import of another federal statute, namely the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §§ 1801, *et seq.* (1976)) (“MSA”). This is the primary law governing fisheries management in federal and, as at issue here, certain state waters as well to include bays and other inland waterways connecting to the ocean. As amended in numerous instances since its enactment in 1976, this statute includes an extensive scheme to regulate the powers of individual states when acting individually or, as also here, in compact with one another through ASMFC. As noted, the MSA sets forth 25 national standards for fishery conservation and management that FMPs prepared by ASMFC must

¹³ See, e.g., For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title. (12 U.S.C. § 5551(a)(2)).

incorporate (16 U.S.C. §§ 1851, 1853). As such, this is a massive federal mandate as to how ASMFC must conduct its delegated authority to “prepare and adopt” FMPs.

As noted, USFWS specifically references the ASMFC as its management partner for Striped Bass and under this “partnership” arrangement, ASFMC: (1) prepares and adopts a plan for Striped Bass management (16 U.S.C. § 5104(a)(1)); (2) incorporates into those plans the MSA’s 25 national standards for fishery conservation and management (*Id.*, §§ 1851, 1853); (3) determines annually whether each coastal state has adopted all regulatory measures necessary to fully implement the FMPs in its coastal waters (*Id.*, § 5153(a)(1)); (4) determines whether the enforcement of the FMP by each state is satisfactory (*Id.*, § 5153(a)(1)); (5) notifies the federal government of each negative determination. (*Id.*, § 5153(c)); (6) invokes MSA enforcement authority by way of a moratorium on all Striped Bass fishing (*Id.*, § 5154) to include individual criminal offenses, civil penalties, and civil forfeitures vested via the U.S. Coast Guard (14 U.S.C. §§ 1, *et seq.*); and, (7) utilizes the U.S. Fish and Wildlife Service as the primary research agency for ASMFC (Ratification I, Art. VII).

In other words, the ASMFC is situated at the very center of a comprehensive regulatory and enforcement scheme consisting of numerous branches of the federal government, all of the ASMFC member states and two non-member but voting entities. In addition, ASMFC’s annual budget is almost exclusively provided via federal government appropriations, for example, in 2022, the federal component was actually \$96.9 million out of total of \$97.6 million or 99 percent. (ASMFC 2023 Annual Report, 16). (Exhibit S) And yet, ASMFC describes itself as simply a composition of “state officials, legislators, and gubernatorial appointees ... to inform members states’ management within the relevant fishery.” (ECF No. 13, p. 6).

Moreover, this is how the “real world” perceives the ASMFC’s transformation from advisory to regulatory starting with this 2005 article published in the *Roger Williams University Law Review*:

Between 1950 and 1984, the ASMFC served only an advisory role in fisheries regulation development to its member states. In 1984, in response to the Atlantic striped bass crisis, Congress passed the Atlantic Striped Bass Conservation Act, giving the ASMFC regulatory authority only over the coastal management of striped bass...member states are **obligated** to implement the regulations contained in the FMPs developed by the ASMFC. Vol. 11: Iss. 1, Article 5 (p. 239) (Emphasis added).

Here is how the retired director of the Massachusetts Division of Marine Fisheries described the post-1984 ASMFC structure in an article appearing in the *Cape Cod Times*:

The Atlantic Striped Bass Conservation Act ... gave the Atlantic States Marine Fisheries Commission (ASMFC) the authority to require the states to develop and implement an accountable restoration plan that would assure adherence to its stringent provisions. **Very simply, if a state had migratory striped bass, it either implemented the plan and participated in the management program or it couldn’t fish** (Oct. 4, 2017) (Emphasis added).

Here is how Charles Witek, another industry expert who has served on a number of state, regional, and federal fishery management bodies and who specializes as an attorney and consultant on issues related to the Magnuson-Stevens Fishery Conservation and Management Act, the Atlantic Coastal Fisheries Cooperative Management Act, and the various management bodies and actions affected by such laws, stated it in this manner:

Congress passed the Atlantic Striped Bass Conservation Act (Act) in 1984. The Act gave the ASMFC the power to **not only craft a coastwide management plan, but to compel** every state to adopt it; those that refused would have their striped bass fisheries completely shut down. *Marine Fish Conservation Network*, Nov. 28, 2023. (Emphasis added.)

