DOES SOVEREIGN IMMUNITY BAR ADMINISTRATIVE PROCEEDINGS PURSUANT TO FEDERAL ENVIRONMENTAL STATUTES?

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I. INTRODUCTION

Recently, the Supreme Court has expanded state sovereign immunity by reversing several established precedents.[1] For example, in 1996, in *Seminole Tribe v. Florida*, the Court held that Congress does not have the power to abrogate state sovereign immunity under Article I in federal courts.[2] In 1999, the Court extended the holding from *Seminole Tribe* to state courts in *Alden v. Maine*, holding that Congress cannot abrogate sovereign immunity under Article I in state courts.[3] Both *Seminole Tribe* and *Alden* overruled *Pennsylvania v. Union Gas Co.*, a case that held, less than a decade earlier, that Congress had the authority to abrogate sovereign immunity under the commerce clause.[4] Also in 1999, the Court held that a state does not waive its sovereign immunity when it enters a federally regulated industry.[5]

Moreover, the Court has also held that the forum of the suit or type of relief sought does not determine whether state sovereign immunity bars suit. In *Alden*, the Court held that sovereign immunity applies regardless of whether a suit against a state is filed in state or federal court.[6] Writing for a five-to-four majority in *Seminole Tribe*, Chief Justice Rehnquist stated that "we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment."[7] This assertion, however, conflicts

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[1] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 534 (3d ed. 2000).

[2] 517 U.S. 44, 58 (1996) (Rehnquist, C. J., for majority; Stevens, J., dissenting; Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.).

[3] Alden v. Maine, 527 U.S. 706 (1999).

[4] *See, e.g., Seminole Tribe*, 517 U.S. at 58 (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).

[5] *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 679 (1999) (Scalia, J., for majority; Stevens, J., dissenting; Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) (overruling Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964), which upheld abrogation when state entered railroad industry).

[6] *Alden* 527 U.S. at 733 (noting that the rationale of sovereign immunity cases in federal courts extends to suits filed in state courts as well).

[7] *Seminole Tribe*, 517 U.S. at 58.

with long-established doctrine allowing a plaintiff to seek prospective and non-monetary relief in the form of an *Ex parte Young* action.[8]

Each of these recent cases expanded state sovereign immunity in judicial proceedings in federal courts under Article III of the Constitution and in state courts, but none had considered whether state sovereign immunity barred an administrative adjudication until *Federal Maritime Commission v. South Carolina State Ports Authority* ("*FMC*").[9] In *FMC*, the Court held that state sovereign immunity bars Federal Maritime Commission ("Commission") adjudication of a private party's complaint "against nonconsenting states"[10] under the Shipping Act of 1984.[11]

Although *FMC* involved the Shipping Act, the Court's decision has broader implications because state entities will undoubtedly assert a defense of sovereign immunity against administrative proceedings under other federal statutes. Specifically, *FMC* impairs enforcement of employee protection ("whistleblower") provisions of federal environmental statutes. Six such statutes include provisions that authorize administrative proceedings against employers, including state entities, for retaliation against whistleblowers: the Toxic Substances Control Act ("TSCA"); the Clean Water Act ("CWA"); the Safe Drinking Water Act ("SDWA"); the Solid Waste Disposal Act ("SWDA"); the Clean Air Act ("CAA"); and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[12] Even before *FMC*, four federal district courts held that sovereign immunity barred administrative proceedings pursuant to the environmental whistleblower provisions, but these courts disagreed about which type of administrative proceedings were barred.[13]

The sovereign immunity issue, in the context of administrative proceedings, illustrates the tension between protecting a state's dignity interests and preserving the supremacy of federal law through state compliance. In *FMC*, the Supreme Court reaffirmed that the United States has

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[8] Ex parte Young, 209 U.S. 123 (1908) (permitting suit against state official when claimant seeks injunctive relief); *see infra* note 43.

[9] 122 S. Ct. 1864 (2002).

[10] *Id.* at 1864, 1874.

[11] 46 U.S.C. app. § 1701 (2000).

[12] TSCA, 15 U.S.C. § 2622 (2000) (prohibiting discharge or discrimination against an employee for commencing, testifying, assisting or participating in a proceeding under TSCA); CWA, 33 U.S.C. § 1367 (2000) (previously the Federal Water Pollution Control Act) (prohibiting firing or discrimination against an employee for filing, instituting, or testifying in a proceeding); SDWA, 42 U.S.C. § 300j-9(i) (2000) (prohibiting discharge or discrimination against employees who have engaged in the same activities as the CAA or have assisted in a proceeding to promote safe drinking water); SWDA, 42 U.S.C. § 6971 (2000) (prohibiting firing or discrimination against employee who has filed or instituted any proceeding or testified before any proceeding under the Act); CAA, 42 U.S.C. § 7622 (2000) (prohibiting discharge or discrimination against employee for commencing, testifying, participating, or assisting in a proceeding); CERCLA, 42 U.S.C. § 9610 (2000) (prohibiting firing or discrimination against an employee for informing, filing, instituting, or testifying in a proceeding).

[13] *See infra* Part IV.

the authority under the Constitution to compel a state to comply with federal law.[14] The Court, however, failed to specify which, if any, federal administrative proceedings, such as investigations culminating in enforcement proceedings brought by or on behalf of the United States, are consistent with sovereign immunity. Given the myriad forms of agency proceedings, lower courts must determine whether the proceeding in question constitutes an affront to a state's dignity (and is barred) or whether it is a suit by the federal government to ensure state compliance with federal law (and is permitted). Unfortunately, a broad interpretation of *FMC* permits lower courts to bar agency investigation in the name of sovereign immunity and at the expense of federal environmental enforcement.

This Note considers the injunctions granted in the four lower court decisions before *FMC* and analyzes the validity of those injunctions after *FMC* to determine which agency proceedings are now barred by sovereign immunity. Each injunction barred an environmental whistleblower proceeding initiated by a public employee against a state entity. If the lower courts interpret *FMC* as barring agency investigation or not permitting agency intervention, state entities could be absolved from complying with whistleblower provisions and with federal environmental statutes generally. Thus, this Note argues that the sovereign immunity doctrine should be interpreted so as to permit federal agencies to investigate and intervene in order for the United States to effectively enforce environmental laws against states.

II. *FEDERAL MARITIME COMMISSION V. SOUTH CAROLINA STATE PORTS AUTHORITY*

A. Procedural History

South Carolina Maritime Services, Inc. ("Maritime Services") requested permission to berth a cruise ship at the port facilities of the South Carolina State Ports Authority ("SCSPA").[15] Maritime Services planned to offer cruise services that included gambling as an on-board activity.[16] Citing an anti-gambling policy, the SCSPA repeatedly refused to authorize Maritime Services's request.[17] Thus, Maritime Services filed a complaint with the Commission,[18] which assigned an administrative law judge ("ALJ") to hear it.[19] The complaint alleged that the SCSPA violated

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[14] *FMC*, 122 S. Ct. at 1876, 1878.

[15] *Id.* at 1868.

[16] *Id.*

[17] *Id.*

[18] The Shipping Act permits a person to file a complaint with the Commission alleging violations and seeking reparations for injury. *See* 46 U.S.C. app. § 1710(a) (2000).

[19] *FMC*, 122 S. Ct. at 1868.

two provisions of the Shipping Act through discriminatory implementation of its anti-gambling policy and an unreasonable refusal to negotiate with Maritime Services.[20] Furthermore, Maritime Services alleged that the SCSPA refused Maritime Services access to the Port of Charleston, but granted access to another cruise line that also offered gambling activities.[21] Maritime Services requested injunctive relief, including a temporary restraining order and preliminary injunction, and declaratory relief in an order directing the SCSPA to comply with the Shipping Act.[22] Additionally, Maritime Services requested reparations, interest, and reasonable attorneys' fees.[23]

The SCSPA denied Maritime Services's allegations and moved to dismiss, arguing that the SCSPA was an arm of the South Carolina government entitled to sovereign immunity from Commission adjudication of Maritime Services's complaint.[24] The ALJ agreed with the SCSPA and dismissed the complaint, relying upon recent Supreme Court decisions that have been "elevating the doctrine of State sovereign immunity from *private* lawsuits to new heights."[25] The ALJ asserted that the Commission retained authority, however, to enforce the Shipping Act by either instituting its own formal investigatory proceeding or referring allegations from a private complainant to the Bureau of Enforcement.[26]

Interestingly, Maritime Services did not appeal the ALJ's decision dismissing the complaint. Nevertheless, the Commission reviewed the ALJ's decision on its own motion and reversed it. The Commission held that state sovereign immunity does not bar administrative adjudication of a private party's complaint.[27] Distinguishing administrative proceedings from judicial proceedings, the Commission reasoned that "[t]he doctrine of state sovereign immunity . . . is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies" and noted that the ALJ's decision would "nullify the Commission's jurisdiction over state ports."[28]

On appeal, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") reversed the Commission's decision.[29] Following *Alden v. Maine*, the Fourth Circuit held that state sovereign immunity bars an agency adjudicating a private party's complaint against a "noncon-

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[20] *Id.*

[21] *Id.*

[22] *See id.* at 1869.

[23] *Id.* at 1868–69. The Shipping Act authorizes the Commission to order compensatory relief in the form of reparations and attorneys' fees. *See* 46 U.S.C. app. § 1710(g).

[24] *See FMC*, 122 S. Ct. at 1869.

[25] S.C. Mar. Servs., Inc. (2000), *available at* http://www.fmc.gov/dockets/99%2D21%20dismissal.htm.

[26] *See id.*; *see also* 46 C.F.R § 502.282 (2001).

[27] S.C. Mar. Servs., Inc., Docket No. 99-21, (Mar. 23, 2000), *available at* http://www.fmc.gov/Dockets/99-21.htm.

