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No. 10-15192

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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STEWART & JASPER ORCHARDS, *et al.*,

Plaintiffs-Appellants,

v.

KENNETH SALAZAR, *et al.*,

Defendants-Appellees,

and

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,

Defendant-Intervenors-Appellees.

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On Appeal from the United States District Court  
for the Eastern District of California  
Honorable Oliver W. Wanger, District Judge

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**PLAINTIFFS-APPELLANTS' OPENING BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Stewart & Jasper Orchards, Arroyo Farms, LLC, and King Pistachio Grove hereby state they have no parent companies, subsidiaries, or affiliates that are publicly owned corporations which have issued shares to the public; and that there is no publicly held corporation that owns 10% or more of their stock.

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## STATEMENT OF SUBJECT MATTER JURISDICTION

The district court possessed subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 704 (judicial review of federal agency action). This appeal rises from the district court's entry of partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) in favor of Defendants-Appellees United States Fish and Wildlife Service, *et al.* (the Service), and Defendant-Intervenors-Appellees Natural Resources Defense Council, *et al.* (Defendant-Intervenors). Excerpts of Record (ER) at 1-2. The statutory basis for this Court's appellate jurisdiction is 28 U.S.C. § 1291.

The district court's partial final judgment was entered on December 30, 2009. ER at 1-2.

Plaintiffs-Appellants filed a Notice of Appeal on January 25, 2010. ER at 119-20. Plaintiffs-Appellants' Notice of Appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

## STATEMENT OF ISSUES

1. Do Stewart & Jasper Orchards, Arroyo Farms, LLC, and King Pistachio Grove (collectively, Stewart Appellants) have standing to challenge federal regulation of the delta smelt, under Section 9 of the Endangered Species Act, as an invalid exercise of constitutional authority under the *Commerce Clause*?

2. Is the Stewart Appellants' constitutional challenge to federal regulation of the delta smelt, under Section 9 of the Endangered Species Act, ripe for review?

3. Is federal regulation of the delta smelt (an intrastate, noncommercial species) under Section 7 or 9 of the Endangered Species Act an invalid exercise of constitutional authority under the *Commerce Clause*?

## STATEMENT OF THE CASE

### A. Introduction

On December 15, 2008, the United States Fish and Wildlife Service (the Service) issued a Biological Opinion on the Proposed Coordinated Operations of the Central Valley Project and State Water Project. ER at 366. The Biological Opinion concerns the impacts the coordinated operations of the Central Valley Project and State Water Project have on the delta smelt, a threatened species under the Endangered Species Act. The Biological Opinion concludes that the coordinated operations of the two projects are likely to jeopardize the continued existence of the delta smelt and are likely to adversely modify delta smelt critical habitat. ER at 368-70. Based on these conclusions, the Biological Opinion includes a Reasonable and Prudent Alternative that the Service believes would avoid the likelihood of jeopardizing the continued existence of the delta smelt or resulting in the destruction or adverse modification of critical habitat. *Id.* at 371.

The Biological Opinion and Reasonable and Prudent Alternative have restricted the operations of two critically important water projects in California, devastating thousands of Californians by depriving them of man's most essential natural resource. The Stewart Appellants have been particularly hurt by the Service's implementation of the Biological Opinion, as their almond, pistachio, and walnut orchards have experienced substantially reduced water deliveries as a result of the Service's decision to act on behalf of the delta smelt. ER at 337-38.

This tragic situation need not be. In implementing the Biological Opinion, the Service is purportedly acting pursuant to the federal government's authority "to regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3. But authority over the delta smelt is far from a regulation of interstate commerce. Indeed, the delta smelt is not a fish of interstate significance, geographically or commercially. It is a fish species that is found only in California and has no commercial value. ER at 355, 361 (58 Fed. Reg. 12,854, 12,860 (Mar. 5, 1993)).

The lynchpin to the devastation caused by the Service is Section 9 of the Endangered Species Act (ESA), which prohibits takes of endangered and threatened species without regard to a take's effect on interstate commerce. 16 U.S.C. § 1538(a)(1)(B), 50 C.F.R. § 17.31(a). Despite the coercive effect Section 9 has on the implementation of biological opinions, issued under Section 7 of the Act, the district court ruled that the Stewart Appellants do not have standing to challenge

Section 9's application in the context of the Service's delta smelt Biological Opinion, and that their Section 9 claim is unripe. ER at 27-28 (*The Delta Smelt Consol. Cases*, 663 F. Supp. 2d 922, 930-31 (E.D. Cal. 2009)).