In the face of this enormous federal regulatory authority, including 25 separate federal mandates and a prior federal approval requirement which has since 1984 been delegated to and

exercised by the ASMFC over the last 40 years, it borders on the preposterous for this reconstituted Interstate Compact to continue to insist that it does not “regulate fishing” and that it only establishes “plans for ASMFC member states to implement.”

B. Lack of Subsequent Ratification of Regulatory Powers

The last Congressional ratification of the ASMFC Interstate Compact was in 1950. However, as to all subsequent federal legislation applicable to ASMFC, including the MSA in 1976, the Striped Bass Act in 1984, and the Coastal Fisheries Act in 1993, all of which delegated both federal mandates and regulatory powers to the Commission, there were effectuated with no congressional ratification of ASMFC in the form of an Interstate Compact. Moreover, on information and belief following reasonable inquiry (and which are likely demonstrable had Applicants been able to undertake discovery), there was likewise no authorizing state legislation as would be required under any standard contractual arrangement, by any, let alone, all of the 15 compacting states post the original 1942 ratification.

Under well-established Supreme Court precedents, “a compact, when approved by Congress, becomes a law of the United States, but a Compact is, after all, a contract.” *Texas v. New Mexico*, 482 U.S. 124, 128 (1987), citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 285 (1959); *see also, Tarrant Regional Water Dist. v. Herrmann*, 569 U. S. 614, 628 (2013): interstate compacts “are construed as contracts under the principles of contract law.” Three important legal consequences stem from this “contractual” jurisprudential context as applied to the facts of this case given that there was no post-1950 Congressional ratification.

The first of these is to be drawn from *Delaware River Joint Toll Bridge Commission v. Oleksiak*, 612 F. Supp. 3d 428 (E.D. Pa. 2020) where, while deciding a dispute over an interstate compact between Pennsylvania and Delaware approved by the two states in 1934, approved by the

Congress 1935, and then amended by the two states several times thereafter without the consent of Congress, the court noted that “We may only consider the terms of the Compact approved by Congress.” *Id.* at 435; conf. *Del. River Joint Toll Bridge Comm'n v. Secy' Pa. Dep't of Lab. & Indus.*, 985 F.3d 189 (3rd Cir. 2021) (Emphasis added).

Other cases in concurrence, according to the American Bar Association’s annual “Developments in Interstate Compact Law and Practice 2020” (July 7, 2020) include, e.g., *Am. Sugar Refining Co. v. Waterfront Comm’n of N.Y. Harbor*, 432 N.E.2d 578, 580 n.4 (N.Y. 1982); *Leadbeater v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 45, 50 n.6 (3d Cir. 1989); *Int’l Union of Operating Eng’rs, Local 542 v. Del. River Joint Toll Bridge Comm’n*, 311 F.3d 273, 280 n.7 (3d Cir. 2002).

The second and even more fundamental “contractual” flaw in ASMFC’s current structure is to be found in the absence of compacting state concurrence in the post-1950 federal statutes introducing the federal government into the compact by way of the direct delegation of substantial federal regulatory authority to the Commission. Privity of contract is an elementary doctrine of contract law that states that contracts cannot be altered to provide rights or obligations to entities other than by joint agreement of those who are parties to the contract. Williston on Contracts § 22; also, Justice Holmes in *O'Donnell v. Town of Clinton*, 14 N.E. 747,751 (Mass. 1888) “[a]ssent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or in the interpretation of words.”

The passage of separate legislation via a standard Act of Congress is non-binding as to ASMFC *per se* and certainly not binding as to any state in its capacity as an ASMFC compacting states without all the requisite steps which went into the 1942 Ratification. *See also* NC Attorney General opinion, *supra*.

