

In The
Supreme Court of the United States

STEWART & JASPER ORCHARDS, *et al.*,

Petitioners,

v.

KENNETH LEE SALAZAR, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**MOTION FOR LEAVE TO FILE *AMICI CURIAE*
BRIEF, AND *AMICI CURIAE* BRIEF OF NATIONAL
WATER RESOURCES ASSOCIATION, CALIFORNIA
FARM BUREAU FEDERATION, SISKIYOU COUNTY,
CALIFORNIA, CITY OF FRESNO, CALIFORNIA,
SAN LUIS & DELTA-MENDOTA WATER AUTHORITY,
CITY OF SAN BERNARDINO MUNICIPAL WATER
DEPARTMENT, SAN BERNARDINO VALLEY
MUNICIPAL WATER DISTRICT IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI**

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**MOTION FOR LEAVE TO
FILE *AMICI CURIAE* BRIEF**

Pursuant to Rule 37.2(b) of this Court, the *amici curiae* respectfully move for leave to file an *amici curiae* brief in support of the petition for writ of certiorari. The Solicitor General of the United States and the petitioner have consented to the filing of this brief, but respondents Natural Resources Defense Council and The Bay Institute have not consented, thus necessitating the filing of this motion.

1. The Question Presented

In this case, the U.S. Fish and Wildlife Service (“FWS”) issued a biological opinion under the Endangered Species Act (“ESA”) effectively requiring federal and state water projects in California to reduce water deliveries to their customers in order to provide more water for the benefit of an endangered species, the Delta smelt. The Delta smelt is an intrastate, local species found solely in the Sacramento-San Joaquin Delta in California, and is not traded in interstate commerce and has no effect on interstate commerce. The question presented is whether Congress has authority under the Commerce Clause of the U.S. Constitution to regulate intrastate, local endangered species that do not substantially affect interstate commerce.

2. Identity Of *Amici Curiae*

The *amici curiae* are:

- National Water Resources Association
- California Farm Bureau Federation
- Siskiyou County, California
- City of Fresno, California
- San Luis & Delta-Mendota Water Authority
- City of San Bernardino Municipal Water Department
- San Bernardino Valley Municipal Water District

A more complete description of the *amici* and their members and constituents is contained in “Interest of the *Amici Curiae*” portion of the brief, at pages 1-3.

3. The *Amici Curiae*’s Interests

The *amici* has a significant interest in the issue presented in this case. Some of the *amici* or their members or constituents divert and use water pursuant to permits and other authorizations of state law. Other *amici* or their members or constituents have contracts for water deliveries from agencies responsible for operation of federal, state, regional or local water projects. For example, the U.S. Bureau of Reclamation (“Bureau”), which operates the federal Central Valley Project (“CVP”) in California, and the

California Department of Water Resources (“DWR”), which operates the State Water Project (“SWP”), have entered into contracts with some of the *amici* or their members for water deliveries from the CVP and SWP, respectively. The *amici*’s interests are directly affected by actions of federal service agencies, such as the FWS, in administering the ESA. Typically, the FWS issues a biological opinion under the ESA that effectively allocates, or requires allocation of, substantial quantities of water for the benefit of endangered species, thus requiring a reduction of water supplies for water users such as the *amici* and their members or constituents. In many cases, as in the instant case, these federal actions and biological opinions have been for the benefit of intrastate, local species that have no effect on interstate commerce.

More specifically, the interest of each *amicus* in the issue presented herein is as follows:

- The National Water Resources Association (“NWRA”) includes some of the nation’s largest water districts, such as the Central Arizona Water Conservation District (Arizona), the Colorado River Water Conservation District (Colorado), the Middle Rio Grande Conservancy District (New Mexico), and the Las Vegas Valley Water District (Nevada). The FWS has issued biological opinions under the ESA effectively requiring the operators of major projects on certain waterways, such as the Colorado River and the Middle Rio Grande and their tributaries, to reduce water deliveries from the projects in order to

provide more water for the benefit of listed endangered species, thus causing many NWRA members to receive reduced water deliveries from the projects.

- The California Farm Bureau Federation (“CFBF”) represents tens of thousands of farmers in California, many of whom depend on water deliveries from the CVP and SWP for their livelihood. The FWS has issued a biological opinion under the ESA effectively requiring the Bureau and DWR to reduce water deliveries from the CVP and SWP, respectively, in order to make more water available for the benefit of the Delta smelt, an endangered species located in the Sacramento-San Joaquin Delta, thus threatening to cause a reduction of water supplies for CFBF members.
- Siskiyou County (“County”), located in northern California, is traversed by various waterways, predominantly the Shasta River and the Scott River. Many of the citizens of Siskiyou County have rights under California law to divert and use water from these rivers, and their rights in many cases have been adjudicated by court decrees. The County is one of two members of the Siskiyou Power Authority (“Authority”), which has water rights under California law to operate a hydroelectric power project in the upper Sacramento River. The FWS has issued biological opinions effectively requiring that a substantial amount of water from these rivers be allocated for the benefit of

listed endangered species, thus potentially reducing available water supplies for the citizens of Siskiyou County and the Authority.

