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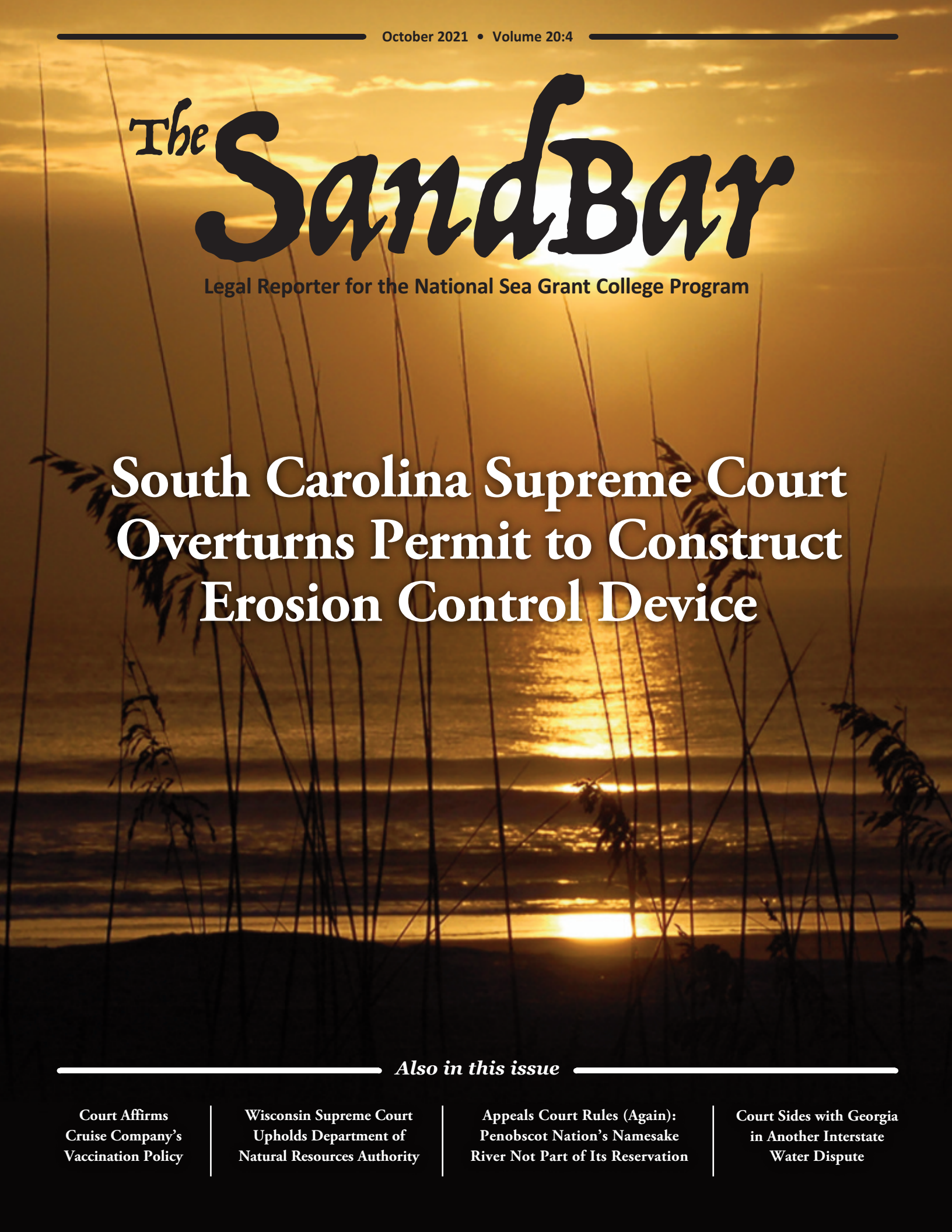

South Carolina Supreme Court Overturns Permit to Construct Erosion Control Device

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Cover page photograph of a sunrise over Kiawah Island, SC, courtesy of Jeffrey Davis.

Contents page photograph of a sunrise over Myrtle Beach, courtesy of James Willamor.

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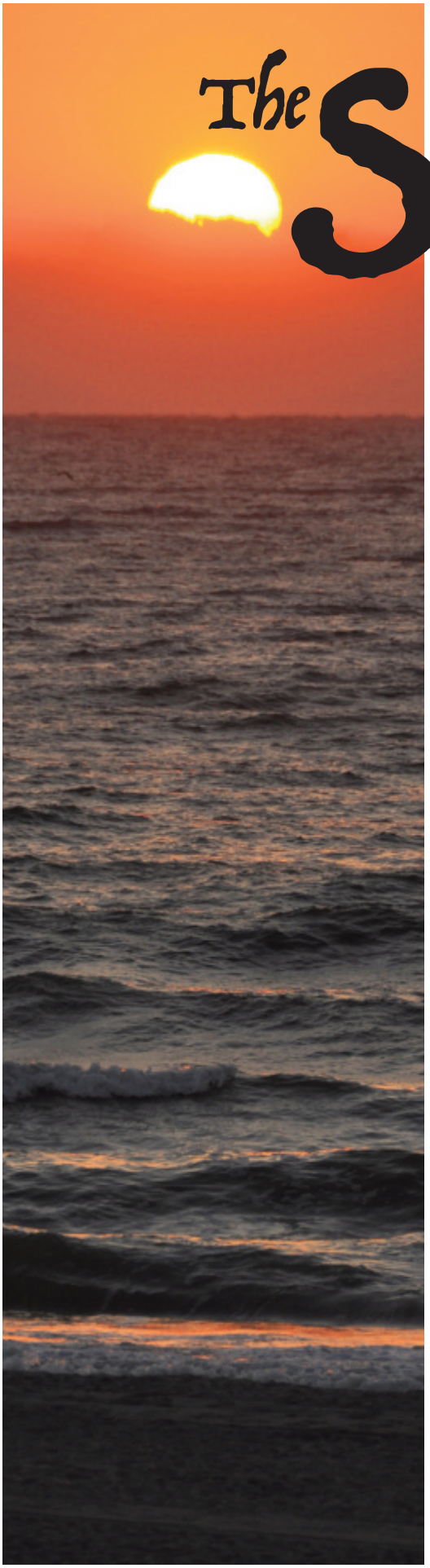