C. Violation of the Anticommandeering Principle

The third and demonstrably fatal flaw in Respondent’s legal position is the well-established line of Supreme Court cases holding that “[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” *New York v. United States*, 505 U.S. 144, 166 (1992). As further explained in that case by Justice O’Connor who wrote the 7-1 decision in that case:

But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation. See Merritt, 88 Colum. L. Rev., at 61-62; La Pierre, Political Accountability in the National Political Process-The Alternative to Judicial Review of Federalism Issues, 80 Nw. U. L. Rev. 577, 639-665 (1985). (Id. at 169.) (Emphasis added.)

To make this point completely clear in light of what the Court termed “some ongoing divergence among the Circuits,” the Supreme Court said this in *Bond v. United States*:

An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate. 564 U.S. 211, 222 (2011).

Numerous other cases now stand for clearcut legal principle:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or **enforce** a federal regulatory program. It matters not whether policymaking is involved, and no case-by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. *Printz v. United States*, 521 U.S. 898, 935 (1997) (Emphasis added re power to “enforce” vested in Secretaries of Commerce and Interior; 16 U.S.C. § 5153(c)) .

The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. *Murphy v National Collegiate Athletic Association*, 584 U.S. 453, ___ (2018)

Nothing could better describe exactly what has transpired in this case where Maryland acted on what it believed to be the best interests of its citizens by voting against Addendum II, was overridden by the vote of other compacting states with no personal jurisdiction over all the Petitioners, and then, in the face of “federal coercion” in the form of a complete moratorium to be imposed by the U.S. Department of Commerce on Striped Bass fishing in the entire state, then changed its rules into conformity with Addendum II.

The further conclusion that could be drawn from the foregoing is that it is entirely plausible that all the fishery actions undertaken by ASMFC since 1984 have been null and void.

D. Standing and Due Process Issues

Respondent’s fixation in claiming in the face of the obvious that ASMFC does not regulate the fishing industry is understandable as without that fiction its argument against Applicants’ standing would also necessarily fail. The question of standing turns on the well-established criteria that a plaintiff: (1) suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury was likely caused by the defendant; and (3) that the injury would likely be redressed by judicial relief.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

As Declarant Hardman has attested: (1) Addendum II has already cost Maryland boat captains 75-85 percent of their 2024 charter revenue. These are concrete, particularized, and actual financial losses which are beyond dispute. (2) The harm was set in motion by Respondent ASMFC, which promulgated Addendum II in January 24, 2024, continued it into the 2025 fishing season,

and thereby compelled its members states to adopt Addendum II as a “floor” even though the Maryland delegation initially voted against proposal; (3) at all times up through and including the submission of this Application, the science behind Addendum II remains entirely speculative: and, (4) it is contrary to logic, that the State of Maryland would take any do anything but repeal its involuntary adoption of Addendum II’s limitation on one fish charter boat customer in the absence of federal/ASMFC coercion to do so.

Respondent has also argued below that redress from court would not remedy the harm inflicted by Addendum II because it is ultimately enforceable only if the State of Maryland implements it. To the contrary, if this Court vacates Addendum II, Applicants’ harm will be redressed because Maryland will no longer be forced to implement it.

This precise standing argument based on a third-party role in regulating the fishing industry was advanced and rejected in *Lofstad v. Raimondo*, 2024 U.S. Dist. LEXIS 34112 (D. NJ).¹⁴ Similar to the ASFMC’s argument here that Maryland’s forced implementation of Addendum II negated redressability, the defendants in *Lofstad* argued that States’ involvement in regulating the fishing industry broke the casual chain connecting the challenged rule from the Plaintiffs’ harm only became enforceable once the Secretary of Commerce approved it. (*Id.*,*31)

The *Lofstad* court rejected the defendants’ causation and redressability arguments based on the independent action of some third party not before the court, noting that the Supreme Court has cautioned against construing this principle too strictly. *Id. See also, Bennett v. Spear*, 520 U.S. 154, 170-71 (1997). (*Id.*, 32) The court found that the challenged rule’s “effect on the states’ promulgation of their own rules resulted from the ‘predictable effect’ of the Challenged Rule on the states and

¹⁴ Now on appeal on other grounds.

does not break the causal chain between Defendants' actions and Plaintiffs' harm. (*Id.*, 35), citing *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (citing *Bennett*, 520 U.S. at 169-70).