In evaluating the Stewart Appellants' *Commerce Clause* challenge, the district court relied on five circuit court decisions that have considered the federal government's commerce power over noncommercial, intrastate species. *See Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); and *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007). Although each of these decisions rejected *Commerce Clause* challenges to the ESA, they provided no uniform rationale in doing so. More importantly, they conflict with the Supreme Court's decisions 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).

The analysis below provides what the district court's opinion and the decisions upon which it relied lack: a methodological explanation and application of the Supreme Court's *Commerce Clause* jurisprudence. When this approach is undertaken, the result is that the Service's authority over delta smelt takes may not be sustained.

For these and other reasons set forth below, the district court's opinion and judgment should be reversed.

## **B. Legal Background**

### **1. The Commerce Clause**

The United States Constitution authorizes Congress “to regulate Commerce . . . among the several States,” U.S. Const. art. I, § 8, cl. 3. Under Congress’s commerce power, the federal government may “regulate the channels of interstate commerce,” “regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce,” and “regulate activities that substantially affect interstate commerce.” *Raich*, 545 U.S. at 17 (internal citations omitted).

### **2. The Endangered Species Act**

#### **a. Listing of Threatened and Endangered Species**

To be protected under the ESA, a species must be designated as either “threatened” or “endangered.” An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

#### **b. Taking of Threatened or Endangered Species**

Section 9 of the ESA forbids the taking of a listed species. *Id.* § 1538(a)(1)(B). Although Section 9 applies only to endangered species, the Service has adopted a rule,

pursuant to authority under Section 4 of the ESA, *id.* § 1533(c), that prohibits the take of a threatened species. 50 C.F.R. § 17.31. To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Unauthorized takes may result in civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 and imprisonment for one year. *See* 16 U.S.C. § 1540(a) and (b).

**c. Designation of “Critical Habitat”**

Under Section 4 of the ESA, the Service must, concurrent with listing, designate a species’ critical habitat “to the maximum extent prudent and determinable.” 16 U.S.C. § 1533(a)(3).

**d. Consultation Under the Endangered Species Act**

Under Section 7 of the ESA, federal agencies are obligated to ensure that actions they authorize, fund, or carry out are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” *Id.* § 1536(a)(2). A federal agency must consult with the Service if a permit applicant “has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.” *Id.* § 1536(a)(3).

At the conclusion of consultation the Service provides the federal agency with a “biological opinion” which explains how the anticipated federal action will affect the listed species or its critical habitat. *Id.* § 1536(b)(3)(A). If the Service determines that jeopardy to the species or adverse modification of its critical habitat will likely result from the contemplated action, then the Service may suggest “reasonable and prudent alternatives” (RPA) to the proposed action that would avoid jeopardy or adverse modification of critical habitat. *See id.*

If the Service determines that the proposed federal action, either by itself or by following a suggested RPA, will not jeopardize the species’ existence or adversely modify its critical habitat, the Service must issue an Incidental Take Statement which authorizes takes that would otherwise be in violation of Section 9 of the ESA. The Incidental Take Statement must specify (1) the impact on the species of the incidental take, (2) the reasonable and prudent measures to minimize the impact, and (3) the terms and conditions with which the agency or applicant must comply. *Id.* § 1536(b)(4)(C).

### **C. The Proceedings Below**

The Service’s delta smelt Biological Opinion was issued “in response to the Bureau of Reclamation’s (Reclamation) May 16, 2008, request for formal consultation with the [Service] on the coordinated operations of the CVP and SWP in California.” ER at 366.