[28] *Id.*

[29] SCSPA v. Commission, 243 F.3d 165 (4th Cir. 2001).

senting state" because such adjudication "would not have passed muster at the time of the Constitution's passage," regardless of whether the forum is administrative.[30] After reviewing the "precise nature of this proceeding" to determine whether it was equivalent to a judicial proceeding, the Fourth Circuit rejected the Commission's argument that the adjudication was an executive branch enforcement proceeding. Concluding that the "proceeding . . . walks, talks, and squawks very much like a lawsuit," the Fourth Circuit held that the Commission's location within the Executive Branch "cannot blind us to the fact that the proceeding is truly an adjudication" barred by state sovereign immunity.[31]

B. Justice Thomas for the Majority

After granting certiorari, the Supreme Court affirmed. Writing for the Court, Justice Thomas[32] held that sovereign immunity bars private administrative complaints "against a nonconsenting state" because of the interest in "protecting States' dignity" and the "strong similarities between [Commission] proceedings and civil litigation."[33] *FMC* was not based upon Eleventh Amendment sovereign immunity because Justice Thomas assumed that the Commission did not exercise judicial power.[34] Regardless, the majority perceived its outcome as necessary to "maintain the balance of power embodied in our Constitution."[35] In determining that state sovereign immunity applies to administrative adjudications, the majority considered two types of evidence. First, the Commission's adjudication, like virtually all administrative adjudications, partook of features analogous to Article III proceedings.[36] Second, the Commission's particular adjudication "bear[s] a remarkably strong resemblance to civil litigation in federal courts" such that the "similarities between [Commission] proceedings and civil litigation are overwhelming."[37]

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[30] *Id.* at 173.

[31] *Id.* at 173–74.

[32] Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy joined Justice Thomas's opinion. Justice Stevens filed a dissenting opinion; Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined. *FMC*, 122 S. Ct. 1864, 1867 (2002).

[33] *Id.* at 1874.

[34] *Id.* at 1871.

[35] *Id.* at 1879.

[36] *Id.* at 1872–73. For Justice Thomas, an ALJ in the Commission adjudication is comparable to a trial judge in an Article III proceeding. *FMC*, 122 S. Ct. at 1872 (noting that an ALJ has the same absolute immunity from suit as an Article III judge because the ALJ's powers and "independent judgment on the evidence" are "functionally comparable" to a judge) (quoting Butz v. Economou, 438 U.S. 478, 513 (1978)). Agency adjudications also have "many of the same safeguards as are available in the judicial process," including adversarial proceedings before an impartial trier of fact. *Id.* at 1873 (quoting *Butz*, 438 U.S. at 513).

[37] *Id.* at 1873–74. Justice Thomas listed similarities between Commission procedural rules and Federal Rules of Civil Procedure, including Commission rules regarding plead-

Despite the substantially changed conditions of the modern administrative state, Justice Thomas focused on the past, inferring that the Framers intended to bar administrative adjudication against a state entity. In so doing, he cited the presumption from *Hans v. Louisiana* that the "Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'"[38] Under the *Hans* presumption, sovereign immunity bars a proceeding if "the Framers would have thought the States possessed immunity when they agreed to enter the Union."[39] Thus, Justice Thomas "attribute[d] great significance to the fact that the States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter."[40]

In justifying his conclusion that sovereign immunity barred administrative adjudications, Justice Thomas primarily emphasized the violation of states' dignity interests in being haled into an adjudicative proceeding, whether before a court or administrative agency. Describing a state's dignity interests as the "preeminent purpose" of sovereign immunity, Justice Thomas argued that the Framers perceived it as "an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts."[41] Hence, Justice Thomas concluded that the type of relief sought is irrelevant in determining whether state sovereign immunity bars a private party's complaint. Because being haled before an administrative proceeding itself affronted a state's dignity, Justice Thomas rejected the Commission's argument that it should be able to hear complaints seeking non-monetary relief.[42] In emphasizing a state's dignity interests and the irrelevance of the type of relief sought in determining whether sovereign immunity bars the Commission's adjudication, Justice Thomas questioned long-established precedents establishing prospective injunctive relief as constitutionally permissible under sovereign immunity.[43]

Justice Thomas also stressed that sovereign immunity serves a state's interest in protecting its treasury. Traditionally, sovereign immunity protects a state's treasury interest, "thus preserving 'the States' abil-

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ings, complaints, answers, counterclaims, discovery, depositions, requests for admissions, sanctions, impartiality of the ALJ, and filing of briefs. ALJ authority over the hearing resembles that of a trial judge because ALJ controls the presentation of evidence and witnesses, hears motions, and orders relief, including reparations and attorneys' fees. *Id.*

[38] *Id.* at 1872 (quoting Hans v. Louisiana, 134 U.S. 1, 18 (1890)).

[39] *FMC*, 122 S. Ct. at 1872.

[40] *Id.* (noting that the earliest evidence of administrative enforcement proceedings was in 1918).

[41] *Id.* at 1874.

[42] *Id.* at 1877, 1879.

[43] Traditionally, a private party can sue a state official for prospective injunctive relief under *Ex parte Young* because such relief mandates state compliance with federal law without threatening the state treasury. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9 (2001) (Kennedy, J., concurring).

ity to govern in accordance with the will of their citizens.'"[44] Here, Justice Thomas argued that the adjudication threatens the state treasury because the Commission has authority to issue a monetary penalty enforceable by the Attorney General against a state that violates the Commission's nonreparation order.[45]

In a functional examination of Commission proceedings, Justice Thomas reasoned that the agency adjudication coerces a state to participate. The United States, in support of the Commission, argued that state sovereign immunity should not apply to Commission adjudications because "the Commission's orders are not self-executing" in that the Commission does not possess contempt power to enforce its own orders as does a court.[46] Furthermore, the United States argued that Commission proceedings do not threaten a state treasury like judicial suits because the only way to enforce a Commission's reparation order is for a private party to bring suit in an Article III court.[47]

In rejecting these arguments, Justice Thomas conceded that the Commission differs from a trial court because the agency lacks contempt power, but he concluded that this distinction was not salient because the agency exerts a practical coercive effect upon state entities.[48] For example, if a state ignores a Commission order, the Attorney General's enforcement proceeding may subject the state to monetary penalties for noncompliance.[49] Therefore, the state entity effectively has two options when an individual files an administrative complaint: (1) appear before the Commission, or (2) "stand defenseless" when the Commission seeks enforcement, which would "substantially compromise [the state's] ability to defend itself at all" because review is not de novo and a state cannot argue the merits at the enforcement stage.[50] In short, without sovereign immunity, a private complaint with an administrative agency would compel a state to respond and participate.[51]

In addition to the coercive effect of an agency adjudication, the majority concluded that the Attorney General's enforcement action after the adjudication would not remove the bar of sovereign immunity. Indeed, the Attorney General's decision to bring an enforcement action after the Commission's adjudication "does not retroactively convert [such] adjudi-

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[44] *FMC*, 122 S. Ct. at 1877 (quoting Alden v. Maine, 527 U.S. 706, 750–51 (1999).

[45] *Id.* at 1878. *But see id.* at 1883 (Breyer, J., dissenting) (noting that the Commission lacks the self-enforcement power of a court, and the agency must secure a court order to enforce an order for nonreparations).

[46] *Id.* at 1875.

[47] *Id.* at 1877. Even if a state did not appear during the Commission proceeding itself, the state could assert a defense of sovereign immunity against the Commission's reparation order in a subsequent court proceeding to enforce the order. *See* 46 U.S.C. app. § 1713(d) (2000).

[48] *Id.* at 1875.

[49] *FMC*, 122 S. Ct. at 1875.

[50] *Id.* at 1875–76.

[51] *Id.*

cation initiated and pursued by a private party into one initiated and pursued by the Federal Government."[52] Justice Thomas noted that a private party controls the "prosecution of a complaint" while the Commission impartially evaluates its merits in an adjudication.[53] Because the Commission does not control whether a complaint is filed, the United States does not "'exercise . . . political responsibility' for such complaints, but instead has impermissibly effected 'a broad delegation to private persons to sue nonconsenting States.'"[54] The Court has applied the criteria of political responsibility to determine whether agency action is constitutionally permissible as a United States suit against a state or is an unconstitutional affront to state sovereign immunity. While the majority held that the Commission did not exercise political responsibility in adjudicating a private complaint, the majority did not consider whether the agency's investigation or intervention in the adjudication would constitute an exercise of political responsibility.

Finally, the majority considered the supremacy of federal law in relation to sovereign immunity.[55] In demonstrating that the federal government retained "ample means of ensuring that state-run ports comply with the Shipping Act," Justice Thomas enumerated three ways in which the agency could enforce federal law.[56] First, the Commission could investigate a state's alleged violations of the Shipping Act "either upon its own initiative or upon information supplied by a private party."[57] Second, the Commission could commence its "own administrative proceeding against a state-run port."[58] Finally, the Commission could seek injunctive relief

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[52] *Id.* at 1876.

[53] *Id.* 1876–77.

[54] *FMC*, 122 S. Ct. at 1877 (quoting Alden v. Maine, 527 U.S. 706, 756 (1999)). Justice Thomas's sovereign immunity decision in *FMC* may achieve another objective in administrative law—to restrict broad legislative delegations of power to administrative agencies. Interestingly, Justice Thomas has repeatedly asserted his willingness to reconsider the line of cases in administrative law which uphold the constitutionality of broad delegations of legislative power to administrative agencies. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring). The rest of the Court has not answered Justice Thomas's suggestion to "reconsider our precedents . . . [and] address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *See id.* at 487. None of the other justices in *Whitman* joined Justice Thomas's concurrence or suggested that the Court should reconsider the delegation doctrine. *See generally id.* Despite Justice Thomas's urging, the Supreme Court has upheld delegations "under standards phrased in sweeping terms" since striking down two federal statutes in 1935 for unconstitutional delegation of legislative authority. Loving v. United States, 517 U.S. 748, 771 (1996) (Thomas, J., concurring in judgment). In restricting a private party's ability to file an administrative complaint against a state entity, Justice Thomas indirectly minimizes the breadth of legislative delegations to administrative agencies.

[55] Justice Thomas did not explicitly consider the expansion of state sovereign immunity in relation to the Supremacy Clause of Article VI, but other recent Court decisions have. *See Alden*, 527 U.S. at 731–32.

[56] *FMC*, 122 S. Ct. at 1878–79.