The SandBar

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South Carolina Supreme Court Overturns Permit to Construct Erosion Control Device

Betsy Lee Montague[1]

View from Kiawah Island, South Carolina, courtesy of Olekinderhook Photography.

The South Carolina Supreme Court recently sided with environmentalists in rejecting a developer's attempt to build a large erosion control device.[2] Installation of the device would have allowed the construction of a road to facilitate the development of fifty houses at Captain Sam's Spit, an area on the south end of Kiawah Island. The court's decision is a big win for the Coastal Conservation League (League), as the organization has worked diligently for the last thirteen years to protect and preserve Captain Sam's Spit. South Carolina Supreme Court Justice Kaye Hearn acknowledged the importance of Capitan Sam's preservation, noting that Capitan Sam's is "one of the only three remaining pristine sandy beaches accessible to the general public."[3]

Background

Capital Sam's Spit encompasses around 170 acres of land above the mean high-water mark along the southwestern tip of Kiawah Island. The Spit is over a mile long and 1,600 feet at its widest point. The present case is concerned with the land along the narrowest point—the neck—which is the isthmus of land connecting the Spit to Kiawah Island. Over the past decade, the neck has narrowed significantly to less than thirty feet due the strong erosive forces.

In February 2008, KPD sought a permit to build a bulkhead and revetment within the critical area along the Kiawah River shoreline, which was denied by the South Carolina Department of Health and Environmental Control (DHEC), the agency responsible for issuing permits. The parties appealed

to the administrative law court (ALC). The ALC ultimately granted approval for the entire structure, causing the parties to appeal yet again and eventually land in the South Carolina Supreme Court for the first time. The supreme court denied the majority of the permit and remanded the case back to the ALC.

In 2015, KPD filed a new permit application for an erosion control device outside of the critical area. Non-critical area permits receive a less stringent review by DHEC. DHEC determined the project complied with the Coastal Zone Management Plan (CZMP) and granted the permits. Aggrieved, the League sought another case hearing before the ALC. The ALC ultimately upheld DHEC's approval of the permits by determining that because the permits were for development outside of the critical area, DHEC did not have to consider Section 48-39-30(D) of the South Carolina Code, which mandates that critical areas must be used to ensure the maximum benefit to the public. Further, the erosion control wall would protect Beachwalk Park, a public park operated by the Charleston County Parks and Recreation Commission at the base of the neck along the Kiawah River. Shortly thereafter, the League filed an appeal, and the South Carolina Supreme Court agreed to hear the case.

Supreme Court's Analysis

Under the state's public trust doctrine, lands below the high-water mark are owned by the state and held in trust for the benefit of the public. At the outset of the opinion, the court reiterated that the basic premise underlying the legal analysis must be the public trust doctrine, as the "neck" at Captain Sam's Inlet falls under the doctrine's protection. Moreover, the court pointed out that while the South Carolina statutory code does not prohibit development in sensitive areas like Captain Sam's Inlet, allowing artificial modification of tidelands is nevertheless the "exception."[4]

Under the state's public trust doctrine, lands below the high-water mark are owned by the state and held in trust for the benefit of the public.

The court raised two distinct issues in its opinion. First, the court considered whether DHEC improperly determined that the stricter review process under the statutory code did not apply because the wall was to be constructed outside the critical area. DHEC did not apply the close review required for structures inside critical areas because KPD planned to build the steel wall just outside of the critical area. However, one of the chief arguments of the League's expert witnesses was that although the wall was set to be built outside the critical area, the proposed location has consistently narrowed over time; therefore, it was only a matter of time before it would eventually wash out into the critical area due to erosion. The court noted "all the expert witnesses agreed that the sandy shoreline—indisputably a critical area—will ultimately be subsumed by the steel structure and at least part of it will be eliminated."[5] Ultimately, no evidence showed that the steel wall would not have at least an "*impact*" on the critical area. Therefore, the court held that the ALC erred by declining to apply the more rigorous scrutiny.

The second issue the court considered was whether the protection of Beachwalker Park and the projected tax revenue were sufficient public benefits to justify the construction of the wall. As mentioned earlier, the ALC previously found the protection of Beachwalker Park sufficient justification for the wall. South Carolina statutory code requires DHEC to consider the "extent to which the development could affect existing public access to tidal and submerged lands, navigable waters, beaches or other recreational coastal sources" while reviewing permit applications.[6] The court found that although the ALC considered the public benefit of protecting the park as justification for the entire 2,380-foot wall, only the 270-foot portion of the wall would actually provide protection for Beachwalker Park. There is therefore no public benefit for the remaining 90% of the wall. Moreover, the court stated "while economic interests are relevant, relying on tax revenue or increased employment opportunities is not sufficient justification for eliminating the public's use of protected tidal lands."[7] The court found that the economic benefits did not outweigh the social and environmental interests in keeping the area undeveloped.