- The City of Fresno (“City”) obtains its water supplies from three main sources, all of which are dependent on the CVP and SWP. Specifically, the City obtains water from the CVP Friant Dam and San Joaquin River diversions; through its rights on the Kings River and operation of Pine Flat Dam; and from a groundwater basin in the Fresno area. The FWS has issued a biological opinion effectively restricting water deliveries from the CVP and SWP to contracting agencies, which threatens to reduce the City’s water supplies from these three main sources.
- The San Luis & Delta-Mendota Water Authority (“SLDMWA”) has a contract with the Bureau for water deliveries from the CVP. The FWS has issued a biological opinion under the ESA effectively requiring the Bureau to reduce water deliveries from the CVP in order to provide more water for the benefit of the endangered Delta smelt, thus potentially reducing SLDMWA’s water supplies from the CVP.
- The City of San Bernardino Municipal Water Department (“CSBMWD”) operates wastewater reclamation plants that discharge water to the Santa Ana River, in an area that

has been recently designated by the FWS as critical habitat for the Santa Ana Sucker fish species, a wholly intrastate, local species.

- The San Bernardino Valley Municipal Water District (“SBVMWD”) receives water deliveries from the SWP. The FWS has issued a biological opinion under the ESA effectively requiring DWR to reduce water deliveries from the SWP, thus threatening SBVMWD’s water supplies.

Thus, all of the *amici* or their members or constituents are adversely affected by federal actions for the benefit of intrastate, local endangered species, such as the FWS’ biological opinion in this case, because such federal actions reduce availability of water supplies for the *amici* or their members or constituents. Moreover, some of the *amici* – specifically the City of Fresno and various California farmers who are members of the California Farm Bureau Federation – have participated in the case below, by filing an *amici* brief in the district court proceeding and the Ninth Circuit proceeding. Thus, all *amici* have an interest in the issue presented in the petition.

4. The *Amici*’s Arguments

The *amici* argue in their brief that the Ninth Circuit decision in the case below failed to properly apply the principle of aggregation established by this Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), and applied in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598

(2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005). This Court held in those cases that the aggregation principle applies to regulation of economic activity but not to regulation of non-economic activity. The Ninth Circuit held, instead, that the aggregation principle applies to regulation of all activity, whether economic or not, as long as the cumulative effect of all such activity affects interstate commerce. Thus, the Ninth Circuit fundamentally misapplied and improperly expanded the aggregation principle established by this Court, and this Court should grant the petition for this reason.

In addition, the *amici* argue that the five circuit courts that have addressed the constitutional issue presented here have adopted conflicting rationales concerning the issue, and the intercircuit conflict concerning the proper constitutional rationale provides an additional basis for this Court to grant the petition.



CONCLUSION

The *amici* have a significant interest in the issue presented in the petition, and are well qualified to address the issue. Their brief will assist the Court in reviewing the issue presented in the petition, and in deciding whether to grant the petition. Therefore, the

amici's motion for leave to file an *amici curiae* brief should be granted.

Respectfully submitted,

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AMICI CURIAE BRIEF¹**INTEREST OF THE AMICI CURIAE**

The *amici curiae*, whose interests are described in more detail in the motion for leave to file *amici curiae* brief, are as follows:

The National Water Resources Association (“NWRA”) is a voluntary organization of western state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in water rights and quality issues in the west. The NWRA includes some of the nation’s largest water districts, including the Central Arizona Water Conservation District, Colorado River Water Conservation District, Middle Rio Grande Conservancy District, and Las Vegas Valley Water District.

The California Farm Bureau Federation (“CFBF”) is a non-governmental, non-profit, voluntary membership California corporation that represents the

¹ Counsel of record for the parties to this petition have received notice of intent to file this *amici curiae* brief at least 10 days prior to the due date for the brief (Rule 37.2). Although the petitioner and the federal respondents have consented to the filing of this brief, the non-federal respondents have not consented, and thus a motion for leave to file *amici curiae* brief is being filed contemporaneously with this brief. None of the parties to this petition authored the brief in whole or in part, and no counsel or party to the petition made a monetary contribution to fund the preparation or submission of the brief (Rule 37.6).

interests of California farmers, who depend on water supplies for their livelihood. CFBF is California's largest farm organization, and consists of 53 local farm bureaus representing approximately 76,500 members in 56 counties.

Siskiyou County ("County"), California's fifth largest county in area, represents its citizens who divert water from the various waterways of Siskiyou County, primarily the Shasta River and the Scott River and their tributaries. The County also represents the Siskiyou Power Authority, of which the County is a member, which diverts water for hydroelectric power generation from the Sacramento River.