[57] *Id.*

[58] *Id.*

from a district court to enforce the Shipping Act.[59] Thus, state sovereign immunity will not interfere with enforcement of the federal law or agency flexibility.[60]

C. Justice Breyer's Dissent

Justice Breyer filed the primary dissent in the case, joined by Justices Stevens, Ginsburg, and Souter. As in the dissenting opinions in the Court's recent five-to-four decisions in this area,[61] the dissenters in *FMC* opposed the continued expansion of sovereign immunity as doctrinally unsound. Apart from doctrinal conflict about when the Constitution protects nonconsenting states through sovereign immunity, Justice Breyer asserted that sovereign immunity was especially inapplicable to executive branch administrative agency adjudications.[62] He characterized the majority as holding that "a private person cannot bring a complaint against a State to a federal administrative agency where the agency (1) will use an internal adjudicative process to decide if the complaint is well founded, and (2) if so, proceed to court to enforce the law."[63] Unlike the majority opinion, which minimized the federal interest in the outcome of agency adjudication of a private complaint, Justice Breyer emphasized the federal government's reliance upon administrative proceedings to enforce federal law.[64] Indeed, he analogized an administrative complaint to a "citizen petitioning for federal intervention" to assess whether the state entity has violated federal law.[65] While the majority emphasized the state's dignity interests and concluded that agency adjudications were coercive, in Justice Breyer's opinion, the entire agency proceeding constitutes an investigation to determine whether the United States will ultimately enforce federal law against a state entity.[66]

Furthermore, Justice Breyer cited established Supreme Court precedents upholding, against constitutional challenge, the discretion of administrative agencies to adjudicate private complaints. For instance, the Court has upheld delegations of congressional and judicial authority to executive branch agencies, including independent administrative agencies.[67] The Court has held that independent federal agencies in the Ex-

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[59] *Id.*

[60] *Id.* at 1879. According to the majority, "we have no reason to believe that our decision to affirm [the Fourth Circuit's] judgment will lead to the parade of horribles envisioned by [the Commission]." *Id.*

[61] *See generally* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[62] *FMC*, 122 S. Ct. at 1881.

[63] *Id.*

[64] *Id.* at 1882–83.

[65] *Id.* at 1885.

[66] *See id.* at 1881, 1883, 1884, 1885. Justice Breyer noted that he "could not accept the Court's conclusion here" even if he agreed with recent sovereign immunity decisions. *Id.* at 1881.

[67] *FMC*, 122 S. Ct. at 1881, 1889. The Court established the constitutionality of rule-

ecutive Branch, such as the Commission, have "broad discretion" in choosing rulemaking or adjudication to enforce their authorizing statutes.[68] Thus, Justice Breyer reasoned that the Commission lawfully exercised its discretion and selected adjudication as the method through which to "evaluate complaints."[69]

While Justice Thomas emphasized the similarities between agency adjudications and judicial proceedings, Justice Breyer highlighted the differences between agency hearings and civil suits. Unlike a trial, an agency adjudication "may involve considerable hearsay, resolution of factual disputes through the use of 'official notice,' and final decisionmaking by a Commission that remains free to disregard the initial decision and decide the matter on its own."[70] Furthermore, unlike a court, the Commission lacks self-enforcement powers.[71] For example, a private party must secure a court order to enforce the Commission's order for reparations.[72] Additionally, either a private party or the Attorney General may seek enforcement of a Commission's order for nonreparations from a court.[73]

Justice Breyer applied the same test as the majority to determine whether the agency exercised political authority and whether the procedure constituted a permissible action by the federal government against a state. Justice Breyer, however, reached a different conclusion. While Justice Thomas concluded that a Commission adjudication effectively coerces state participation, Justice Breyer argued that a state participates voluntarily even if there are "practical pressures" upon a state's decision.[74] Justice Breyer argued that a Commission's enforcement proceeding in court, after adjudication of a private complaint, would amount to an exercise of political responsibility.[75] Like a lawsuit brought by the federal government, an agency exercises political responsibility in determining whether to "institute a court proceeding" that "legally forces the State to act."[76] Additionally, the Commission's order resulting from an

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making and adjudicative powers partly because of "certain safeguards surrounding the exercise of these powers." *Id.* at 1881; *see, e.g.*, Crowell v. Benson, 285 U.S. 22, 45–46 (1932) (permitting agency adjudication as long as agency order is subject to judicial review).

[68] *FMC*, 122 S. Ct. at 1885 (citing *Crowell*, 285 U.S. at 49–53; SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)).

[69] *Id.* at 1882 (internal citations omitted). The Commission's enabling statute does not mandate the use of adjudication to evaluate a complaint.

[70] *Id.* (internal citations omitted).

[71] *Id.* at 1883 (observing that while the Commission has the authority to enjoin violations of the Shipping Act in a court and to "assess civil penalties (payable to the United States) against a person who fails to obey a Commission order," the Commission must obtain a court order to collect penalties).

[72] *Id.*

[73] *FMC*, 122 S. Ct. at 1883 (citing 46 U.S.C. app. § 1713(c)–(d) (2000)).

[74] *Id.* at 1886.

[75] *Id.*

[76] *Id.*

adjudication, while initiated by a private party, is subject to full judicial review, and the opponent on appeal is the agency itself rather than the private party.[77]

Ultimately, Justice Breyer feared *FMC*'s "practical consequences" for other administrative agencies and methods of adjudicating a private complaint against a state entity. He thought that this case exemplified "a typical Executive Branch agency exercising typical Executive Branch powers seeking to determine whether a particular person has violated federal law."[78] In holding that sovereign immunity bars formal adjudication against states by private parties, the majority barred the Commission's decision to use adjudication itself as investigation.[79] Justice Breyer responded, however, that the Commission proceeding at issue was the "process by which the Commission determines how it should discharge its obligation to enforce federal law" because the Commission, through adjudication, "gather [sic] facts, assesses competing law and policy considerations, and determines what position it will take in enforcing federal law."[80] While a federal court can only adjudicate cases or controversies, the Commission has sua sponte authority to decide an issue even when no case presents it because the Commission is "setting the policy for the Executive branch" through its administrative process, culminating in an administrative order.[81] For Justice Breyer, the Commission proceeding is necessary to secure state compliance with supremacy of federal law.[82]

Justice Breyer also feared the systemic implications of *FMC* for agency decision-making. The "natural result" of the majority's decision would be "less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement."[83] For instance, while the United States may sue a state, the majority's decision stripped the agency of its discretion to use agency adjudication as the means to determine whether enforcement is warranted, thus forcing an agency to

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[77] *Id.* at 1886–87.

[78] *FMC*, 122 S. Ct. at 1882, 1883.

[79] *See* 46 C.F.R. § 502.61 (2001). The Shipping Act provides that the "Commission shall investigate [a complaint] in an appropriate manner and make an appropriate order." 46 U.S.C. app. § 1710(b)–(c) (2000). In its implementing regulations, the Commission is not required to conduct its own agency investigation in response to a private party complaint. *See* 46 C.F.R. § 502.61. Furthermore, the implementing regulations permit "nonadjudication investigations" in certain cases, including rulemaking. 46 C.F.R. § 502.282 (2001). Thus, *FMC* could be interpreted to bar the Commission's actions when it, in exercising its discretion, conducts an adjudication as a way to investigate a private claim, even though the majority specifically permitted an agency to investigate alleged violations of federal law either on its own initiative or in response to "information supplied by a private party." *FMC*, 122 S. Ct. at 1879.

[80] Brief of Amici Curiae Sens. Edward M. Kennedy and Russell D. Feingold, FMC, 122 S. Ct. 1864 (2002) (No. 01-46), *available at* LEXIS 2001 U.S. Briefs 46, *2, *12.

[81] *Id.* at *16.

[82] *Id.* at *26 n.12.

[83] *FMC*, 122 S. Ct. at 1888.

"rely more heavily upon its own informal staff investigations."[84] Justice Breyer bolstered his argument that *FMC* could impede enforcement of federal laws—such as the CAA, CWA, TSCA, and SWDA—against state employers by citing pre-existing lower court decisions that applied sovereign immunity to whistleblower proceedings.[85] The dissent's constitutional interpretation focuses upon the changed circumstances of the modern administrative state.[86] While the majority invoked the Framer's implied intent concerning the changed conditions of the burgeoned administrative state, Justice Breyer emphasized the "structural flexibility" permissible within the Constitution.[87]

D. Justice Stevens's Dissent

Justice Stevens joined Justice Breyer's dissenting opinion and also wrote a separate dissent to oppose the majority's reliance upon *Alden v. Maine* and emphasis on a state's dignity interests.[88] Justice Stevens asserted that neither historical principles nor constitutional structure are consistent with the treatment of sovereign immunity in *Alden*.[89] Furthermore, he chastised the majority's application of dignity interests to federal administrative proceedings because such interests were derived from the English monarchy and were inapposite even for the thirteen colonies.[90]

III. EXTENDING *FMC* TO ADMINISTRATIVE PROCEEDINGS UNDER ENVIRONMENTAL STATUTES

A. FMC *Applies to Whistleblower Administrative Proceedings Against State Entities*

In *FMC*, the Court held that sovereign immunity bars formal adjudication of a private party's complaint against states, but Justice Thomas did not confine the holding by explaining precisely which administrative proceedings are unconstitutional. Such vagueness will have significant

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[84] *Id.*

[85] *Id.*; *see also* R.I. Dep't of Envtl. Mgmt. v. United states, 286 F.3d 27, 36–40 (1st Cir. 2002).

[86] *FMC*, 122 S. Ct. at 1889.

[87] *Id.* at 1888–89.

[88] *Id.* at 1879–80.

[89] *Id.* at 1880 (citing Justice Souter's dissenting opinion in Alden v. Maine, 527 U.S. 706, 814 (1999)).

[90] *Id.* at 1881. Justice Stevens asserted that the majority in Chisholm v. Georgia, 2 U.S. 419 (1793), was correct in rejecting the state's dignity interests as a basis for asserting sovereign immunity because the thirteen colonies rejected such interests as the premise for sovereign immunity. In contrast, Justice Thomas asserted that the Eleventh Amendment intended to overturn *Chisholm* and that the Court has "since acknowledged that the *Chisholm* decision was erroneous." *FMC*, 122 S. Ct. at 1870.

ramifications when lower courts determine claims of state sovereign immunity in environmental whistleblower proceedings, which implicate the relationship between a state's interests as a sovereign and federal interests as the enforcer of supreme federal law. Thus, *FMC* provides little guidance for lower courts on how to enforce federal law in a manner consistent with sovereign immunity.