Conclusion

In sum, the South Carolina Supreme Court held that the ALC erred in upholding the permits, as the economic benefit was insufficient to establish an overriding public interest. The court's decision is significant and sets a legal precedent for state permit reviewers in reviewing development permits in narrow areas like Captain Sam's that may be sensitive to climate change and sea level rise.[8]

Endnotes

1. 2022 J.D. Candidate, University of Mississippi School of Law.
2. S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control, No. 2019-000074, 2021 WL 2214218 (S.C. June 2, 2021).
3. *Id.* at *1.
4. *Id.* at *4.
5. *Id.* at *6.
6. S.C. Code Ann. § 48-39-150(A)(5).
7. *Id.* at *7.
8. Chloe Johnson, *SC Supreme Court Overturns Permits in Latest Battle Over Captain Sam's Spit*, The Post and Courier (June 2, 2021).

Court Affirms Cruise Company's Vaccination Policy

Terra Bowling

As COVID-19 vaccines have become readily available in the U.S., states have taken different strategies with respect to the use of vaccination documentation or "vaccine passports" by businesses. While some states have allowed individuals with proof-of-vaccination status to have fewer COVID-19 restrictions or engage in activities that unvaccinated people can't, other states have specifically prohibited businesses from implementing proof-of-vaccination requirements. The laws have inevitably led to litigation.

Recently, the U.S. District Court for the Southern District of Florida ruled on Norwegian Cruise Line's challenge to a Florida law that prohibited businesses from implementing proof of vaccination requirements.[1] The court granted the company a preliminary injunction, which means that the cruise line may require passengers to show proof of vaccination, despite the state law prohibiting them from doing so. The ruling will allow all cruises departing from Florida to implement vaccine documentation measures while the case is pending.

Background

The cruise industry has been severely disrupted by the COVID-19 pandemic, coming to a grinding halt in March 2020 with the CDC's "no sail" order. The industry has slowly begun to emerge in recent months, with many planning to begin sailing again under the CDC's COVID-19 conditional sailing order (CSO) for passenger cruise ships. The CDC order outlined a four-step process for ships to resume sailing and included requirements for COVID-19 precautions in its Operation Manual. One of the steps cruises are required to take is a simulated voyage to test the ships' COVID-19 protocols. Ships with 95% of verified vaccinated passengers and 98% vaccinated crew are not required to take the simulated voyage.

Florida filed a lawsuit challenging the implementation of the CSO in April 2021. The state alleged that the onerous requirements in the CSO would further delay the reopening of the cruise industry. In June, the federal district court issued a preliminary injunction prohibiting the CDC from enforcing the CSO and the other requirements on ships sailing from Florida.[2] The CDC sought a stay of that injunction, which the 11th Circuit granted but then quickly reversed in July. The court's decision meant that the CDC guidelines were non-binding for cruises leaving from Florida.[3] Despite those rulings, all cruise lines operating in Florida have continued to implement the CSO and the manual's COVID-19 precautions.

In May, Florida enacted Fla. Stat. § 381.00316, which, among other things, prohibits businesses from requiring proof of vaccination.

Norwegian Cruise Line (NCL) planned to resume passenger cruises from Florida in August 2021, fifteen months after its last cruise. In preparation, the company adopted a policy requiring all passengers on its vessels to be fully vaccinated against COVID-19 and to provide documentation confirming their vaccination status before boarding. The company was not required by law to implement the policy, but did so "as a measure to prevent a COVID-19 outbreak onboard, build brand trust and goodwill with customers, ensure compliance with the attestation it submitted to the CDC, and take advantage of the leniency afforded cruise ships with 95 percent vaccinated passengers and crew under the CDC's Operation Manual."[4]

In May, Florida enacted Fla. Stat. § 381.00316, which, among other things, prohibits businesses from requiring proof of vaccination. The law further stipulates a $5,000 per violation fine. The law codified an earlier Executive Order passed by Florida Governor Ron DeSantis in April 2021 with similar prohibitions. The Florida Department of Health is authorized to enforce the statute.

NCL filed suit in July against Florida's Surgeon General and Department of Health alleging that without the proof-

of-vaccination policy, it would "be forced to either cancel all voyages leaving from the state or allow unvaccinated passengers to sail, and both options would cause significant financial and reputational harms."[5] The lawsuit claimed that the state statute violated the First Amendment, the dormant Commerce Clause, and the Due Process Clause. The company also claimed the state law was preempted by the CSO and successive instructions. The company asked the court to enjoin the order while the court's review of the merits of the case is pending. A preliminary injunction may be granted if a party establishes 1) a likelihood of success on the merits; 2) a substantial threat of irreparable injury; 3) that its own injury outweighs the injury to the other party; and 4) that the injunction would not be against the public interest.

Likelihood of Success

The court first considered NCL's likelihood of success on its First Amendment claim. Under the First Amendment, a government may not enact laws that target speech based on its content—these laws are presumptively unconstitutional according to U.S. Supreme Court precedent. A law is considered to be "content based" if it singles out specific subject matter for differential treatment. In this instance, the law prohibits businesses from requiring proof of COVID-19 vaccination but does not similarly prohibit businesses from requiring COVID-19 test results, other vaccine documentation, or other types of medical information. The court concluded that the statute is content-based restriction on speech and subject to strict scrutiny.