The City of Fresno ("City"), the fifth largest city in California, obtains its water supply from various sources that are dependent on the federal Central Valley Project ("CVP") and the State Water Project ("SWP").

The San Luis & Delta-Mendota Water Authority ("SLDMWA") is a joint powers agency consisting of 29 public agencies, 27 of which have contracts for water supplies from the CVP. The CVP water provided to SLDMWA agencies supports approximately 1.2 million acres of agricultural lands in western San Joaquin Valley and parts of San Benito and Santa Clara Counties, and also municipal and industrial uses in the Silicon Valley as well as cities in the San Joaquin Valley serving more than one million people.

The City of San Bernardino Municipal Water Department ("CSBMWD"), a department of the City

of San Bernardino, provides retail water service to over 150,000 customers and waste water service to over 200,000 customers in the Inland Empire area of southern California.

The San Bernardino Valley Municipal Water District (“SBVMWD”), a regional agency responsible for water supply planning for San Bernardino Valley, imports SWP water into its service area, and manages surface water diversions and groundwater storage within its boundaries. SBVMWD’s customers include 13 retail water agencies, which collectively have more than 700,000 business and residential customers, and includes the cities of San Bernardino, Colton, Loma Linda, Redlands, and Rialto, among others.

The *amici* have an interest in maintaining availability of water supplies for their use, or for use by their members or constituents, and thus have an interest in the issue presented in the petition. Some of the *amici* or their members or constituents divert water from waterways pursuant to permits or other authorizations under state laws, and others have contracts for water deliveries from federal, state, regional or local water projects. The *amici*’s interests in both situations are directly affected by actions of federal service agencies, such as the U.S. Fish and Wildlife Service (“FWS”), in administering the ESA, and in issuing biological opinions thereunder; such biological opinions typically require allocations of water supplies for the benefit of endangered species, and thus reduce availability of water supplies for consumptive water uses, including uses by the *amici* or their

members or constituents. The FWS' biological opinions in many cases are for the benefit of intrastate, local species that have no effect on interstate commerce, such as the Delta smelt in this case. The *amici* believe that the Commerce Clause of the U.S. Constitution does not authorize federal agencies to regulate intrastate, local species that do not affect interstate commerce, or require allocation of water supplies for the benefit of such species. Therefore, the *amici* request that this Court grant the petition and reverse the Ninth Circuit decision below.



REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT FUNDAMENTALLY MISAPPLIED THE AGGREGATION PRINCIPLE THAT THIS COURT ESTABLISHED IN *WICKARD* AND APPLIED IN *LOPEZ, MORRISON* AND *RAICH*.

A. Nature And Background Of Issue Presented

This petition presents the question whether the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, as applied to intrastate, local species that have no effects on interstate commerce, falls within the scope of Congress’ powers under the Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3.

Section 7(a) of the ESA requires federal agencies to consult with a designated service agency – in this case, the U.S. Fish and Wildlife Service (“FWS”)

– before taking any action that may “jeopardize” the continued existence of a listed endangered or threatened species or adversely affect its critical habitat. 16 U.S.C. § 1536(a); *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 652 (2007). Pursuant to section 7(a), the U.S. Bureau of Reclamation (“Bureau”) consulted with the FWS regarding the Bureau’s operation of the Central Valley Project (“CVP”), a federal water project that exports water from the Sacramento-San Joaquin Delta to contracting agencies for agricultural, municipal and other uses in California. The CVP provides a major portion of California’s water supplies.

Following the consultation, the FWS issued a biological opinion, as authorized under section 7(b) of the ESA, 16 U.S.C. § 1536(b), which concluded that the Bureau’s operation of the CVP, and the California Department of Water Resources’ (“DWR”) operation of the State Water Project (“SWP”), were causing “jeopardy” to the continued existence of the Delta smelt and adversely affecting its critical habitat. The Delta smelt is a wholly intrastate species that is not traded in interstate commerce, and has no effect on such commerce. The biological opinion included a “reasonable and prudent alternative” (“RPA”), as authorized by section 7(b) of the ESA, which recommended that the Bureau and DWR reduce water deliveries from the CVP and SWP, respectively, to the contracting water agencies in order to provide more water for the benefit of the Delta smelt. The biological opinion included an Incidental Take Statement immunizing

the Bureau and DWR from liability under section 9 of the ESA, 16 U.S.C. § 1538 – which prohibits the “take” of an endangered species – if the agencies complied with the RPA. The Bureau and DWR accordingly reduced water deliveries to the contracting agencies, which resulted in a reduction of water supplies for approximately 25 million people, about two-thirds of California’s population.