While the impact of *FMC* may be uncertain, the decision will disproportionately affect federal environmental law. The Court's holding itself "might not extend too broadly because 'not very many agencies have the authority to entertain private causes of action.'"[91] Six federal environmental statutes, however, include whistleblower provisions that rely upon agency proceedings instituted by a private party.[92]

The Commission's implementing regulations do not explicitly require independent agency investigation, nor did the Commission conduct one in this particular case. Unlike the agency procedures at issue in *FMC*, the Occupational Safety and Health Administration's ("OSHA") implementing regulations require initial agency investigation in response to a private complaint. Justice Thomas did not acknowledge differences in agency procedure in *FMC*. Hence, in failing to limit his holding to Commission-type administrative adjudications, Justice Thomas affords wide discretion to lower courts to use sovereign immunity to bar whistleblower proceedings, risking under-enforcement of federal environmental laws against state employers.

Lower courts will apply *FMC* to all administrative proceedings initiated by a private individual against a state because the agency adjudication at issue in *FMC* resembles other agency adjudications.[93] Specifically, lower courts have applied and will likely continue to apply *FMC* to agency proceedings against states under the environmental whistleblower provisions.[94] For example, after *FMC*, the First Circuit withdrew and vacated its initial decision in a case involving SWDA.[95] In so doing, the First Circuit exemplified *FMC*'s potentially broad applicability in stating that "[a]lthough [*FMC*] involved a different administrative agency, a dif-

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[91] *Supreme Court's Sovereign Immunity Ruling May Curb U.S. Enforcement Against States*, 70 U.S.L.W. No. 46, at 2767 (June 4, 2002) (quoting Warren L. Dean, Jr., who argued the case for the South Carolina State Ports Authority).

[92] The Occupational Safety and Health Administration ("OSHA") administers twelve federal statutes with whistleblower protections. OSHA, U.S. Dep't of Labor, *Discrimination Against Employees who Exercise Their Safety and Health Rights*, *at* http://www.osha.gov/as/opa/worker/whistle.html (last visited Nov. 26, 2002) (on file with the Harvard Environmental Law Review). OSHA, as a division of the Department of Labor, receives private complaints. Cases cited herein use DOL and OSHA interchangeably, and this Note, where practical, defers to the court's reference to either DOL or OSHA.

[93] *See FMC*, 122 S. Ct. at 1871, 1872, 1874 (referring to Commission "proceedings" and "adjudications" generally rather than the formal adjudication at issue).

[94] *See infra* Part IV.

[95] R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 46 (1st Cir. 2002), *vacating* 286 F.3d 27 (1st Cir. 2002).

ferent federal statute, and a different scheme of administrative adjudication, we see no basis for distinguishing [*FMC*'s] central holding."[96]

B. OSHA Implementing Regulations Permit Agency Adjudication Under Environmental Statutes

Each of the six environmental statutes include whistleblower provisions that delegates authority to the Secretary of the Department of Labor ("DOL") to receive complaints from employees. In *FMC*, the Supreme Court concluded that sovereign immunity barred agency adjudication by examining the agency's implementing regulations and the context of the proceeding at issue. Thus, to determine whether sovereign immunity bars agency proceedings regarding whistleblower complaints against state entities, lower courts must consider the relevant agency's implementing regulations and the procedural history of the agency proceeding at issue.

Congress, in these six environmental statutes, has authorized an employee to file a complaint against his employer under the whistleblower provisions.[97] State entities are subject to these federal environmental whistleblower statutes.[98] DOL has adopted implementing regulations governing whistleblower complaints filed, and has delegated the authority to administer the implementing regulations to OSHA, which receives complaints from employees alleging retaliation.[99] Unlike the Commission in *FMC*, which did not conduct independent agency investigation during adjudication itself, DOL's implementing regulations mandate a separate, threshold agency investigation as part of agency adjudication. The complaint may allege discrimination for "environmental related activities such as filing a complaint with the [federal Environmental Protection Agency], testifying at a proceeding under one of the statutes, or otherwise participat[ing] in activities related to the statutes."[100] Whistleblowers

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[96] *See id.*; *see also infra* Part IV.A.

[97] *See, e.g.*, CWA, 33 U.S.C. § 1367(a)–(b) (2000) (providing that employees may request review of alleged retaliation from the Secretary of Labor); SWDA, 42 U.S.C. § 6971(b) (2000).

[98] Congress specifically intended federal environmental statutes to apply to state employers. *See, e.g.*, H.R. Rep. 95-294, at 326 (1977) *reprinted in* 1977 U.S.C.C.A.N. 1077, 1405 (legislative history of CAA whistleblower provision notes that "[t]his section is applicable, of course, to Federal, state or local employees to the same extent as any employee of a private employer").

[99] *See supra* note 92.

[100] OSHA, U.S. DOL, Whistleblower Investigations Manual, Chapter 11, Part III (Jan. 14, 2002), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2771&p_text_version=FALSE; *see also supra* note 12 (describing an employee's protected activities). Discrimination includes, among other things, "firing, demotion, transfer, layoff, losing opportunity for overtime or promotion, exclusion from normal overtime work, assignment to an undesirable shift, denial of benefits such as sick leave or vacation time, blacklisting with other employers, taking away company housing, damaging credit at banks or credit unions and reducing pay or hours." *See* OSHA, U.S. DOL, *Discrimination Against Employees who Exercise Their Safety and*

play a unique role in the enforcement of federal environmental statutes because they have direct, uninhibited access to information regarding an employer's compliance with federal law. When an employer retaliates against an employee's protected activities, employees themselves bear most of the societal costs of enforcing environmental statutes because they alone are subject to the risks of retaliation. The whistleblower provisions, thus, reduce risk to employees by providing a remedy when retaliation occurs, which in turn encourages employees to report violations of environmental statutes.[101]

Upon receiving a complaint, the environmental whistleblower statutes require the Secretary of Labor ("Secretary") to conduct an investigation into the alleged violation.[102] The Assistant Secretary ("Assistant Secretary") has thirty days after receiving a complaint to "complete the investigation, determine whether the alleged violation has occurred, and give notice of the determination."[103] The implementing regulations for the environmental whistleblower provisions broadly defines the subject matter and means of conducting this agency investigation:

> [The Assistant Secretary] shall, on a priority basis investigate and gather data concerning such case, and as part of the investigation may enter and inspect such places and records (and make copies thereof), may question persons being proceeded against and other employees of the charged employer, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the law involved has been committed.[104]

OSHA's Whistleblower Investigations Manual further explains that a "successful investigation is one that reveals the truth of the situation in a timely manner and correctly applies the law to arrive at the proper case disposition."[105] In addition to the DOL implementing regulations, the CWA and SWDA require an opportunity for a public hearing at the re-

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Health Rights, *at* http://www.osha.gov/as/opa/worker/whistle.html (last visited Nov. 26, 2002) (on file with the Harvard Environmental Law Review).

[101] For examples of protected employee activity, see *supra* note 100 and accompanying text.

[102] 29 C.F.R. § 24.4(b) (2002); *see* CWA, 33 U.S.C. § 1367(b) (providing that "upon receipt of such application, the Secretary of Labor shall cause investigation to be made as he deems appropriate"); SWDA, 42 U.S.C. § 6971(b); CAA, 42 U.S.C. § 7622(b)(2)(A) (2000) (providing that the Secretary of Labor "shall conduct an investigation of the violation alleged in the complaint").

[103] 29 C.F.R. § 24.4(d)(1); State of Ohio Envtl. Prot. Agency v. U.S. Dep't of Labor, 121 F. Supp. 2d 1155, 1166 (S.D. Ohio 2000).

[104] 29 C.F.R. § 24.4(b). This implementing regulation applies to all environmental whistleblower statutes.

[105] OSHA, U.S. DOL, *Whistleblower Investigations Manual*, Chapter 4 (Jan. 14, 2002), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2771&p_text_version=FALSE.

quest of any party as part of the investigation.[106] Upon completion of this agency investigation, the Assistant Secretary must issue a Notice of Determination ("Notice"), which includes the findings and conclusions of law and an order to abate the violation if a violation has occurred.[107] This Notice proffers the "*initial* agency view as to whether the claims have merit."[108] It also becomes the final order of the Assistant Secretary subject to DOL enforcement authority if neither party files a request for a Chief ALJ hearing.[109] If either party requests an ALJ hearing, however, the Notice becomes inoperative and remains so unless the case before the ALJ is dismissed.[110]

If requested, the ALJ hearing is a de novo hearing conducted under the formal adjudication proceedings of the Administrative Procedure Act ("APA").[111] The DOL regulations further prescribe the procedure for an ALJ hearing, which is public and reported. For example, the ALJ is impartial and is not bound by the Federal Rules of Evidence.[112] Also, the Assistant Secretary has the discretion to participate as a party or as amicus curiae at the ALJ hearing and "*at any time* in the proceedings."[113] Upon conclusion of the hearing, the ALJ must issue a Recommended Decision and Order. If the ALJ concludes that a violation has occurred, then the ALJ is required to issue an order directing the employer to remedy the violation through appropriate action, including reinstatement, restoration of employment benefits, back pay, and compensatory damages.[114] If the ALJ concludes that a violation has not occurred, then the employee can appeal.

Unless either party files a petition for review with the Administrative Review Board ("ARB"), the ALJ's Recommended Decision and Order becomes the Secretary's final decision. If a petition is filed with the ARB, however, then the ALJ's recommended decision becomes inoperative unless the ARB subsequently issues an order adopting the recommended decision.[115] The ARB reviews the ALJ decision to determine whether a violation occurred, and if so, the ARB orders the violating party to take "appropriate affirmative action to abate the violation" and awards relief

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[106] *See* CWA, 33 U.S.C. § 1367(b); SWDA, 42 U.S.C. § 6971(b).

[107] 29 C.F.R. § 24.4(d)(1).

[108] *Ohio Envtl. Prot. Agency*, 121 F. Supp. 2d at 1166.

[109] *See* 29 C.F.R. § 24.4(d)(2) (2002).

[110] *Id.*

[111] *Id.* § 24.6; APA, 5 U.S.C. § 554 (2000); *see also* SDWA, 42 U.S.C. § 6971(b) (2000).

[112] 29 C.F.R. § 24.6(e)(1) (charging ALJ only to admit probative evidence).