Under strict scrutiny, content-based restrictions may only be permitted when the government proves that they are narrowly tailored to serve compelling state interests. In this instance, the court found that the defendants did not show the law was justified by a substantial government interest, advanced those interests, and was appropriately tailored to accomplish that interest. The court therefore held that NCL was likely to prevail on the merits of the First Amendment claim.

Next, the court considered the NCL's dormant Commerce Clause claim. The dormant Commerce Clause prevents states from unfairly burdening interstate commerce. A court can invalidate a law under the dormant Commerce Clause if it is facially discriminatory or if "the burden on interstate commerce clearly exceeds the local benefits." For the latter determination, courts undertake a balancing test established by the U.S. Supreme Court in *Pike v. Bruce Church*, 397 U.S. 137 (1970). The test requires the court to determine if there is a legitimate local purpose to justify the statute's alleged burden on interstate commerce. In this case, the court found that the law was not facially discriminatory and the defendants failed to provide any evidence that would justify the law's burdens on interstate commerce. Therefore, the court found that the plaintiffs' dormant Commerce Clause claim is likely to be successful.

Irreparable Injury

The court next looked at the second factor in considering a preliminary injunction: whether the plaintiffs would suffer irreparable injury. First, the court noted the loss of First Amendment freedoms constitutes an irreparable injury. Second, the plaintiffs showed that not being allowed to require vaccine passports could result in an irreparable injury to its reputation, trust, and goodwill, as it would either have to cancel its cruises or change its vaccination policy. Finally, the plaintiffs would suffer a financial loss without an injunction, and it would not have a financial remedy from the state due to sovereign immunity.

Equities & Public Interest

The third and fourth factors for considering a preliminary injunction merge when the opposing party is the government. First, the court looked at whether the public interest weighed in favor of an injunction. The court concluded that it did, as it would be in the public's interest to not enforce a likely unconstitutional statute under the First Amendment and the dormant Commerce Clause. The court also concluded that the balance of harm weighed in favor of an injunction because the plaintiffs were likely to suffer significant financial and reputational harms absent an injunction, and the defendants failed to show a public benefit of its statute.

Conclusion

The court granted a preliminary injunction on the Florida law prohibiting COVID-19 vaccine passports. The injunction allowed the *Norwegian Gem* to be the first fully vaccinated cruise ship to sail from Florida on August 15th, 2021.[6] The state has already filed an appeal of the ruling to the Eleventh Circuit.

Endnotes

1 Norwegian Cruise Line Holdings, Ltd. v. Rivkees, No. 21-22492-CIV, 2021 WL 3471585 (S.D. Fla. Aug. 8, 2021).

2 Florida v. Becerra, No. 8-21-CIV-839-SDM, 2021 WL 1345392 (M.D. Fla. April 8, 2021).

3 Florida v. Sec'y, Dep't of Health & Hum. Servs. No. 21-12243 (11th Cir. July 17, 2021); Florida v. Sec'y, Dep't of Health & Hum. Servs. No. 21-12243 (11th Cir. July 23, 2021).

4 *Norwegian Cruise Line Holdings, Ltd.*, 2021 WL 3471585, at *6.

5 *Id.* at *1.

6 Chris Gay Faust, *Norwegian Gem Becomes First Fully Vaccinated Ship to Sail from Florida*, USA TODAY (Aug. 17, 2021).

Wisconsin Supreme Court Upholds Department of Natural Resources Authority

Caroline Heavey[1]

Entrance of the Wisconsin Supreme Court, courtesy of Richard Hurd.

The growth of government agencies at both the federal and state level has led many to refer to agencies as the "fourth branch" of government, disturbing the traditional balance of power between the executive, legislative, and judicial branches. Therefore, many courts have been poised to determine the scope and role of these agencies. The Wisconsin Supreme Court recently had the opportunity. On July 8th, the court issued two opinions involving "Act 21," a state statute restricting state agency authority.[2] In both cases, the court was tasked with determining the extent to which Act 21 limited the authority of the Wisconsin Department of Natural Resources (DNR) to protect public resources.

Act 21

In 2011, the Wisconsin legislature passed Act 21, which defines the scope of state agency authority. Act 21 limits state agency authority to that which is "explicitly required or explicitly permitted by statute or by a rule." This constraint applies to the implementation and enforcement of standards, rules, or thresholds, including terms or conditions of any license issued by the agency. Act 21 also prohibits any agency rule that conflicts with state law. Further, Act 21 clarifies that no deference is afforded to an agency's interpretation of a law or rule. In sum, Act 21 serves to restrict state agency authority to that which is explicitly authorized by statute.

Kinnard Farms

In the first case, the court had to determine whether the DNR had the authority to include certain conditions on an agency-issued permit.[3] In 2012, Kinnard Farms, a dairy concentrated animal feeding operation (CAFO) located in Lincoln, Wisconsin, applied to the DNR for a Wisconsin Pollutant Discharge Elimination System (WPDES) permit to expand its operations. WPDES permits act as a mechanism, among other things, to protect groundwater from pollution. The DNR issued Kinnard the permit. Subsequently, five members of Kinnard's local community who owned private drinking wells (collectively, petitioners) sought review of the WPDES permit, arguing that Kinnard's proposed expansion would exacerbate current groundwater contamination issues. The petitioners alleged that the Kinnard CAFO was the source of the E. coli bacteria that had contamination the groundwater. They urged the DNR to make the permit contingent upon an animal maximum and groundwater testing requirements.