The Stewart Appellants filed suit over the Service's delta smelt Biological Opinion, contesting the Service's *Commerce Clause* authority to regulate delta smelt takes and questioning the Service's compliance with the ESA and Administrative Procedure Act (APA), 5 U.S.C. §§ 704, 706. ER at 335-54. Based upon the intrastate, noncommercial nature of the delta smelt, the Stewart Appellants' *Commerce Clause* complaint alleged that "Sections 7(a)(2) and 9 of the ESA, 16 U.S.C. §§ 1536(a)2, 1538 as applied to the Long Term Operational Criteria and Plan for coordination of the Central Valley Project and the State Water Project, are invalid exercises of constitutional authority." ER at 352.<sup>1</sup>

On October 8, 2009, the district court issued a memorandum decision granting the Service and Defendant-Intervenors summary judgment on the Stewart Appellants' *Commerce Clause* claim. ER at 14 (*The Delta Smelt Consol. Cases*, 663 F. Supp. 2d at 922). The memorandum decision also denied the Stewart Appellants' motion for summary judgment on their *Commerce Clause* claim, concluded that the Appellants do not have standing to challenge the application of Section 9 but did have standing

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<sup>1</sup> Shortly after the Stewart Appellants filed their complaint, their lawsuit was consolidated with other actions that had raised similar ESA and APA claims, as well as claims arising under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.* ER at 98. The consolidated delta smelt litigation is still ongoing. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 1:09-cv-407-OWW-DLB (E.D. Cal. filed Mar. 3, 2009).

to challenge application of Section 7 of the Act, and concluded that the Appellants' Section 9 claim was unripe. ER at 59 (*Delta Smelt*, 663 F. Supp. 2d at 948).

The district court entered partial final judgment in favor of the Service and Defendant-Intervenors on December 30, 2009, finding no just reason for delay. ER at 1-2. The district court's partial final judgment was made under Federal Rule of Civil Procedure 54(b), which provides that in actions involving multiple parties, district courts may "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

This appeal followed and was filed on January 25, 2010. ER at 119-20.

### **STATEMENT OF FACTS**

The Service listed the delta smelt as a threatened species on March 5, 1993. ER at 355 (58 Fed. Reg. 12,854 (Mar. 5, 1993)). The Service made no finding that the delta smelt or the taking of delta smelt, either individually or in the aggregate, substantially affects interstate commerce. In fact, the Service concluded that the delta smelt "is the only smelt endemic to California," ER at 355 (58 Fed. Reg. at 12,854), and has no commercial value. ER at 361 (58 Fed. Reg. at 12,860).

On December 15, 2008, under Section 7 of the ESA, the Service issued a Biological Opinion, along with an Incidental Take Statement, on the Long Term Operational Criteria and Plan for coordination of the Central Valley Project (CVP)

and the State Water Project (SWP). *See* ER at 2. The Biological Opinion concluded that “the coordinated operations of the CVP and the SWP, as proposed, are likely to jeopardize the continued existence of the delta smelt” and “adversely modify delta smelt critical habitat.” ER at 368-70.

The Service’s Biological Opinion includes an RPA that the Service claims would not jeopardize the continued existence of the delta smelt or result in the destruction or adverse modification of delta smelt critical habitat. ER at 371.

The Biological Opinion States:

If [the Bureau of] Reclamation fails to assume and implement the RPA and terms and conditions or is unable to ensure that [the California Department of Water Resources (DWR)] adheres to the RPA and terms and conditions of [the] Incidental Take Statement . . . the protective coverage of section 7(o)(2) [of the ESA] may lapse.

ER at 378. According to the Service, the measures it described in the RPA “are nondiscretionary and must be implemented by Reclamation, working with DWR . . . in order for the [Section 9 liability] exemption in section 7(o)(2) to apply.” *Id.*

### **SUMMARY OF ARGUMENT**

It is the threat of civil and criminal liability for an unpermitted take of a listed species that allows the Service to require compliance with its Biological Opinion. The Supreme Court has recognized that although biological opinions are issued under

Section 7 of the ESA, it is the Section 9 take prohibition that gives a biological opinion its “powerful coercive effect.” *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

In this case, Section 9 animates the Section 7 delta smelt Biological Opinion in a manner that directly results in reduced water deliveries for the Stewart Appellants. Accordingly, the Stewart Appellants have standing to challenge the ESA as applied to the delta smelt under both Section 9 and Section 7. Likewise, the case is ripe.

As will be demonstrated below, the district court’s standing and ripeness rulings were erroneous, but its *Commerce Clause* analysis was egregiously so. This is because rather than conduct its analysis under a framework that is mandated by this Court and the Supreme Court, it provided a lengthy transcription of an Eleventh Circuit decision that cannot be squared with Supreme Court precedent.