[113] *See id.* § 24.6(f)(1); *see also Ohio Envtl. Prot. Agency*, 121 F. Supp. 2d at 1166 n.7 (noting that the DOL "enjoys discretion to join as a party at any stage of the case").

[114] 29 C.F.R. § 24.7(c)(1). SDWA and TSCA also permit exemplary damages. *Id.* The regulations require immediate reinstatement of the employee, even during pending appeals. *See id.* § 24.7(c)(2).

[115] *Id.* § 24.8(a).

to the employee.[116] If the ARB determines that no violation occurred, it issues an order dismissing the complaint.[117]

If a party requests ARB review, then the ARB decision constitutes the final order of the Secretary. The ARB decision, however, is subject to judicial review in a federal district court if either the Assistant Secretary brings an enforcement action or an aggrieved party appeals.[118] Any final order of the Secretary, upon a party's failure to comply, can be enforced in the district court through an enforcement action filed by the Attorney General, but neither DOL nor OSHA have contempt powers to enforce the Secretary's final order.[119]

In determining whether OSHA's whistleblower proceeding violates sovereign immunity, *FMC* counsels that lower courts must consider OSHA's implementing regulations and the particular posture of the agency proceeding in the instant case.

IV. Disagreement Among Lower Courts over Which Administrative Proceedings Are Barred by State Sovereign Immunity

Before the Supreme Court decision in *FMC*, four district courts held that state sovereign immunity barred certain administrative proceedings initiated pursuant to environmental whistleblower provisions—rulings that are consistent with *FMC*. While *FMC* considered a formal adjudication, the administrative proceedings at issue in these four lower court decisions varied widely: (1) agency investigation, *Connecticut Department of Environmental Protection v. OSHA*;[120] (2) ALJ hearing requested by a state, *Ohio Environmental Protection Agency v. United States*;[121] (3) ALJ hearing requested by a public employee, *Florida v. United States*;[122] and (4) ARB review of an ALJ's decision, *Rhode Island Department of Environmental Management v. United States*.[123] In applying sovereign immunity to environmental whistleblower proceedings, two approaches emerged from these four lower court decisions. The first approach, adopted by the district courts in Rhode Island, Ohio, and Florida, permitted agency investigation but enjoined agency adjudication of a private party's complaint if the agency did not intervene. The second approach, adopted by the Connecticut district court, enjoined agency investigation and did not permit agency intervention to remove the bar of sov-

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[116] *Id.* § 24.8(d)(1).

[117] *Id.* § 24.8(e).

[118] 29 C.F.R. §§ 24.7(d), 24.8 (2002).

[119] *See, e.g.*, 15 U.S.C. § 2622(d) (2000); 42 U.S.C. § 7622(d), (e) (2000).

[120] 138 F. Supp. 2d 285 (D. Conn. 2001); *see infra* Part IV.D.

[121] 121 F. Supp. 2d 1155 (S.D. Ohio 2000); *see infra* Part IV.B.

[122] 133 F. Supp. 2d 1280 (N.D. Fla. 2001); *see infra* Part IV.C.

[123] 115 F. Supp. 2d 269 (D. R.I. 2000), *aff'd in part & modified in part*, 286 F.3d 27 (1st Cir. 2002), *vacated*, 304 F.3d 31 (1st Cir. 2002); *see infra* Part IV.A.

ereign immunity. This Part argues that, while both approaches are consistent with, supported by, and remain valid after *FMC*, only the first approach retains a sufficient enforcement role for the United States in federal environmental law. That is, lower courts should interpret *FMC* according to the first approach—that sovereign immunity bars ALJ hearings only if the agency declines to intervene and should not bar administrative proceedings formulated as agency investigation, prosecution, intervention, or enforcement. Finally, this Part argues that while the language in *FMC* supports both approaches, it mandates only the first. Ultimately, these decisions, coupled with *FMC*'s vagueness, further conflict among the lower courts in applying sovereign immunity analysis to the myriad forms of agency proceedings.

A. Rhode Island: Assistant Secretary Concluded No Violation Occurred, and ALJ Awarded Damages

1. Procedural Posture

In *Rhode Island Department of Environmental Management v. United States*,[124] three employees, including Beverly Migliore, each filed complaints with DOL alleging that the Rhode Island Department of Environmental Management ("DEM") retaliated against them for reporting violations of the SDWA, and Migliore filed a second complaint alleging retaliation for filing the initial complaint.[125] The employees sought compensatory damages for mental anguish, attorneys' fees, and "changes in the terms and conditions of employment . . . to undo the effects of the alleged retaliation and to protect them from future retaliation."[126]

In investigating Migliore's complaints, the Assistant Secretary concluded that DEM did not violate the whistleblower provisions of SDWA; Migliore then requested an ALJ hearing. The ALJ conducted a twenty-three day hearing and awarded damages to Migliore in the amount of $843,000, including front pay, back pay, compensatory damages (including damages for emotional distress and damage to professional reputation), and attorneys' fees and costs.[127] Regarding Migliore's second complaint, the ALJ awarded $10,000 in monetary relief.[128] In appealing the ALJ's decision to the ARB, DEM argued that state sovereign immunity barred the DOL proceeding. Additionally, DEM moved for a pre-

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[124] 115 F. Supp. 2d 269 (D. R.I. 2000), *aff'd in part & modified in part*, 286 F.3d 27 (1st Cir. 2002), *vacated*, 304 F.3d 31 (1st Cir. 2002).

[125] *Id.* at 270–71.

[126] *Id.* at 271.

[127] *Id.* at 272.

[128] *Id.*

liminary injunction from the district court to halt further proceedings regarding these complaints.[129]

2. *ARB Proceeding Enjoined Unless DOL Intervenes*

The Rhode Island federal district court granted an injunction against "any further prosecution" of Migliore's complaints. Acknowledging that sovereign immunity would not bar an agency investigation, the district judge permitted DOL to "investigat[e] alleged violations on which those claims are based or seek[ ] to enforce the State's compliance with federal law."[130] Although permitting agency investigation, the district judge enjoined the ARB proceeding.

The district judge stated that "substance is more important than form" in determining whether an ARB proceeding is "an action by the United States to enforce federal law in which a private party derives an incidental benefit [or] an action by, or on behalf of, the private party the objective of which is to obtain damages or other relief claimed by that party."[131] Sovereign immunity would bar the latter action but not the former.[132] The district judge concluded that the ALJ hearings were "not investigations or enforcement actions by DOL" because the employee requested the ALJ hearing after the Assistant Secretary concluded no violation occurred.[133] The judge also noted that DOL is not a party or participant in the hearing because the ALJ, although employed within DOL, presides over the adjudication as an impartial decision-maker.[134] Furthermore, the district judge categorized the relief awarded to Migliore, which included compensatory damages for emotional distress and damage to reputation, as "hallmarks of a private tort action."[135]

On appeal, the First Circuit modified the district court's injunction, explicitly permitting agency intervention in the administrative proceedings to remove the bar of sovereign immunity.[136] This original opinion was vacated after *FMC*; though the First Circuit altered its reasoning, its disposition of the case did not change.[137] The First Circuit noted that, under *FMC*, sovereign immunity would bar an ARB proceeding initiated by a private party against a state entity. Consistent with *FMC*, however, the

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[129] *R.I. DEM*, 304 F.3d at 39; *R.I. DEM*, 115 F. Supp. 2d at 272. In the other two employee complaints, the Assistant Secretary concluded that the DEM did not violate the SDWA whistleblower provisions with respect to Barbara Raddatz, who then requested an ALJ hearing. The Assistant Secretary subsequently found that Joan Taylor's allegation had merit, and the DEM requested an ALJ hearing. *R.I. DEM*, 304 F.3d at 39.

[130] *R.I. DEM*, 115 F. Supp. 2d at 279.

[131] *Id.* at 273–74.

[132] *See id.*

[133] *Id.* at 275, 276.

[134] *Id.* at 274–75.

[135] *R.I. DEM*, 115 F. Supp. 2d at 275.

[136] R.I. DEM v. United States, 304 F.3d 31, 53, 54 (1st Cir. 2002).

[137] The remainder of this discussion refers to the post-*FMC* First Circuit opinion.

First Circuit permitted agency investigation and intervention to remove the sovereign immunity bar so the agency could enforce federal law. The First Circuit held that the ARB proceeding may continue upon OSHA intervention "to prosecute the complaints on the individuals' behalf," even if the Secretary "seeks the same relief as the private parties."[138] The First Circuit expressly stated that "OSHA is not enjoined from receiving complaints, conducting its own investigations on such complaints, and making determinations as to liability under 29 C.F.R. 24.4(d)(1)."[139] In permitting OSHA intervention in the ARB hearing, the First Circuit's injunction correctly permits agency enforcement of federal law in a manner consistent with state sovereign immunity because the agency has discretion to intervene in ARB proceedings against a state if OSHA determines that a violation of federal law occurred. Although *FMC* did not explicitly discuss whether agency intervention removed the bar of sovereign immunity, the Supreme Court did acknowledge the role of the federal government in enforcing environmental law, which could be accomplished through agency intervention.[140] Thus, the First Circuit's modified injunction is supported by and consistent with *FMC*.

Rhode Island DEM presents unique factual circumstances because DEM sought an injunction against the ARB hearing. After *FMC*, however, most state entities will raise the defense of sovereign immunity earlier in the DOL proceedings, either during the ALJ hearing phase or the Assistant Secretary's investigation. If a state moves to enjoin an ALJ hearing asserting sovereign immunity, the case would be analogous to the facts in *FMC*: the lower court should grant an injunction, provided that the agency will have sufficient time to determine whether it will intervene. If the agency declines to intervene, *FMC* bars the ALJ hearing between a private individual and a state entity. Thus, after *FMC*, a public employee's ability to recover monetary damages depends upon agency intervention. It is unlikely, however, that DOL would intervene if the Assistant Secretary concludes a violation did not occur. Essentially, *FMC* effectively deprives a public employee of the de novo ALJ hearing in determining whether her claim had merit if the Assistant Secretary concludes that no violation occurred. Thus, under the First Circuit's interpretation, *FMC* increases the importance of the Assistant Secretary's investigation to public employees, but *FMC* at least permits a way for DOL to enforce federal environmental law against the state.

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[138] *Id.* at 39, 53.

[139] *Id.* at 54 n.13.