The DNR granted review and passed the case to an administrative law judge (ALJ), who determined that the DNR had clear regulatory authority to impose an animal limit and groundwater testing as conditions of the WPDES permit. The DNR subsequently implemented the two conditions. In 2015, the Wisconsin Department of Justice advised the DNR that Act 21 prohibited the agency from implementing the conditions, and the DNR Secretary subsequently reversed the conditions. As a result, the petitioners sought judicial review in circuit court, which determined that the DNR had explicit authority under Wisconsin Statute § 283.31 to impose the two conditions. Wisconsin Statute § 283.31 authorizes the DNR to issue pollution discharge permits subject to limitations related to water quality, effluents, and groundwater protection as well as to set maximum levels of discharge during the term of the permit. The DNR and Kinnard appealed.

The Wisconsin Supreme Court's decision turned on the interpretation of "explicit" in Act 21. The Wisconsin Legislature and Kinnard suggested that "explicit" meant "specific," thereby requiring the condition to be included verbatim in the statute. On appeal, the DNR no longer advocated for this position. The DNR suggested a broader definition, arguing that "explicit" meant expressly conferred and clear. The court agreed with the DNR.

First, the court noted that the legislature has used the term "specific," as opposed to "explicit," in other similar statutes which undermined Kinnard's argument that the terms meant the same thing. Then, the court referenced definitions of "explicit" in the *Black's Law Dictionary*[4] and the *America Heritage Dictionary*,[5] which supported the DNR's argument for a broader interpretation. Because the legislature deliberately used the term "explicit" and the term can be defined broadly, the court determined that Act 21 grants authority that is explicit but broad, and that the two are not mutually exclusive.

The court also reasoned that, pursuant to Wisconsin Statute § 283.31, the DNR is authorized to prescribe conditions for a permit to ensure compliance with pollution limits and water quality standards. Therefore, the court held that, although Act 21 precludes state agencies from taking actions not explicitly authorized by the legislature, the DNR has explicit authority to consider the environmental impact and require an animal limit and groundwater monitoring as conditions of the permit. Therefore, the DNR had authority to implement the two conditions on Kinnard's WPDES permit.

High-Capacity Wells

In the second case, the Wisconsin Supreme Court had to determine whether Act 21 prohibited the DNR from considering the potential environmental effects of a proposed high-capacity groundwater well when such consideration is not required by statute.[6] The case involved eight applications to operate high-capacity groundwater wells. Under Wisconsin Statute § 281.34(4)(a), such applications do not require a formal environmental impact review process prior to approval. Although the DNR knew the proposed wells would negatively impact the environment, the agency approved the applications in 2016. Relying on an Attorney General opinion stating that the agency was precluded from imposing permit conditions not explicitly listed in the statute, the DNR concluded that it had no authority to consider the proposed wells' environmental impact.

Clean Wisconsin, an environmental group, challenged these approvals in court, arguing that the DNR erroneously determined that it did not have authority to consider the environmental impact of the wells. The group cited a 2011 Wisconsin Supreme Court case holding that the DNR has the authority and the discretion to consider the environmental effects of all proposed high-capacity wells.[7] The circuit court ruled that the DNR was bound by the 2011 opinion and had the authority to conduct the environmental reviews, in part because the 2011 opinion included a footnote stating that Act 21 did not affect the court's analysis. The DNR appealed. Because of the tension between the language of Act 21 and the 2011 opinion, the Wisconsin Supreme Court had to determine whether the DNR erroneously concluded that it had no authority to consider the environmental effects of the eight wells.

The DNR may, under the state's public trust doctrine, exercise the power necessary to ensure the quality management and protection of all state waters against all sources of pollution. As part of that responsibility, the DNR regulates and approves permits for high-capacity groundwater wells. When issuing such a permit, the DNR may implement conditions to ensure compliance with groundwater regulations. To fulfill the DNR's duty to protect, maintain, and improve the state's water supply, the DNR must consider the

Sunset over the Wisconsin River, courtesy of Anne Marie Peterson.

environmental effects of high-capacity groundwater wells. Wisconsin Statute § 281.34(4) requires that the DNR conduct environmental analysis prior to approval of high-capacity groundwater wells under specific conditions, but it also permits the DNR to do so when not required so long as it relates to the DNR's decision whether to approve the high-capacity well.[8]

Again, the Wisconsin Supreme Court concluded that explicit authority under Act 21 could be both explicit and broad, so long as the authority was clear. The court reasoned that Wisconsin Statute § 281.34(4) granted the DNR authority to evaluate the environmental impact of proposed high-capacity groundwater wells. Therefore, the court held that the DNR had both a constitutional duty and the statutory authority to consider the environmental effects of all proposed high-capacity groundwater wells, especially when presented with evidence of potential environmental harms. Moreover, the court affirmed its 2011 decision as consistent with Act 21.

Conclusion

In both decisions, the Wisconsin Supreme Court clarified the meaning of "explicit" in Act 21, carefully differentiating it from "specific," reaffirmed the state's commitment to preserving the environment, and identified the limits on the DNR's agency authority under Act 21. These decisions have broad applications to state agency authority generally, but they specifically enable the DNR to steadfastly protect the state's resources and environmental interests.

Endnotes

1 2022 J.D. Candidate, University of Mississippi School of Law.

2 2011 Wis. Act 21, Wis. Stat § 227.10 (2m).