The actions of the FWS, the Bureau and DWR were taken pursuant to the authorizations and requirements in the ESA. The question presented is whether the ESA, in authorizing and requiring these actions, exceeds Congress’ powers under the Commerce Clause, and more particularly whether Congress has power under the Commerce Clause to regulate an intrastate, local species that has no effect on interstate commerce.

B. The Commerce Clause

The Commerce Clause authorizes Congress to regulate the “channels” and “instrumentalities” of interstate commerce, and also “activities” that “substantially affect” interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995); *United States v. Morrison*, 529 U.S. 598, 608-609 (2000); *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). The question presented here, as in *Lopez*, *Morrison* and *Raich*, is whether the regulated activity “substantially affects” interstate commerce.

In *Lopez* and *Morrison*, this Court held that Congress' commerce powers, although broad, are not unlimited. In *Lopez*, this Court held that the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which prohibited the possession of guns near schools, exceeded Congress' commerce powers because gun possession near schools does not substantially affect interstate commerce. *Lopez*, 514 U.S. at 563-568. In *Morrison*, this Court held that the Violence Against Women Act, 42 U.S.C. § 13981, which provided a federal court remedy for acts of violence against women, exceeded Congress' commerce powers because gender-based acts of violence do not substantially affect interstate commerce. *Morrison*, 529 U.S. at 612-613.

Lopez and *Morrison* established several important principles governing the scope of Congress' commerce powers. First, the federal commerce power applies only to activities that “*substantially*” affect – and not simply “affect” – interstate “commerce,” and, further, that “commerce” denotes economic activity. *Lopez*, 514 U.S. at 559, 560-561 (emphasis added); *Morrison*, 529 U.S. at 610-611 (same). Second, the congressional regulation must have a “jurisdictional element” that limits its reach to activities substantially affecting interstate commerce; the jurisdictional element allows the courts to determine on a case-by-case basis whether the regulated activity has such effects. *Lopez*, 514 U.S. at 561-562; *Morrison*, 529 U.S. at 611-612. Third, congressional findings that an activity substantially affects interstate commerce are relevant only if Congress employs the same

“substantially affects” test developed by this Court. *Lopez*, 514 U.S. at 559, 562-563; *Morrison*, 529 U.S. at 612, 614-616. Finally, the link between the congressional regulation and interstate commerce must be substantial and not attenuated; otherwise, Congress’ regulatory powers under the Commerce Clause would have no logical stopping point, and Congress would possess the equivalent of the general police power retained by the states. *Lopez*, 514 U.S. at 563-568; *Morrison*, 529 U.S. at 612-613. The ultimate test of the statute’s constitutionality is whether the regulated activity affects national or local interests; “[t]he Constitution requires a distinction between what is truly national and what is truly local.” *Morrison*, 529 U.S. at 617-618.

C. The Aggregation Principle, And The Ninth Circuit’s Misapplication Of The Principle

In *Lopez*, *Morrison* and *Raich*, this Court – following its earlier decision in *Wickard v. Filburn*, 317 U.S. 111 (1942) – held that Congress under some circumstances may regulate intrastate, local activities that do not substantially affect interstate commerce. Specifically, the Court held that, under the principle of “aggregation,” Congress may regulate individual activities having only local effects if *all* such activities, collectively and in the “aggregate,” substantially affect interstate commerce. *Lopez*, 514 U.S. at 559-561; *Morrison*, 529 U.S. at 610-611; *Raich*, 545 U.S. at 24-26. These local activities may be aggregated,

the Court stated, if they are “an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561; *Raich*, 545 U.S. at 24, 36.

The Ninth Circuit applied the aggregation principle in holding that the Commerce Clause authorizes Congress to regulate an intrastate, local endangered species, such as the Delta smelt. Pet. App. A-19 – A-26. Citing *Raich*, *Lopez* and *Morrison*, the Ninth Circuit stated that “when a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute (rather than an isolated application) in determining whether the statute relates to ‘commerce or any sort of economic enterprise.’” Pet. App. A-21 (citations and internal quote marks omitted).

The Ninth Circuit held that the aggregation principle applies to regulation of all activity – whether economic or not – as long as the cumulative effect of the activity has some effect on interstate commerce. Pet. App. A-25. The court rejected the plaintiffs’ argument that the principle applies only to regulation of economic activity, stating:

The Supreme Court has never required that a statute be a “comprehensive *economic* regulatory scheme” or a “comprehensive regulatory scheme for *economic activity*” in order to pass muster under the Commerce Clause. Indeed, it has never used those terms. The only requirement – which was expressly detailed

in *Raich* – is that the “comprehensive regulatory scheme” have a “substantial relation to commerce.” *See Raich*, 545 U.S. 17. The statute need not be a purely economic or commercial statute. . . .

Pet. App. A-25 (original emphasis).