[140] *See* FMC, 122 S. Ct. 1864, 1879 (2002) (noting that Commission may sue a state under the Shipping Act).

B. Ohio: Both Assistant Secretary and ALJ Concluded Violation Occurred

1. Procedural Posture

In *Ohio Environmental Protection Agency v. United States*,[141] Paul Jayco was a site supervisor overseeing environmental investigations to determine whether the high incidence of leukemia at a school was related to potential carcinogens from former Department of Defense sites. Jayco alleged that the Ohio Environmental Protection Agency ("EPA") "suspended him from employment and removed him as site supervisor" because he had "insisted that a detailed investigation be conducted in conformity with federal environmental statutes."[142] Unlike the Assistant Secretary's conclusion in Migliore's case that the Rhode Island DEM did not violate SDWA, the Assistant Secretary concluded in Jayco's case that Ohio EPA violated the whistleblower provisions of each environmental statute and ordered full back pay, reinstatement, and attorneys' fees.[143] Ohio EPA then requested an ALJ hearing. After a two-week de novo hearing, the ALJ ordered reinstatement, back pay, compensatory damages, and punitive damages. Notably, the ALJ found that Ohio EPA's removal and suspension of Jayco were based on "pretextual allegations; the actual motivation for the adverse employment action was retaliation for Jayco's efforts to ensure an investigation in compliance with federal environmental law."[144] Ohio EPA then appealed the ALJ's order to the ARB and to the district court.

2. ALJ Hearing Enjoined Unless DOL Participates as a Party

The federal district judge in Ohio analyzed each stage of the administrative procedure and regulations to determine which ones were barred by state sovereign immunity.[145] Ohio EPA conceded that state sovereign immunity does not bar the Assistant Secretary's investigation.[146] The district judge distinguished agency adjudication from investigations, describing the ALJ hearing as "tantamount to the exercise of judicial power."[147] Indeed, the district judge contrasted adjudication with agency

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[141] 121 F. Supp. 2d 1155 (S.D. Ohio 2000).

[142] *Id.* at 1160.

[143] *Id.* at 1159–60.

[144] *Id.* at 1160.

[145] *See id.* at 1165–66. The district judge cited one reason that an ALJ hearing violated sovereign immunity: a public employee can request an ALJ hearing if dissatisfied with the Assistant Secretary's Notice. This observation, however, is inapplicable to the case at hand because Ohio EPA requested the ALJ hearing.

[146] *Ohio EPA*, 121 F. Supp. 2d at 1166. State entities may not accede to agency investigation if district courts enjoin agency investigation. Instead, state entities will argue that even agency investigation violates sovereign immunity. *See infra* Part IV.D.2.

[147] *Ohio EPA*, 121 F. Supp. 2d at 1167.

investigation, which includes "an investigation by employees of the agency in the form of taking of statements, subpoenaing documents, reviewing records and work sites, etc."[148] Concluding that the ALJ hearing was unconstitutional, the Ohio district judge granted an injunction to be lifted only if the DOL intervened within thirty days.[149]

Consistent with the First Circuit injunction in *Rhode Island DEM*, which permitted agency intervention in an ARB proceeding, the Ohio district court injunction permitted agency intervention in ALJ hearings. The district judge concluded that the ALJ hearing is constitutionally permissible "only if [DOL] itself elects to join the action at the time the case is referred to the Office of Administrative Law Judges."[150] Indeed, the district judge observed that the "primary concern" in this case was that DOL "has yet to finalize its position with regard to whether it will, in its administrative discretion, pursue the relief recommended by [ALJ]."[151] To enable the agency to determine whether it will intervene, the district judge granted a conditional injunction.

Both the First Circuit's injunction and the Ohio district court's injunction permit agency intervention to remove the bar of state sovereign immunity, which is consistent with *FMC*. The juxtaposition of these two decisions reveals *FMC*'s significant ramifications: sovereign immunity bars any ALJ hearing or ARB proceeding instituted by a private individual against a state unless OSHA intervenes, regardless of whether the Assistant Secretary concluded that a violation occurred.[152] Thus, sovereign immunity precludes OSHA from adjudicating a public employee's complaint unless the agency intervenes.[153]

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[148] *Id.*

[149] *See id.* at 1157.

[150] *Id.* at 1166. The district judge noted that the United States, "acting through an agency such as the Department of Labor, may commence a suit in federal court against one of the various states." *Id.* at 1165.

[151] *Id.* at 1166.

[152] The district judge in Ohio granted an injunction against DOL proceedings, similar to that of the First Circuit in *Rhode Island DEM*. Regardless of whether the employee requests an ALJ hearing (Rhode Island) or the state requests the hearing (Ohio), state sovereign immunity bars ALJ hearings if OSHA declines to intervene. Justice Breyer and the other dissenting justices might argue that Jayco's complaint in Ohio should not be enjoined, even if Migliore's complaint is. In Ohio, the Assistant Secretary concluded that a violation occurred, and this could constitute an agency exercise of political responsibility on behalf of the United States, which satisfies *Alden*. Additionally, in Ohio, no further action on Jayco's part was required when the Assistant Secretary and ALJ hearing both concluded that his claim had merit. It was Ohio EPA that requested the ALJ hearing and ARB review. As Justice Breyer argued in dissent, the "practical consequences" of agency decision were not coercive. *See* FMC, 122 S. Ct. 1864, 1886–87 (2002). Justice Thomas, for the majority in *FMC*, clearly stated that a state is coerced in formal adjudications, and the majority would conclude that sovereign immunity bars administrative proceedings, even when the Assistant Secretary concludes the claim has merit. *See id.* at 1875.

[153] The implementing regulation provides that the Assistant Secretary investigation results in an "initial decision" after which either party can request an ALJ de novo hearing. 29 C.F.R. § 24.4(d)(1)–(2) (2002). After *FMC*, the ALJ hearing is barred unless an agency intervenes. Thus, the public employee is not entitled to a de novo ALJ hearing without

This means that after *FMC*, OSHA is precluded from relying upon the ALJ's de novo hearing as an indication of the merits of an environmental whistleblower's claim and as an aid in deciding whether the agency should participate in an ARB proceeding or prosecute the state entity in an enforcement action. Hence, a public employee's ability to obtain congressionally authorized relief pursuant to the whistleblower provisions depends upon the initial Assistant Secretary's investigation and whether the agency decides to intervene in an administrative proceeding, which would remove the bar of sovereign immunity. To the extent that OSHA may decline to intervene in potentially meritorious cases, federal environmental laws will be under-enforced after *FMC* because sovereign immunity will bar public employees from proceeding against states on their own in agency adjudication. OSHA can mitigate under-enforcement of federal law by conducting more thorough Assistant Secretary's investigations in order to determine whether to intervene.[154]

C. Florida: Assistant Secretary Concluded That No Violation Occurred

1. Procedural Posture

In *Florida v. United States*,[155] Dr. Omar Shafey alleged that the Florida Department of Health ("DEH") discriminated against him for contacting the federal Environmental Protection Agency about aerial application of malathion and occupational pesticide exposure.[156] Shafey named the State of Florida, DEH, and two state employees in their individual and official capacities in his complaint. Shafey requested relief including reinstatement, back pay, compensatory damages, and punitive damages.[157] The Assistant Secretary concluded that no violation occurred, and Shafey requested an ALJ hearing.[158] When the ALJ denied Florida's motion to dismiss based on state sovereign immunity, the state sought injunctive relief from the federal district court.

2. ALJ Hearing Enjoined Unless DOL Intervenes

The district judge enjoined the ALJ hearing under sovereign immunity and held that the employee cannot seek retrospective relief from in-

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agency intervention and the Assistant Secretary will be pressured to conduct more thorough investigations.

[154] *See Ohio EPA*, 121 F. Supp. 2d at 1166–67. The First Circuit approved a more extensive Assistant Secretary investigation in describing the "broad range of investigatory techniques."

[155] 133 F. Supp. 2d 1280 (N.D. Fla. 2001).

[156] *Id.* at 1283.

[157] *Id.*

[158] *Id.*

dividuals in their official capacities.[159] The district judge described the remaining legal recourses for public employees, given that sovereign immunity bars their agency proceedings: sue an individual officer in his or her official capacity for prospective relief in an *Ex parte Young* action or sue officials in their individual capacities for monetary damages.[160] Like the First Circuit and the Ohio district court, the Florida district judge agreed that DOL intervention would remove the sovereign immunity bar.[161] The district judge in Florida applied a test of whether the administrative proceeding is the "functional equivalent of an action commenced and prosecuted by Dr. Shafey individually (and thus barred as against the state) or . . . the functional equivalent of an investigation conducted by, or administrative proceeding commenced and prosecuted by, the Department of Labor itself (and thus not barred)."[162] The district judge concluded that Shafey, rather than DOL, commenced and prosecuted the administrative hearing because DOL "completed its investigation . . . and determined there had been no violation," and the administrative proceedings would have been terminated absent Shafey's request for a hearing.[163]

Recognizing the tension between enforcing federal law and upholding state sovereign immunity, the district judge cited *Alden* for the proposition that a suit brought by the United States requires an exercise of political responsibility.[164] Applying *Alden*, the district judge concluded that "[n]o federal official has taken responsibility for the decision to proceed" when the Assistant Secretary concluded that the public employee's complaint lacks merit and the employee requests the ALJ hearing.[165] Decided before *FMC*, this holding suggests that DOL adjudication might not be barred if the Assistant Secretary concluded that a violation did occur. The First Circuit and the Ohio district court, however, granted injunc-

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[159] *Id.* at 1289, 1291.

[160] *See Florida*, 133 F. Supp. 2d at 1289, 1291. Lower courts have concluded that prospective relief includes reinstatement. Thus, private individuals may also be able to seek reinstatement pursuant to *Ex parte Young*, even after *FMC*. *See, e.g.*, Sonnleitner v. York, No. 01-3966, 2002 U.S. App. LEXIS 18706, at *34 (7th Cir. Sept. 12, 2002) (noting that reinstatement can be characterized as prospective relief); Koslow v. Pennsylvania, 302 F. 3d 161, 179 (3d Cir. 2002) (noting that reinstatement is the "type of injunctive, 'forward-looking' relief cognizable under *Ex parte Young*"); Carten v. Kent State Univ., 282 F.3d 391, 396 (6th Cir. 2002) (describing reinstatement as appropriate relief under *Ex parte Young*); Hibbs v. Dep't of Human Res., 273 F.3d 844, 871 (9th Cir. 2001) (describing reinstatement as the "sort of prospective relief for which a state officer can be held liable"); Warnock v. Pecos County, 88 F.3d 341, 343 (5th Cir. 1996) (noting reinstatement is prospective relief).