3 Clean Wis., Inc. v. Wis. Dep't Nat. Res., 2021 WI 71, 961 N.W.2d 346 (Wis. 2021).

4 *Black's Law Dictionary* defines "explicit" as "clear, open, direct, or exact" and "expressed without ambiguity or vagueness." *Black's L. Dict.* 725 (11th ed. 2019).

5 *America Heritage Dictionary* defines "explicit" as "fully and clearly expressed; leaving nothing implied" and "fully developed or formulated." *Am. Heritage Dict.* (5th ed. 2011).

6 Clean Wis., Inc. v. Wis. Dep't Nat. Res., 961 N.W.2d 611 (Wis. 2021).

7 Lake Beulah Mgmt. Dist. v. Wis. Dep't Nat. Res., 799 N.W.2d 73 (Wis. 2011).

8 Wisconsin Statute § 281.34(4)(b) includes the language "may" when describing the DNR's power to request an environmental analysis when not required. Wis. Stat. § 281.34(4)(b).

Appeals Court Rules (Again): Penobscot Nation's Namesake River Not Part of Its Reservation

Katherine Hupp[1]

View of the Penobscot River, courtesy of David Brossard.

Nearly a decade ago, the Penobscot Nation (the Nation) brought suit in federal court to affirm its asserted right to ownership over the "Main Stem" of the Penobscot River. After years of litigation and multiple adverse judgments, the U.S. Court of Appeals for the First Circuit recently delivered yet another unfavorable ruling for the Nation. The federal appellate court's ruling in *Penobscot Nation v. Frey* could have broader implications for Indian tribes throughout the United States governed by similar statutes.[2]

Background

In 2012, the Penobscot Nation sued the state of Maine in federal district court, alleging a right to ownership over the Main Stem of the Penobscot River under the "Settlement Acts"—a pair of federal and state statutes that define the boundaries of the Nation's reservation. The "Maine Implementing Act" (MIA), the state law component of the Settlement Acts, contains the statutory language at issue in this case. The relevant language of the MIA reads:

"Penobscot Indian Reservation" means the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of [specific islands] that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act.[3]

The Nation sued the state of Maine in response to a Maine Attorney General (AG) legal opinion that interpreted the above MIA language as limiting the Nation's reservation only to the upland portion of islands within the Main Stem, but not to the water or submerged lands. The jurisdictional determination in the AG legal opinion meant that the Nation does not have exclusive regulatory authority "to promulgate and enact ordinances regulating . . . [h]unting, trapping or other taking of wildlife" on the Penobscot River nor does the Nation have authority to enforce tribal laws within the waters of the river.[4]

Joined by the United States federal government in its lawsuit, the Nation asked the district court for a declaratory judgment acknowledging that its reservation extends over the water in the Main Stem. The district court refused, and instead granted Maine's counterclaim for declaratory judgment in support of the AG legal opinion. However, the district court granted the Nation's second request for relief and declared that the Nation's sustenance fishing rights under the Settlement Acts include the right to use the entire Main Stem.

Court decision on appeal and rehearing *en banc*

On the parties' cross-appeal of the district court ruling, the First Circuit Court of Appeals affirmed on the issue of the Nation's limited regulatory jurisdiction but vacated the district court's holding on the sustenance fishing rights issue. The Nation then successfully petitioned for a rehearing *en banc*, which refers to a hearing before all of the judges sitting on the court.

Regarding the regulatory jurisdiction issue in the *en banc* session, the Penobscot Nation argued that the court must look to past treaties between the Nation and Maine to accurately discern the meaning of "Reservation" in the MIA. The MIA defines the Penobscot Nation's reservation to consist solely of specific islands "*that existed on June 29, 1818* [and that were] *reserved to the Penobscot Nation by agreement* with Massachusetts and Maine."[4] Thus, the Nation contended that the MIA's reference to June 29, 1818 directs the court to read the definition of "Reservation" in a manner that upholds the treaty signed on that date between the Nation and what was then Massachusetts and later became Maine, under which certain lands were reserved to the Nation.

In its *en banc* ruling, the First Circuit again ruled against the Nation. The court refused to consider external sources to inform its interpretation of the Nation's reservation boundaries under the MIA. Notably, the majority found that the purpose of the Settlement Acts—to "remove the cloud on titles to land in the State of Maine resulting from Indian claim"—negated the Nation's attempt to use treaties to "muddy otherwise-valid title to lands or natural resources in Maine."[6] The court also rejected the Nation's argument that its sustenance fishing rights under the MIA alter the definition of "Reservation" and demonstrate that the Nation owns the water around its islands. According to the court, the statutory definition of "Reservation"—specifically, "islands in the Penobscot River"—is plain and unambiguous under the MIA.

The court relied on several dictionary definitions to derive the ordinary meaning of an "island" to mean a piece of *land* completely surrounded by water. The court also pointed to the fact that *submerged* lands and *waters* are referenced elsewhere in the MIA. If the reference to "islands" was supposed to include the surrounding waters, the court reasoned, the MIA would have mentioned that in the definition for "Reservation." The court bolstered its interpretation by pointing to the MIA's federal counterpart in the Settlement Acts—the Maine Indian Claims Settlement Act (MICSA)—which defines the Penobscot Indian Reservation as "those *lands* defined [in the MIA]."[7]

Likewise, because the majority found the word "island" to be unambiguous, it declined to apply the canons of statutory construction that are used in Native American law. One Indian canon instructs federal courts to construe statutes "liberally in favor of Indians, with ambiguous provisions interpreted to their benefit."[6] But, sitting *en banc*, the First Circuit abstained from using these canons of construction proposed by the Nation and once again affirmed the district court's decision regarding the Reservation's uplands-only jurisdiction under the Settlement Acts.