Accordingly, because Applicants seek “legal or equitable relief,” the redressability element is met when a favorable opinion would “relieve ‘a discrete injury.’” *Id.*, 38, citing *Lutter v. JNESO*, 86 F.4th 111, 128 (3d Cir. 2023) (*quoting Larson v. Valente*, 456 U.S. 228, 243, n.15 (1982)). As in *Lofstad*, Applicants’ injury is loss of income that flows from their customers being unable to catch as many fish as before Addendum II went into effect. The relief sought in the Complaint is a declaration that Addendum II was void and Applicants sought an injunction of its implementation. In the event of a finding that the ASFMC's action violated Applicants’ constitutional rights, then the injury may be “redressed by a favorable decision” setting aside the regulation that Maryland voted against and certainly would not have considered on its own initiative.

Another central issue to this petition is the Respondent’s assertion that Applicants lack any cause of action authorizing them, as private parties, to challenge” an Interstate Compact such as the ASMFC. (District ECF No. 13, p. 25). This would be an absurd consequence as it would place Plaintiffs in the position of having their businesses destroyed by a Fifth Amendment regulatory taking and other grounds but with no remedy on their own behalf. That status is, in the first instance, in direct contradiction to the momentous and arguably most fundamental case in American jurisprudence when, in 1803, Chief Justice Marshall ruled in *Marbury v. Madison*¹⁵ that the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury” and warned that a government cannot be called a “government of laws, and not of men ... if the laws furnish no remedy for the violation of a vested legal right.” (5 U.S. 137.) Nowhere does it say in that case, as the District Court said and the

¹⁵ See Chemerinsky, Erwin (2019). *Constitutional Law: Principles and Policies* (6th ed.), characterizing *Marbury v. Madison* the single most important decision in American constitutional law.

appellate court ignored, that Applicants must go through Maryland’s Office of Attorney General, in order to protect their constitutional and other rights. Carried to its logical conclusion, the effect of that argument would be that the due process rights of any person harmed by act of federal or state law could be sidestepped by simply delegating regulatory implementation to an Interstate Compact.

That line of argument would also overlook the very significant and recent Supreme Court cases stressing the importance of private rights to judicial review in remedial actions, namely *Health and Hospital Corp. v. Talevski*, 143 S. Ct. 1444 (2023). In that instance, decades of settled precedent under the Federal Nursing Home Protection Act (Pub. L.100-203 (1987)) being interpreted to preclude private lawsuits were set aside. Of additional interest, *Talevski*, was, as here, a § 1983 case where the Court’s 7-2 opinion by Justice Jackson also noted that “because ‘§1983 generally supplies a remedy for the vindication of rights secured by federal statutes,’ rights so secured are deemed ‘presumptively enforceable’ under §1983.” (Id. at 1457, citing *Gonzaga Univ. v Doe*, 536 U. S. 273, 284 (2002).

In addition to overriding 231 years of *Marbury* precedent, another extraordinary position being advanced here and blandly accepted in some decisions (*e.g.*, *New York supra at p. 7*) is the notion that an Interstate Compact can somehow embody due process immunity. Respondent’s Memorandum below in its Opposition to the Motion to Dismiss (District ECF No. 19, at 23) states that ASMFC “is not a federal agency within the meaning of the APA.” That is a pronouncement which misconstrues the very derivation of due process rights. Applicants’ due process rights do not derive and are not being asserted under the Administrative Procedure Act (Pub. L. 79–404) (5 U.S.C. §§ 551–559) but are buried deep within the U.S. Constitution and its predecessor embodiments of law such as the Maryland Constitution’s Declaration. of Rights. (District ECF No. 8, pp. 11, 32)