[161] *Florida*, 133 F. Supp. 2d at 1290.

[162] *Id.* at 1289.

[163] *Id.* (noting that the ALJ hearing was "no mere investigation. It would have included, instead, a formal evidentiary hearing, resulting in formal findings of fact, with defined legal consequences.").

[164] *Id.* at 1290.

[165] *See id.*

tions against an ALJ hearing involving a public employee regardless of the Assistant Secretary's initial decision.[166] Clearly, after *FMC*, these injunctions are proper: sovereign immunity bars formal adjudication of a private party's complaint against a state entity in environmental whistleblower provisions, regardless of the Assistant Secretary's initial decision.

In *FMC*, Justice Thomas specifically identified agency-initiated proceedings against a state as consistent with sovereign immunity.[167] The injunctions from the First Circuit and federal district courts in Ohio and Florida each recognized that agency intervention would remove the bar of state sovereign immunity, thus permitting the federal enforcement of environmental law through administrative agencies. Therefore, these three court decisions are consistent with *FMC* in retaining a role for agency enforcement of federal law.[168]

D. Connecticut: Motion to Enjoin Assistant Secretary's Investigation

1. Procedural Posture

In *Connecticut Department of Environmental Protection v. OSHA*,[169] attorney Anne Rapkin alleged that the Department of Environmental Protection ("DEP") violated the whistleblower provisions of CAA, CWA, and SWDA with respect to her employment.[170] Rapkin requested compensatory damages for mental anguish and pain and suffering, attorneys' fees, and an "injunction, enjoining the State DEP from further harassment, intimidation, and retaliation."[171] After Rapkin filed her complaint, but before the Assistant Secretary concluded the investigation, DEP moved to enjoin the investigation in district court. DEP alleged that Rapkin's complaint itself violated state sovereign immunity when she filed it and sought an injunction to prevent DOL "from investigating, hearing, and adjudicating an adversary complaint."[172] OSHA stayed its investigation of Rapkin's complaint pending the district court's resolution of DEP's motion.

2. All Agency Proceedings Enjoined, Including OSHA Investigation

Unlike the three other cases, which permitted OSHA investigation and intervention, the Connecticut district judge concluded that a public employee's complaint against a state entity violated sovereign immunity.

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[166] *See supra* note 152 and accompanying text.

[167] *See* FMC, 122 S. Ct. 1864, 1878–79 (2002).

[168] Even though agency intervention allows for federal enforcement of law, agency resources constrain enforcement in cases initiated by public employees. *See infra* Part V.C.

[169] 138 F. Supp. 2d 285 (D. Conn. 2001).

[170] *Id.* at 287.

[171] *Id.*

[172] *Id.* at 286–88.

Even though the Assistant Secretary had not completed the initial investigation, the district judge enjoined "all OSHA proceedings against the state relating to this private complaint, including its investigation," because "the filing with OSHA of a whistleblower complaint by a private party against a State agency violates the State's sovereign immunity."[173] The district judge specifically rejected the distinction between OSHA investigation and adjudication. A private complaint, which triggers OSHA investigation, violates sovereign immunity when "the initial investigatory stages" compel a state to defend itself.[174] The district judge cited the Fourth Circuit's decision in *SCSPA v. Commission*[175] that state sovereign immunity "barred any proceeding where a federal officer adjudicates disputes between private parties and unconsenting States."[176]

Recognizing the conflict between decisions in Rhode Island and Ohio, the district judge compared the Rhode Island decision, which permitted OSHA investigation but enjoined "all further agency proceedings," to the Ohio decision, which permitted OSHA investigation and intervention.[177] Adopting the Rhode Island approach, the Connecticut district court focused upon the "'relief sought and the role played by the government agency rather than on the forum in which the proceeding takes place or how the proceeding is characterized'"[178] to determine whether a private party or the United States brings the proceeding. Under this test, the court found that Rapkin filed the complaint "individually, on her own behalf," and "DOL is not even a party to the proceedings."[179] The district judge concluded that "all further OSHA proceedings against the State must be enjoined" because both agency investigation and compelling the state to respond violate sovereign immunity.[180] Although it ostensibly followed the Rhode Island approach, the Connecticut injunction was broader in holding that sovereign immunity bars even agency investigation. Under the Connecticut injunction, OSHA does not even have an opportunity to investigate whether the federal government should bring an enforcement suit against the state or to intervene in the current proceeding to remove the sovereign immunity bar.

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[173] *See id.* at 297–98.

[174] *Conn. DEP*, 138 F. Supp. 2d at 296. The district courts in Ohio and Florida specifically distinguished between OSHA investigation and adjudication. *See* Ohio EPA v. United States, 121 F. Supp. 2d 1155, 1166 (S.D. Ohio 2000); Florida v. United States, 133 F. Supp. 2d 1280, 1289 (N.D. Fla. 2001).

[175] 243 F.3d 165 (4th Cir. 2001).

[176] *Conn. DEP*, 138 F. Supp. 2d at 290.

[177] *Id.* at 288–89. The First Circuit had not modified the district judges' injunction at the time of the Connecticut decision. The modified injunction explicitly permitted DOL to intervene and investigate to determine whether it should intervene, removing the difference between Ohio and Rhode Island.

[178] *Id.* at 297 (quoting R.I. DEM v. United States, 115 F. Supp. 2d 269, 274 (D. R.I. 2000)).

[179] *Id.*

[180] *Id.*

Because *FMC* did not discuss explicitly whether agency intervention would be permissible under sovereign immunity, language from Justice Thomas's opinion supports the Connecticut district court's injunction. For example, Justice Thomas emphasized the state's dignity interests, which support the district judge's conclusion that Rapkin's complaint violated sovereign immunity when it was filed.[181] Furthermore, Justice Thomas stated that the Attorney General's decision to file suit at the conclusion of administrative proceedings "does not retroactively convert an [agency] adjudication initiated and pursued by a private party into one initiated and pursued by the Federal Government."[182] Hence, after *FMC*, lower courts could conclude—like the Connecticut district court—that sovereign immunity bars even agency investigation and intervention.

V. LOWER COURT CONFLICT COULD PREVENT FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAW

A. FMC *Sanctions Lower Court Conflict*

Justice Thomas did not address whether agency investigation or intervention removes the bar of sovereign immunity, and the Supreme Court's silence failed to resolve the pre-existing lower court conflict about the scope of sovereign immunity in environmental whistleblower proceedings. As a result, after *FMC*, lower courts appear to have discretion to enjoin all administrative proceedings,[183] including agency investigation and intervention, in the name of sovereign immunity at the expense of enforcing environmental whistleblower provisions.

For example, the Connecticut district court's injunction exemplified over-inclusive relief to protect state sovereign immunity. In the Connecticut decision, filing the complaint itself violated sovereign immunity.[184] In barring all agency proceedings, including the Assistant Secretary's investigation, the Connecticut injunction thus impinges upon the enforcement powers of the United States by not permitting agency intervention to enforce federal law. While *FMC* did not mandate the breadth of the Connecticut district court's injunction, Justice Thomas's language permits lower courts to take the drastic step of barring agency investigation *and* intervention in the name of sovereign immunity.

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[181] *See supra* notes 41–43 and accompanying text.

[182] *See* FMC, 122 S. Ct. 1864, 1876 (2002).

[183] OSHA stayed its own investigation pending the district court decision regarding Connecticut's immunity claim, which may indicate typical agency reaction to a claim for sovereign immunity. *See Conn. DEP*, 138 F. Supp. 2d at 288.

[184] *Id.* at 296. Lower courts could interpret Justice Thomas's emphasis in *FMC* upon dignity interests, *see supra* note 41 and accompanying text, as barring the mere filing of a private party's complaint with an administrative agency against a state entity.

The pre-existing lower court conflict about sovereign immunity remains after *FMC*. Unlike the Connecticut district court's decision, which is not mandated by *FMC*, the Court's decision does mandate the holdings of the First Circuit and the district courts of Ohio and Florida—that an ALJ hearing or ARB proceeding violates sovereign immunity if OSHA declines to intervene. Each of these three injunctions expressly permitted agency investigation and intervention to remove the bar of sovereign immunity.

Unfortunately, the broad language of *FMC* allows either of these approaches. Justice Thomas failed to properly confine the *FMC* holding to the formal adjudication stage or to instances in which agencies do not independently investigate as part of adjudication. Such a distinction between agency adjudication and investigation is salient in determining whether the agency proceeding is unconstitutional. Differences in agency implementing procedures demonstrate the necessity of a case-by-case analysis, and a distinction between agency investigation and adjudication would provide some order to the sovereign immunity doctrine as applied to administrative agencies. *FMC*'s imprecise and conflicting language permits, however, conflict among lower courts at the expense of public employee protection and federal enforcement of environmental whistleblower provisions.

B. OSHA Investigation and Intervention Is Consistent with Sovereign Immunity

Tension exists in the sovereign immunity doctrine between protecting states' dignity interests and permitting the United States to enforce federal law.[185] When the states entered the Union, they consented to suits brought by the United States government, and current sovereign immunity doctrine does not bar such suits.[186] In fact, the Supreme Court, even while barring suits by private individuals against states in courts and administrative adjudications, has repeatedly maintained that sovereign immunity does not bar suits by the United States.[187] Even when a private party initiates the proceeding or benefits from the federal intervention, the United States can enforce federal law against the states.[188] In suing a state, the United States can request monetary relief that will be remitted to a private individual, including unpaid wages.[189] As long as the United

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[185] *See* Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996) (noting that sovereign immunity does not bar the United States from suing a state).

[186] *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 140–41 (1965); United States v. Texas, 143 U.S. 621, 644–45 (1892).

[187] Alden v. Maine, 527 U.S. 706, 755–56, 759–60 (1999); *Seminole Tribe*, 517 U.S. at 71 n.14.

[188] Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285–86 (1973).