Dissent

It is important to note that a dissenting circuit judge thought the majority unjustifiably ignored important context and hastily concluded that the word "island" should be given its ordinary meaning.[9] Relying on U.S. Supreme Court precedent about Indian reservation boundaries, the dissent would have found the statute's reference to a group of islands to be water-inclusive.[10] For example, the dissent agreed with the Penobscot Nation's argument that, at the very least, precedent supports an ambiguous reading of the statute. In its 1918 decision, *Alaska Pacific Fisheries v. United States*, the Supreme Court found that a statute that defined a reservation in Alaska as a "body of lands known as Annette Islands" could refer to "the area comprising the islands."[11]

The Penobscot River, courtesy of Axel Drainville.

Likewise, Congress potentially intended to "embrac[e] the intervening and surrounding waters as well as the upland" when it reserved "the body of lands known as the Annette Islands," especially because the water surrounding the islands was a necessary resource for the Indians to sustain themselves and prosper.[12] Drawing similarities between the MIA and the statute at issue in *Alaska Pacific Fisheries*, the dissent in *Penobscot Nation v. Frey* criticized the majority for "reaching too quickly for the dictionary" instead of using context.[13]

Furthermore, the dissent chastised the majority's refusal to consider treaty negotiations between the Nation and Maine to derive the definition of "Reservation" in the MIA. According to the dissent, the "reserved by agreement" language within the definition of the Penobscot Reservation casts even more doubt on the majority's refusal to consider outside texts. The dissent reasoned that the MIA essentially revised the 1818 treaty that is mentioned in the definition of "Reservation." The MIA substituted the word "including" in the 1818 treaty for the terms "consisting solely" and "excepting" certain islands—a substitution that simply narrowed the scope of the reserved lands to account for unforeseen post-treaty developments. The dissent maintained that even considering this narrowed scope of reserved lands, a water-inclusive reading of the Nation's regulatory jurisdiction is appropriate.

Conclusion

The First Circuit court majority ultimately found the Nation's reservation to extend only to the upland part of the specified islands within the MIA definition of "Reservation," not to the water or submerged lands of the Main Stem. The court also vacated the lower court's opinion with respect to the Nation's sustenance fishing rights claim on the basis that the court lacked jurisdiction. According to the appellate court, the Nation lacked standing—i.e., the ability to bring a lawsuit because of actual or imminent harm caused by the adverse party—to bring this claim because the AG legal opinion did not prevent tribal members from engaging in sustenance fishing. In other words, the AG legal opinion did not cause actual or imminent harm to the Nation. This story is not finished, however, as the Nation has indicated its intention to petition the U.S. Supreme Court for another day in court.[14]

Endnotes

1 2022 J.D. Candidate, University of Florida School of Law.

2 No. 16-1424, 2021 WL 2850139 (1st Cir. July 8, 2021).

3 Me. Rev. Stat. Ann. tit. 30 § 6203(8).

4 *Id.* § 6207(1).

5 *Id.* § 6203(8) (emphasis added).

6 25 U.S.C. § 1721(b)(1); *Penobscot Nation*, 2021 WL 2850139, at *11.

7 25 U.S.C. § 1722(i) (emphasis added).

8 *See*, e.g., Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

9 *Penobscot Nation*, 2021 WL 2850139, at *21 (Barron, J., dissenting).

10 *Id.* at *22-24 (Barron, J. dissenting).

11 Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

12 *Id.* at 89.

13 *Penobscot Nation*, 2021 WL 2850139, at *24 (Barron, J., dissenting).

14 Robbie Feinberg, *Appeals Court Again Rules Against Penobscot Nation Over River Jurisdiction*, Vt. Pub. Radio (July 10, 2021).

Court Sides with Georgia in Another Interstate Water Dispute

Olivia Deans[1]

On August 11, 2021, the U. S. District Court for the Northern District of Georgia ruled in favor of Georgia over a water allocation dispute in the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin). Like many other regions, the Southeast has faced a handful of droughts over the past 20 years, and water allocation has become an important and controversial issue. Alabama, Florida, and Georgia have been involved in legal disputes for control and allocation of interstate water sources for decades. Several federal courts have been called on to mediate water disputes between the three states. In the most recent case, *In Re ACF Basin Water Litigation*, the State of Alabama sued the U.S. Army Corps of Engineers (Corps) over water allocation operation plans for Lake Lanier and the ACF Basin.[2] Alabama and environmental organizations advocated for water allocation to downstream hydropower facilities and aquatic resources. Georgia and the Corps advocated for increased water allocation for municipal water use in the greater Atlanta area. The court ruled in favor of Georgia and the Corps.

Map of the Apalachicola-Chattahoochee-Flint (ACF) River Basin, courtesy of Chattahoochee Riverkeeper.

In Re ACF Basin

Alabama filed a complaint in 2017 against the Corps alleging the agency violated the Administrative Procedure Act, the Water Supply Act, and the National Environmental Policy Act (NEPA) when it adopted a Final Environmental Impact Statement and Master Plan for the Apalachicola-Chattahoochee-Flint River Basin Water Control Manual and Water Supply Storage Assessment (ACF Project). A month later, environmental organizations filed a second case against the Corps alleging similar arguments. The cases were consolidated, and Georgia intervened as a defendant.