Congress passed the APA in 1946 in order to establish a uniform set of rules to govern the growing level of non-legislative governmental decision-making, but by then the Supreme Court had already acknowledged the legal rights of persons deemed to have been adversely affected by those governmental decisions. For example, in *Morgan v. U.S.*, 304 U.S. 1 (1938), the Supreme Court pointed out that “[i]n administrative proceedings of a quasi-judicial character, the liberty and property of the citizen must be protected” (Id. at 4-5) ... “by the fundamental requirements of fairness which are of **the essence of due process.**” (Id. at 19) (Emphasis added.)

E. Takings Clause Is Fully Applicable

Individual Applicants and associational members, as citizens of the United States, are entitled to protection under the Fifth Amendment to the U.S. Constitution providing that: “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Traditionally, cases in this area arise in connection with real property but as the Chief Justice wrote in the 2015 opinion of the on *Horne v. Dep’t of Agriculture*, “Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property.” 576 U.S. 351, 358.

The *Horne* case also contains very pertinent language for present purposes via its cross reference to the establishment and explanation of what has come to be known as a “Regulatory Taking” via the “economic impact of the regulation:”

Prior to this Court’s decision in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922), the Takings Clause was understood to provide protection only against a direct appropriation of property—personal or real. *Pennsylvania Coal* expanded the protection of the Takings Clause, holding that compensation was also required for a “**regulatory taking**” — a restriction on the use of property that went “too far.” *Id.*, at 415. And in *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, 124 (1978), the Court clarified that the test for how far was “too far” required an “ad hoc” factual

inquiry. That inquiry required considering factors such as **the economic impact of the regulation**... *Id.* at 360 (Emphases added.)

This case presents precisely that situation where, by virtue of the ASMFC action, the vessels and other personal business property of the Plaintiffs have been taken, in the Supreme Court's own words, via "the economic impact of the regulation" and which has also been further effectuated, in opposition to another very pertinent Supreme Court ruling: "The Fifth Amendment's [Takings Clause] ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States* 364 U.S. 40, 49 (1960). *See also, Lebanon Valley Auto Racing v. Cuomo*: "Fluctuations in profitability under a new regulation do not establish a regulatory taking, **provided that the state's action does not destroy the marketability of the regulated property.**" 478 F. Supp.3d 389, 401–02 (N.D.N.Y. 2020). It is precisely the "provided" clause in the preceding sentence that occurred to the Petitioners in that the promulgation of Addendum II has done nothing less than "destroy the marketability" of their property falling within the scope of that regulation.

In addition, there can be no question but that the adverse impact of Addendum II has fallen not just immediately but also predominantly upon the Applicants' property. The Supreme Court in *Armstrong v. United States* phrased this principle in a manner that could not be more apt for purposes of this case: "The Fifth Amendment's [Takings Clause] ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

In addition to the personal property in their businesses, Applicants in many instances also have real property interests at stake in the form of the marina storage and maintenance facilities for their vessels. Whether the property be realty, personalty or some other form of business asset, the

underlying constitutional protection is the same as expressed by Justice Scalia in *Lucas, v. South Carolina Coastal Council*:

[T]he notion ... that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture. 505 U.S. 1003, 1028 (1992).

Beyond the devastation to the Applicants, an equally compelling cause for prompt emergency relief is the admonition well expressed Judge Doumar in finding that the Secretary of Commerce acted arbitrarily and capriciously in failing to provide any meaningful consideration to the economic effects on fishing communities. As with the previously quoted comments of Judge Ginsburg (*supra* at 7), fishing management rules “should not be used as a buzzsaw to mow down whole fishing communities in order to save some fish.” *North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650, 667 (E.D. Va. 1998).