The Ninth Circuit’s view of the aggregation principle is flatly wrong. This Court in *Lopez*, *Morrison* and *Raich* unequivocally held that the aggregation principle applies only to regulation of economic activity. Indeed, the Court in those cases reached divergent results concerning the applicability of the aggregation principle – and the constitutionality of the statutes – precisely because the statute in *Raich* regulated economic activity and the statutes in *Lopez* and *Morrison* did not.

In *Lopez*, the Court stated that it had “upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected interstate commerce,” and that “[w]here *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” *Lopez*, 514 U.S. at 559-560 (emphasis added). *Lopez* declined to apply the aggregation principle because the gun possession statute did not regulate economic activity. *Lopez* stated:

Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however

broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulation of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561. *Lopez* also stated:

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.

Id. at 567. Thus, *Lopez* plainly held that the aggregation principle applies only to regulation of economic activity.

Similarly, in *Morrison*, the Court held that the aggregation principle applies only to regulation of economic activity, and declined to apply the aggregation principle because the regulated activity – gender-based acts of violence – was not economic in nature. *Morrison* stated:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause

regulation of intrastate activity only where that activity is economic in nature.

529 U.S. at 613. *Morrison* observed that if the aggregation principle were not limited to economic activity, Congress' commerce powers would potentially extend to "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-616.

In *Raich*, on the other hand, this Court applied the aggregation principle in upholding the constitutionality of the Controlled Substances Act ("CSA") because the Court regarded the regulated activity as economic in nature. The Court held that local use of marijuana – which was the regulated activity in that case – was part of a larger activity relating to the interstate marketing of drugs, and that Congress has authority under the Commerce Clause to regulate the interstate marketing of drugs because of the economic nature of such marketing. The interstate marketing of drugs, the Court stated, is "quintessentially economic"; the word "economic" according to its dictionary definition refers to "the production, distribution, and consumption of commodities," 545 U.S. at 25, and the CSA "regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 26. *Raich* distinguished *Lopez* and *Morrison* on grounds that the CSA regulated an economic activity and the statutes in *Lopez* and *Morrison* did not. *Id.* at 24-26. Thus, *Raich* held, as *Lopez* and *Morrison* had

held, that the aggregation principle applies to regulation of economic activity, and the decisions are distinguishable only because the regulated activity was economic in the former case and not economic in the latter two cases.

In the seminal *Wickard* case itself, the Court applied the aggregation principle in upholding congressional regulation of economic activity. The Court held that the Agricultural Adjustment Act of 1938 was constitutional as applied to a farmer who grew wheat for home use, even though his activity did not affect interstate commerce. *Wickard*, 317 U.S. at 127-128. The Court held that if other farmers also grew wheat for home use, the aggregate effect of all such activity would likely affect the interstate market for wheat, either because the farmers might later sell the wheat if market prices increased or because the withholding of wheat from the market by the farmers would itself affect the market price of wheat. *Id.* Thus, *Wickard* held that the farmer's production of wheat for home use was an economic activity that, when aggregated with other like activity, would collectively and substantially affect interstate commerce. As this Court stated in *Lopez*:

Even *Wickard*, which is perhaps the far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.

Lopez, 514 U.S. at 560.

In sum, *Lopez*, *Morrison* and *Raich* – and *Wickard* itself – held that the aggregation principle applies to congressional regulation of economic activity if such activity, when aggregated with like economic activity elsewhere, substantially affects interstate commerce. *Wickard* and *Raich* applied the aggregation principle and *Lopez* and *Morrison* did not only because the regulated activity in the former cases was economic and in the latter cases was not. The Court agreed in all four cases, however, that the aggregation principle applies only to regulation of economic activity.

The Ninth Circuit, by disregarding the economic nature of the regulated activity, fundamentally misapplied the aggregation principle and expanded it beyond limits recognized in *Lopez*, *Morrison* and *Raich*. Under the Ninth Circuit's view, Congress may permissibly regulate all activity in the nation, irrespective of whether the activity is economic in nature, if the collective effect of all such activity has an effect, however remote and tenuous, on interstate commerce. It is difficult to imagine any activity that might not fall within the scope of Congress' commerce powers under the Ninth Circuit's expansive interpretation. For example, although the states are responsible for regulating property use in our federal system, *e.g.*, *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1978) – and therefore Congress cannot permissibly regulate property uses under its commerce powers – the Ninth Circuit's open-ended interpretation of Congress' commerce powers would potentially authorize congressional regulation of all

property uses in the nation, and a host of other activities that have been traditionally regulated by state and local governments under our federal system. Under the Ninth Circuit’s view, Congress’ commerce powers would have no logical stopping point, and Congress would possess the equivalent of a general police power similar to that retained by the states, contrary to this Court’s admonition that the Commerce Clause does not extend this far. *Lopez*, 514 U.S. at 567.