Central to the dispute is water allocation from Lake Lanier in the ACF Basin. This large basin spans Georgia, Alabama, and Florida and includes the tributaries and drainage areas formed by the Apalachicola, Chattahoochee, and Flint rivers. The Corps is responsible for operating five reservoirs within the ACF Basin, including the Buford Dam. The Buford Dam is located north of Atlanta and controls the water levels in Lake Lanier, an important ecosystem and water source that covers 692 miles of shoreline and approximately 38,000 acres. The Corps releases water from the Buford Dam to provide water for downstream uses such as hydropower and municipal drinking water.

Congress delegated authority to the Corps under the Rivers and Harbors Act of 1946 (RHA) to operate the Buford Dam for authorized purposes, including navigation, hydropower, flood control, water supply, and conservation.[3] Because these authorized purposes often conflict, the Corps is required to publish a Master Manual describing how it will balance the conflicting uses. In 2000, Georgia requested that the Corps modify the Master Manual to provide for increased water supply needs. Originally, the Corps rejected Georgia's request because it was not clear whether the Corps had authority under the RHA to reallocate water storage without Congressional approval. However, after several lawsuits, the Corps concluded in 2012 that it was authorized to grant Georgia's request but would need an Environmental Impact Statement (EIS) to complete the project.[4]

NEPA requires federal agencies to consider the environmental effects of all major federal actions that significantly affect the quality of the human environment through preparation of an EIS.[5] In 2015, the Corps updated the Master Manual and prepared an EIS. In the Final EIS, the Corps concluded it could increase Georgia's water supply by increasing withdrawals from Lake Lanier and the Chattahoochee River. The EIS acknowledged potential effects might include poor water quality downstream and adverse effects to fish and aquatic resources in the Chattahoochee River. The plaintiffs argued the Corps "struck the wrong balance" by giving too much weight to water supply and not enough to aquatic resource conservation. The issues before the district court were: 1) whether the Corps violated the Water Supply Act when it approved a change in allocation without Congressional approval, and 2) whether the 2015 Master Manual and EIS violated NEPA.

District Court Decision

When analyzing the first issue, the court acknowledged that when a statute is ambiguous, deference is given to the agency's interpretation as long as the interpretation is reasonable. Under the Water Control Act, modifications that would "seriously affect" the project purposes or modifications that involve "major structural" changes must be approved by Congress.[6] The court determined the terms "major" and "seriously affect" were vague, so the Corps' interpretation approving Georgia's water reallocation would be upheld so long as it was reasonable.[7] The Corps interpreted major change to mean a fundamental change that departs from the Congressional intent for the project. The agency reasoned that reallocation for increased water supplies did not depart from Congressional intent. The court agreed with the Corps and found its interpretation to be reasonable. Therefore, the court denied the plaintiffs' request to remand the ACF Project on the grounds that it violated the Water Supply Act.

Turning to the second issue, the court determined that the agency decision would only be overturned if the plaintiffs can show by a "preponderance of the evidence" that the agency did not comply with NEPA.[8] The court found the Corps complied with NEPA when it: 1) reasonably considered the project alternatives, 2) reasonably determined the purpose and need statements in the EIS, 3) reasonably analyzed the impacts of the proposed actions, and 4) reasonably analyzed the direct and cumulative impacts of the project. Therefore, the court denied the plaintiffs' request for summary judgement and approved the defendants' motion for summary judgement.

There is a possibility the ACF Basin case will be appealed and overturned by a higher court, but, unless that happens, the 2015 Master Manual approving the reallocation of water from Lake Lanier will stand.

Conclusion

This is not the first time courts have stepped in to resolve water disputes in the ACF Basin. In April 2021, the U.S. Supreme Court sided with Georgia over a case brought by Florida for water allocation from the Apalachicola River.[9] There is a possibility the *ACF Basin* case will be appealed and overturned by a higher court, but, unless that happens, the 2015 Master Manual approving the reallocation of water from Lake Lanier will stand. This case highlights the time consuming and complex controversies between states when trying to share limited natural resources and the challenges of balancing important competing uses.

Endnotes

1 Ocean and Coastal Law Fellow, National Sea Grant Law Center.

2 In Re ACF Basin Water Litigation, No. 1:18-MI-43-TWT, 2021 WL 3566861 (N.D. Ga. Aug. 11, 2021).

3 Rivers and Harbors Act, Pub. L. No. 87-874, 76 Stat. 1182 (1962).

4 *See*, *e.g.*, In re MDL-1924 Tri-State Water Rights Litig., 644 F.3d 1160 (11th Cir. 2011) (holding Georgia's request for water reallocation must be remanded to the Corps).

5 42 U.S.C. § 4332(C).

6 43 U.S.C. § 390b(e).

7 *In Re ACF Basin Water Litigation*, WL 3566861, at *9.

8 *Id.* at *16.

9 Florida v. Georgia, No. 142, 2021 WL 1215718 (U.S. Apr. 1, 2021). *See also*, Betsy Lee Montague, *Supreme Court Sides with Georgia Against Florida in Long-Running Water Rights Dispute*, The SandBar, July 2021, at 4-5.

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Littoral Events

American Fisheries Society Annual Meeting

November 6-10, 2021
Baltimore, MD

For more information, visit: https://afsannualmeeting.fisheries.org

Social Coast Forum 2022

February 1-3, 2022
Charleston, SC

For more information, visit: https://bit.ly/socialcoast2022

Aquaculture 2022

February 28 - March 4, 2022
San Diego, CA

For more information, visit: https://www.was.org/meeting/code/AQ2022