[189] *See id.* (noting Secretary has authority to bring suit against state for unpaid mini-

States "seeks the same relief as the private parties," the "otherwise-barred private parties . . . may continue to participate in the suit."[190] For instance, several statutes permit a federal official to bring suit, terminating the individual's right to sue and remitting any recovered money to the individual.[191] In addition, several cases allow private parties to continue to participate in a suit against a state after federal government intervention.[192]

Under the implementing regulations of the whistleblower provisions of environmental statutes, the Secretary may intervene at any time as a party or amicus, which should remove the sovereign immunity bar under the better approach followed by the First Circuit and Ohio and Florida federal district courts.[193] After *FMC*, there is some evidence that DOL will exercise its authority to intervene in a public employee's administrative proceeding against a state entity. DOL has expressed interest in developing "'ways to identify cases where it is appropriate to bring cases on behalf of employees'" whose administrative proceedings are otherwise barred.[194]

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mum wages and overtime compensation, which can be remitted to employee after recovered); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563 (8th Cir. 1980) (granting back pay and reinstatement to employee under Atomic Energy Act in a proceeding brought by the Secretary when the employee was not a party).

[190] R.I. DEM v. United States, 304 F.3d 31, 53 (1st Cir. 2002).

[191] *See* Fair Labor Standards Act, 29 U.S.C. § 216(b) (2000) (permitting suit for unpaid minimum wages or unpaid overtime compensation and for equitable relief); *see also* Civil Rights Act of 1964, 42 U.S.C. §§ 1981a(a)(1), 2000e-5(g)(1) (2000) (permitting Equal Opportunity Employment Commission ("EEOC") to file suit as a complaining party and to seek relief including reinstatement, back pay, compensatory and punitive damages).

[192] *Cf.* Arizona v. California, 460 U.S. 605, 614 (1983) (permitting Indian Tribes to intervene in suit brought by United States because the Tribes do not "bring new claims or issues against the States but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States"); Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 913 (8th Cir. 1997), *aff'd* 526 U.S. 172 (1999); Seneca Nation of Indians v. New York, 26 F. Supp. 2d 555, 564 (W.D.N.Y. 1998) (noting that courts permit Indian Tribes to intervene or join in cases brought by the United States), *aff'd* 178 F.3d 95, 97 (2d Cir. 1999) (per curium).

[193] *See R.I. DEM*, 304 F.3d at 53 (noting that "if the United States joins a suit after it has been initiated by otherwise-barred private parties and seeks the same relief as the private parties, this generally cures any Eleventh Amendment or sovereign immunity defect, and the private parties may continue to participate in the suit"). The Ohio district court also specifically noted that the Secretary's intervention in an investigatory capacity would remove the sovereign immunity defense to administrative proceedings. *See* Ohio EPA v. United States, 121 F. Supp. 2d 1155, 1167 (2000); *cf.* Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996) (noting that sovereign immunity does not bar a suit by United States); *cf.* United States v. Texas, 143 U.S. 621, 644–45 (1892) (noting that the power of the federal government to sue states is necessary for the "permanence of the Union").

[194] *Supreme Court's Sovereign Immunity Ruling May Curb U.S. Enforcement Against States*, 70 U.S.L.W. No. 46 at 2767 (June 4, 2002) (quoting a DOL spokeswoman with respect to the agency's view of the *FMC* decision).

C. OSHA's Limited Resources Cause Under-Enforcement of Environmental Statutes

In *FMC*, Justice Thomas entrusted enforcement of federal law to an agency initiating its own action against the state, which depends upon agency resources. OSHA, in particular, epitomizes an agency whose scarce resources constrain enforcement decisions. Nonetheless, after *FMC*, a public employee's ability to recover monetary damages under federal environmental whistleblower statutes depends upon OSHA's exercising discretion to intervene in an ALJ hearing, presuming a lower court permits such agency intervention. OSHA has significant enforcement duties under other statutes to protect workers' health and safety, which practically limit its ability to intervene in whistleblower proceedings. For example, under the Occupational Health and Safety Act[195] ("OSH Act") the Secretary of OSHA referred 559 cases to district courts out of 3342 complaints filed in 1989.[196] Additionally, OSHA referred 121 cases for criminal prosecution over a nineteen year period. Of these cases, sixty-six defendants were not prosecuted, twenty-seven cases pled guilty, five pled no contest, two cases settled, and five defendants were convicted.[197] Finally, four thousand compliance officers are responsible for enforcing the OSH Act in approximately six million workplaces.[198] These statistics demonstrate OSHA's scarce resources, which make OSHA intervention in whistleblower proceedings unlikely. After *FMC*, an agency's failure to intervene undermines an employer's incentive to comply with federal environmental statutes.[199]

The Supreme Court and other commentators have recognized the correlation between limited resources and agency enforcement decisions. For example, despite Justice Thomas's reliance on federal government suits and agency action to enforce federal law, the Supreme Court previously has acknowledged that agencies only file suit in a small percentage of meritorious cases.[200] Some private practitioners in administrative law concur that it is unrealistic, given agency resources, to expect an agency to commence enforcement proceedings. Functionally, administrative agencies "depend heavily on private parties to have any kind of meaning-

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[195] 29 U.S.C. §§ 651–678 (2000), *amended by* Pub. L. No. 107-188, § 153, 116 Stat. 594, 631 (2002); *see also* 29 C.F.R. §§ 1910–1926 (2002).

[196] Brett R. Gordon, Comment, *Employee Involvement in the Enforcement of Occupational Safety and Health Laws of Canada and the United States*, 15 COMP. LAB. L. J. 527, 540 (1994).

[197] Michelle Gorton, *Intentional Disregard: Remedies for the Toxic Workplace*, 30 ENVTL. L. 811, 832 (2000).

[198] Gordon, *supra* note 196, at 535.

[199] *See* Gorton, *supra* note 197, at 829–30.

[200] *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 290 n.7 (2002) (noting that EEOC filed 291 lawsuits and intervened in 111 lawsuits during fiscal year 2000 even though it found reasonable cause in 8248 charges of employment discrimination).

ful enforcement regime."[201] Another practitioner asserts that Justice Thomas's decision in *FMC* "turns a blind eye to the serious lack of resources of these agencies."[202] Thus, although agencies may intervene to remove the bar of sovereign immunity, scarce agency resources limit a public employee's ability to recover for retaliation, which ultimately results in the under-enforcement of federal environmental laws.

D. FMC *Decreases OSHA Flexibility at the Expense of Public Employees*

In determining whether to intervene in an adjudication against a state, OSHA will consider its limited agency resources and lower court conflict regarding sovereign immunity. Such factors discourage OSHA investigation of a public employee's complaint against a state entity. Therefore, *FMC* eliminates the advantages of the administrative process—flexibility and efficiency—when claims involve a public employee and state entity.[203] If some lower courts are willing to enjoin all agency proceedings, including agency investigations and intervention, states will be encouraged to assert the defense of sovereign immunity as soon as a complaint is filed. OSHA might hesitate or even refuse to invest resources into a public employee's complaint if sovereign immunity defenses either result in costly and lengthy litigation or injunctions against agency investigations.[204]

Congress determined that this retaliation was a risk to which employees, whether public or private, should not be subjected. *FMC*'s treatment of state sovereignty creates a discrepancy in the enforcement of environmental whistleblower statutes as private employees remain protected while public employees face significant hurdles. *FMC* further undermines uniformity among public employees whose ability to recover depends upon varying lower court interpretations and concomitant OSHA discretion. Effectively, *FMC* bars public employees from obtaining relief as whistleblowers, which will make public employees less likely to report environmental violations.[205] Without protection from retaliation, public

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[201] Marcia Coyle, *States Get New Shield from Suits*, NAT'L L.J. JUNE 3, 2002, at A1 (quoting Eric Glitzenstein, who litigates under the Endangered Species Act).

[202] *Id.* (quoting David Vladeck of Public Citizen Litigation Group).

[203] *See* FMC, 122 S. Ct. 1864, 1888 (2002) (Breyer, J., dissenting); *see, e.g.*, Commission v. Port of Seattle, 521 F.2d 431, 433 (9th Cir. 1975) (noting that the "very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate the activities of the entities over which it has jurisdiction and the right under the appropriate conditions to have district courts enforce its [actions]").

[204] *See* Conn. DEP v. OSHA, 138 F. Supp. 2d 285, 297–98 (2001); 29 C.F.R. § 24.4 (b) (2002) (requiring Assistant Secretary to conduct investigation "on a priority basis").

[205] *Cf.* Gordon, *supra* note 196, at 544 n.110 (noting that unionized employees are more likely to file a complaint with OSHA under OSH Act where "the collective agreement protects employees from discipline without just cause").

employees will be reluctant to file a complaint against a state entity given the likelihood that *FMC* will bar OSHA adjudication of any resulting claims and low probability of OSHA intervention in the first place.[206] Ultimately then, *FMC* exposes public employees to the risk of retaliation in reporting violations of federal environmental statutes, thus removing this crucial indirect method of enforcing federal environmental statutes.

VI. CONCLUSION

In *FMC*, the Supreme Court did not resolve the conflict between enforcing federal law and protecting a state's dignity interest. In fact, Justice Thomas perpetuated the conflict by suggesting that the filing of a complaint itself could violate a state's dignity interests while simultaneously maintaining that federal agencies could investigate reports from private individuals. Additionally, the Court did not limit its decision to formal adjudication and did not resolve the pre-existing lower court conflict with respect to environmental whistleblower proceedings. This permits lower courts to enjoin both OSHA investigation and intervention although not mandated by *FMC*. Such over-inclusive injunctions impair OSHA's administrative flexibility and discourage public employees from reporting environmental violations, thereby undermining the federal enforcement scheme of environmental law. *FMC* does mandate OSHA intervention in a public employee's whistleblower claims if the claims are to survive sovereign immunity challenges. Even if the lower court permits intervention, OSHA may still often decline to intervene in a whistleblower's administrative proceeding for a variety of reasons, including its scarce resources with which to conduct agency investigations and determine whether enforcement is necessary. Thus, after *FMC*, sovereign immunity now effectively bars most administrative proceedings of public employees' complaints seeking whistleblower protection.

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[206] *See id.* at 540 (noting that employees are reluctant to file a claim even when the OSH Act includes provisions prohibiting retaliation because "[f]ew employees are successful in their claims under the anti-retaliation provision").