D. Non-Applicability Of Aggregation Principle To Endangered Species Act

The aggregation principle does not apply to the ESA because the ESA does not regulate, or purport to regulate, economic activity. The ESA’s “purposes” are the “conservation of . . . endangered species and threatened species” and the “ecosystems upon which [they] depend.” 16 U.S.C. § 1531(b). According to the ESA’s findings, endangered species have “esthetic, ecological, educational, historical, recreational, and scientific value.” *Id.* at § 1531(a)(3). These statutory purposes and findings make no mention of economic or commercial activity as a basis for regulation. Since the ESA was enacted for purposes unrelated to economic or commercial regulation, the aggregation principle does not apply to regulation under the ESA.

In *Lopez*, *Morrison* and *Raich*, this Court held that the aggregation principle applies where the regulation of intrastate, local activity is “an essential

part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561; *Raich*, 545 U.S. at 24, 36. Apart from the fact that the ESA does not regulate “economic activity,” the regulation of an intrastate, local endangered species is not an “essential part” of a larger regulatory scheme that would be “undercut” if the species were not regulated. Although endangered species, whether of the plant or animal variety, have one thing in common – they are “endangered” – there is generally no inherent connection or interdependency between them, such that the failure to regulate one such species would “undercut” regulation of the others. Although the arroyo toad in southern California, the silvery minnow in New Mexico and the Delta smelt in northern California are all listed as “endangered,” this singular commonality does not support the conclusion that the regulation of one such species is “essential” to the regulation of others. On the contrary, the existence and survival of a local species found in one area is not dependent on regulation of other local species found in other areas, because these various species by definition have only local effects. The Ninth Circuit’s view that *all* endangered species must be regulated or *none* can be effectively regulated is a misguided product of the court’s own supposition.

Clearly Congress has the power under the Commerce Clause to regulate endangered species that substantially affect interstate commerce, and the question presented here is whether Congress has

power to regulate endangered species that do not have these effects. The question is not whether the ESA is facially unconstitutional, but whether the ESA is unconstitutional as applied to endangered species that do not affect interstate commerce. If this Court were to hold that the Commerce Clause does not extend this far, Congress could amend the ESA to limit its coverage to species that substantially affect interstate commerce, and establish criteria for making this determination; the Secretaries of Interior and Commerce would then be able to determine through the regulatory process which specific species are subject to regulation and which are not. In short, Congress should adopt a “jurisdictional element” that limits the ESA’s reach to subjects within Congress’ commerce powers, as *Lopez* and *Morrison* held it must. *Lopez*, 514 U.S. at 561-562; *Morrison*, 529 U.S. at 611-612. To date, Congress has not done so.

II. THIS COURT SHOULD RESOLVE THE INTERCIRCUIT CONFLICT CONCERNING THE PROPER CONSTITUTIONAL RATIONALE FOR THE ISSUE PRESENTED HERE.

Prior to the instant case, the federal circuit courts issued five decisions addressing the question whether the Commerce Clause authorizes congressional regulation of endangered species that do not affect interstate commerce. *National Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001);

GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003), *rehearing en banc denied*, 362 F.3d 286 (2004), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *rehearing en banc denied*, 334 F.3d 1158, *cert. denied*, 540 U.S. 1218 (2004); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 522 U.S. 1097 (2008). These five circuit court decisions upheld the constitutionality of the ESA as applied to the endangered species involved in the cases. All five decisions concerned the application of section 9 of the ESA, 16 U.S.C. § 1538, which prohibits the “take” of an endangered species, and not the application of section 7, which requires federal consultation as in this case.

Although these five circuit court decisions upheld the constitutionality of the ESA as applied, the circuit courts offered divergent and conflicting rationales in support of their decisions. Thus, there is no generally-accepted consensus among the federal circuit courts concerning the proper constitutional rationale for the issue presented here. Moreover, several federal circuit judges wrote dissenting opinions in the cases, arguing that the ESA is unconstitutional as applied. Thus, there is even no generally-accepted consensus among the federal circuit judges themselves concerning the proper constitutional outcome. This Court should grant review to determine the constitutionality of the ESA as applied, and in any event the proper rationale for the constitutional conclusion.

Then-Judge John Roberts, while sitting on the District of Columbia Court of Appeals, dissented from the denial of rehearing *en banc* in *Rancho Viejo*, arguing that *en banc* review was necessary to resolve the intercircuit conflict regarding the proper constitutional rationale. *Rancho Viejo, rehearing en banc denied*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting). He argued that “[e]n banc review is appropriate because the approach of the panel in this case and *NAHB* [*National Ass’n of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)] now conflicts with the opinion of a sister circuit [*GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003)] – a fact confirmed by that circuit’s quotation from the *NAHB* dissent.” *Id.* Thus, then-Judge Roberts perceived the existence of an intercircuit “conflict[]” concerning the constitutional issue presented here, which is not only a ground for rehearing *en banc* by the appellate courts but also a ground for review by this Court. Supreme Court Rule 10(a).