CONCLUSION

In addition to its Tenth Amendment deficiency, the Due Process Clauses of the Fifth and Fourteenth Amendments provide that certain substantive rights such as livelihood and property cannot be deprived except pursuant to constitutionally adequate procedures. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). These constitutional guarantees of procedural due process must be guarded through judicial oversight equally applicable to governmental decision-making in any form. ASFMC is not just any Interstate Compact, but one which has been delegated enormous federal powers and has decidedly gravitated over time to a far-reaching, federal-state partnership distinctly different than both its other national counterparts, namely the Gulf States Marine Fishery Commission <https://www.gsmfc.org/> and the Pacific States Marine Fishery Commission. <https://www.psmfc.org/>

Most importantly, Applicants respectfully submit that ASMFC has transmogrified beyond recognizable from its original and, as argued here, still applicable federally ratified contractual status. Applicants have asserted this plainly throughout its filings including the Complaint (District ECF No. 1, ¶ 5, No. 8, pp. 12-13; Circuit ECF No. 19, pp. 3-4) which set forth in incontrovertible facts that the U.S. Congress commandeered the management of Atlantic Striped Bass in 1984 with the enactment of the Striped Bass Act and did the same in 1993 with respect to 26 other species of migratory fish had previously had since 1942 been under the advisory oversight the ASMFC Interstate Compact.

In doing so, Congress and the ASMFC have sought by design or not (and it does not matter which) to construct a system purporting to insulate both governmental entities from the U.S. Constitution and, in particular, its due process of law. ASMFC flagrantly violates even its own rules by, as noted at the outset of this memorandum, adopting Addendum II by a vote of 14-2 even though it only had 13 states eligible to vote on the basis of waters populated by Striped Bass. This was accomplished, as appears to be typical through lack of any real oversight, by allowing the District of Columbia, the Potomac River Fisheries Commission, and two federal agencies, USFWS and the National Oceanic and Atmospheric Administration (“NOAA”), to vote on the measure even though none of these entities are “compacting states” as specified in ASMFC own voting rules. (Art. IV).

ASMFC lists itself as a Commission of 15 Atlantic Coastal States (ASMFC 2023 Annual Report), (Exhibit S, index) and as noted supra, a composition of “state officials, legislators, and gubernatorial appointees.” And yet the USFWS and NOAA are active participants and, in the instance of Addendum II were illegally-voting members on a regulation placing hundreds of family-owned small businesses at the risk of bankruptcy by depriving them of up to 85 percent of annual revenues.

The entire ASMFC structure is and has been legally deficient since 1984 and the adoption of Addendum II, where 15 minus five equals 14 is just the latest example of what seems to be no real rules, no meaningful state rather than federal funding for what purports to ‘Interstate Compact,’ no accountability whatsoever to citizens impacted by their decisions, and a clearcut violation of the Tenth Amendment’s mandate that “Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” *New York*, 505 U.S., at 178.

Both courts below also drew an incorrect conclusion from *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) in assuming that just because a state is generally held not to be a “person” under 42 U.S.C. § 1983,¹⁶ that the same status pertains to an Interstate Compact. State sovereign immunity under the Eleventh Amendment is the dominant factor in the *Will* line of cases but the very essence of an Interstate Compact is that each state waives its sovereignty in part to the commission. *Petty*, 359 U.S. 283 The same logic would induce applicability under § 1983.

Any form of even modest recovery is impossible unless this Court steps in to vacate the District and Appellate Court Orders and remand this case which is of enormous importance not just to the named applicants but to charter boat captains in the mid-Atlantic and New England states. (Exhibit T).

For all the reasons stated herein, Applicants urge this Honorable Court to issue a preliminary injunction preserving the *status quo ante* until a decision can be rendered below on the merits.

Dated: March 4, 2025

¹⁶ Exhibit D, p.6 and Appellate hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James J. Butera". The signature is written in a cursive style with a white rectangular background behind it.

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 21.2(c) and 33.2, I certify that the foregoing Application is proportionately spaced, has a typeface of Times New Roman, 12 points, and contain 24 pages (and 8,266 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, Table of Exhibits, and the Certificate as to Form.

Dated: March 4, 2025

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 4th day of March, 2025, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by U.S Priority Mail, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel:

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