A. Circuit Court Decisions Addressing ESA’s Constitutionality

The federal circuit court decisions addressing the ESA’s constitutionality are as follows, in chronological order:

1. ***National Ass'n of Home Builders v. Babbitt* (“NAHB”), 130 F.3d 1041 (D.C. Cir. 1997)**

In *NAHB*, the District of Columbia Circuit, in a 2-1 panel decision, held that the ESA is constitutional as applied to the taking of the Delhi Sands Flowering-Loving Fly in California. The three panel judges, unable to agree on either a conclusion or rationale, wrote three separate opinions. Judge Wald wrote that the ESA is constitutional as applied because it regulates the “channels” of interstate commerce; endangered species are part of “biodiversity”; endangered species may lead to important medical discoveries; and Congress adopted findings describing the importance of endangered species in maintaining our “ecosystem.” 130 F.3d at 1043-1057. Judge Henderson disagreed with Judge Wald’s conclusions that the case involved the “channels” of interstate commerce and the possibility of medical discoveries – it is, she wrote, “impossible to ascertain” whether endangered species will lead to medical discoveries – but argued that the ESA is constitutional as applied because there is an “interconnection of the various species and ecosystems” and “the extinction of one species affects others and their ecosystems.” *Id.* at 1057-1060. Judge Sentelle dissented, arguing that the ESA is unconstitutional as applied because “the Commerce Clause empowers Congress ‘to regulate commerce’ not ‘ecosystems’” and the ESA does not regulate “commerce.” *Id.* at 1060-1067.

2. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000)

In *Gibbs*, the Fourth Circuit, in a 2-1 panel decision, held that the ESA is constitutional as applied to the taking of endangered red wolves in North Carolina. The court held that the wolves affect interstate commerce because they provide the basis for tourism, scientific research, and commercial pelt trade. 214 F.3d at 492. The wolves can be aggregated under *Wickard*, the court held, because the wolves have commercial value. *Id.* at 493. Judge Luttig dissented, arguing that the ESA is unconstitutional as applied because the taking of the wolves does not constitute “economic activity,” and the regulation “implicates but a handful of animals, if even that, in one small region of one state.” *Id.* at 506-508.

3. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003)

In *GDF Realty*, the Fifth Circuit held that the ESA is constitutional as applied to the taking of certain cave species, such as spiders and beetles, in Texas. The court rejected the argument, partially relied on in *NAHB* and *Gibbs*, that the ESA’s constitutionality depends on whether the actor is engaged in commercial activity; the ESA, the court stated, does not regulate commercial activity and therefore it is erroneous to “look[] primarily to the plaintiffs’ commercial motivations.” 326 F.3d at 636. The court also stated that the cave species, unlike the wolves in *Gibbs*, “are neither economic nor commercial,”

because “[t]here is no market for them.” *Id.* at 638. The court concluded, however, that regulation of the cave species is “part of a larger regulation of activity,” and the ESA’s protection of endangered species is “economic in nature” because of “the ‘incalculable’ value of the genetic heritage that might be lost absent regulation.” *Id.* at 638-640.²

4. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003)

In *Rancho Viejo*, the District of Columbia Circuit upheld the ESA’s constitutionality as applied to the taking of the arroyo toad in California. The court held that the ESA’s constitutionality depends on whether the actor is engaged in commercial or economic activity, and not whether the species itself affects

² The court denied rehearing *en banc*, with six judges dissenting. 362 F.3d 286 (2004). Judge Edith Jones, who authored the dissenting opinion, argued that the panel decision failed to apply the factors described in *Lopez* and *Morrison*, and that the taking of the cave species does not affect interstate commerce or involve economic activity. *Id.* at 288-292. She agreed that some endangered species takes may be aggregated, as in the case of the red wolves in *Gibbs*, because these species have interstate commercial effects, such as by encouraging hunting, tourism and scientific research; she argued, however, that the panel decision’s theory that all species can be regulated as part of an “interdependent web” is flawed, because this theory would allow Congress to regulate land uses traditionally regulated by the states, thus obliterating the line between what is national and what is local. *Id.* at 292-293. “The Commerce Clause,” she wrote, “does not regulate crime, sexual inequality, or ecosystems as such – it regulates commerce.” *Id.* at 294.

interstate commerce; “the ESA,” the court stated, “regulates takings, not toads.” 323 F.3d at 1072. The court concluded that since the actor was engaged in construction of a commercial development project, the ESA was constitutional as applied in the case. The court thus adopted the argument expressly rejected in *GDF Realty, i.e.*, that the constitutionality of the ESA depends on whether the actor is engaged in commercial activity. Under *Rancho Viejo’s* view, the ESA’s constitutionality depends on the fortuity of whether the actor is engaged in commercial activity, a view that would result in disparate regulation of the same endangered species depending on the nature of the actor’s activities.³

5. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007)

In *Alabama-Tombigbee*, the Eleventh Circuit held that the ESA is constitutional as applied to the endangered Alabama sturgeon. 477 F.3d at 1271-1277.

³ The court denied rehearing *en banc*, with two judges dissenting. 334 F.3d 1158 (2003). One of the dissenting judges was then-Judge Roberts, who argued that the majority opinion “in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so.” *Id.* at 1160 (Roberts, J., dissenting) (original emphasis). According to Roberts, “[t]he panel’s approach . . . leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating ‘Commerce . . . among the several States.’” *Id.*

The court stated that the ESA is a “general regulatory statute bearing a substantial relation to commerce,” *id.* at 1273, and thus it is permissible to aggregate the effects of all endangered species in determining whether Congress can properly regulate such species under its commerce powers. *Id.* at 1271-1277. The court stated that the Alabama sturgeon is part of a “biodiversity” that includes all species that, in turn, form different “ecosystems,” *id.* at 1273, 1275; that endangered species in the aggregate provide benefits to medicine as well as agriculture and aquaculture, *id.* at 1273; and that some endangered species provide distinct commercial benefits by encouraging tourism, fishing and hunting. *Id.* at 1274. The court thus applied *Wickard’s* aggregation principle in upholding the constitutionality of the ESA as applied to species that do not affect interstate commerce. The Ninth Circuit in the instant case substantially relied on the Eleventh Circuit’s decision in concluding that the ESA is constitutional as applied to the Delta smelt, and in particular in concluding that the aggregation principle applies in sustaining its constitutionality. Pet. App. A-22 – A-25.

B. Conflict Among The Circuit Court Rationales

The rationales offered in these various circuit court decisions are in conflict. The Fourth Circuit in *Gibbs* held that the ESA is constitutional as applied to species that affect interstate commerce, such as by encouraging tourism, trade and research. 214 F.3d at

492. The Fifth Circuit in *GDF Realty* and the two majority judges of the District of Columbia Circuit in *NAHB* held that the ESA is constitutional as applied to *all* species, because the ESA protects “biodiversity” and “ecosystems.” *GDF Realty*, 326 F.3d at 640; *NAHB*, 130 F.3d at 1043-1057 (Wald, J.), 1057-1060 (Henderson, J.) The District of Columbia Circuit in *Rancho Viejo* held that the ESA is constitutional as applied if the actor is engaged in commercial activity, regardless of whether the species itself affects interstate commerce. 323 F.3d at 1073. The Eleventh Circuit in *Alabama-Tombigbee* and the Fifth Circuit in *GDF Realty* – as well as the Ninth Circuit here – applied the aggregation principle in concluding that the ESA is constitutional as applied to endangered species that do not affect interstate commerce. The circuit courts’ divergent and conflicting rationales would produce different outcomes of the same case, depending on which rationale is applied.

In the *amici*’s view, the Fourth Circuit’s rationale in *Gibbs* is consistent with this Court’s decisions in *Lopez*, *Morrison* and *Raich*, and the rationales of the other circuit court decisions are not. The *Gibbs* rationale considers whether the regulated species affects interstate commerce, and applies the aggregation principle only if the regulated species has this effect. As the dissenting opinion in *GDF Realty* properly argued, the *Gibbs* analysis is consistent with the principles of federalism established in *Lopez* and *Morrison*, because it ensures that the link between congressional regulation and interstate commerce is

substantial and not attenuated. *GDF Realty, rehearing en banc denied*, 362 F.3d at 288-293 (Jones, J., dissenting). Therefore, *Gibbs* establishes a logical stopping point to the congressional commerce power, and limits congressional intrusion into areas traditionally regulated by the states. *Id.*

In *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159 (2001), this Court, citing *Lopez* and *Morrison*, suggested in dictum that – although the Clean Water Act (“CWA”) is constitutional as applied to navigable waters and waters that have a “significant nexus” to navigable waters – the CWA may not be constitutional as applied to “isolated” waters that have no connection to navigable waters. 531 U.S. at 173-174. The Court reasoned that since navigable waters are within the scope of the federal commerce power and “isolated” waters have no connection to navigable waters, “isolated” waters may not be within the reach of the federal commerce power. *Id.* As this Court in *Solid Waste Agency* distinguished between navigable waters and “isolated” waters in determining the scope of the federal commerce power in the CWA context, this Court should distinguish between endangered species that affect interstate commerce and those that do not in determining the scope of the federal commerce power in the ESA context.

Therefore, the Commerce Clause does not authorize Congress to regulate, or authorize regulation of, intrastate, local species such as the Delta smelt that do not substantially affect interstate commerce. This

Court should grant review not only because the Ninth Circuit fundamentally misapplied the aggregation principle, but also to resolve the intercircuit conflict concerning the proper constitutional rationale for the issue presented here.



CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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