Indeed, the Eleventh Circuit in *Tombigbee*, 477 F.3d 1250, failed to engage in a step-by-step analysis of the *Commerce Clause* challenge to the ESA, contrary to the Supreme Court’s decisions in *Lopez*, *Morrison*, and *Raich*. Under these decisions, Congress may regulate “ ‘economic activity [that] substantially affects interstate commerce.’ ” *Raich*, 545 U.S. at 25 (quoting *Morrison*, 529 U.S. at 610). Congress may not regulate noneconomic activity except as part of a comprehensive market regulatory scheme for economic activity. *Raich*, 545 U.S. at 18.

Whether a regulation of noneconomic activity (like the take of a delta smelt) fits within this rubric must be analyzed under factors set forth in *Lopez* and *Morrison*. But

in *Tombigbee*, relied on by the court below, the Eleventh Circuit did not “directly evaluat[e] any of [the] four *Lopez* factors.” ER at 42-43 (*Delta Smelt*, 663 F. Supp. 2d at 938).

Other circuit courts have upheld federal authority over noncommercial, intrastate species, but have engaged in similarly flawed applications of the Supreme Court’s “substantial effects” test. The result has been a messy and contradictory jurisprudence that does not comport with the fundamental purposes of the *Commerce Clause*—protection of state sovereignty and federalism.

This illogical expansion of federal authority must end. For this reason the Stewart Appellants provide below extensive summaries of the Supreme Court’s *Commerce Clause* cases, as well as explanations for why the circuit cases were wrongly decided. When the Supreme Court’s *Commerce Clause* jurisprudence is properly applied to the delta smelt, it is apparent that the Service has no authority over this species.

### **STANDARD OF REVIEW**

The district court’s grant of summary judgment in favor of the Service and Defendant-Intervenors and denial of summary judgment for the Stewart Appellants is reviewed *de novo*. *McClung v. City of Sumner*, 548 F.3d 1219, 1223 (9th Cir. 2008). *See also United States v. Snoring Relief Labs., Inc.*, 210 F.3d 1081, 1084 (9th Cir. 2000). “Viewing the evidence in the light most favorable to the non-moving

party,” this Court must determine “whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” *Id.*

The district court’s holding that the Stewart Appellants do not have standing to challenge the delta smelt Biological Opinion under Section 9 of the Endangered Species Act is reviewed *de novo*. *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000). The district court’s holding that the Stewart Appellants’ Section 9 claim is unripe is also reviewed *de novo* because “[r]ipeness for federal adjudication [is] a question of law.” *Anchorage v. United States*, 980 F.2d 1320, 1322-23 (9th Cir. 1992).

Whether the federal government has *Commerce Clause* authority over an activity is a question of law which is reviewed *de novo*. *See Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 613; *Raich*, 545 U.S. at 18-19.

## ARGUMENT

### I

#### **THE STEWART APPELLANTS HAVE STANDING TO CHALLENGE THE BIOLOGICAL OPINION UNDER SECTION 9 OF THE ESA DUE TO THE “COERCIVE EFFECT” SECTION 9 LIABILITY HAS ON FEDERAL AND STATE WATER PROJECT MANAGERS**

In order to establish Article III standing, a plaintiff must demonstrate (1) an “injury in fact,” (2) a “causal connection between the injury and the conduct complained of,” and (3) that it is “likely, as opposed to merely speculative, that the

injury will be redressed by a favorable decision.” *Bennett*, 520 U.S. at 167 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The Stewart Appellants challenge the delta smelt Biological Opinion under Section 9 of the ESA in order to remedy the wrongful denial of water “to which they would otherwise be entitled had [the Service] acted in a lawful manner.” ER at 336. The injury to the Stewart Appellants, its cause, and the likelihood of redressability was clear to the district court: “It is undisputed that the issuance of the BiOp has resulted in reduced water deliveries to south-of-Delta [water] users, including Plaintiffs, to protect the smelt. This has resulted in a number of adverse consequences to water users.” ER at 27 (*Delta Smelt*, 663 F. Supp. 2d at 930).<sup>2</sup>

Similarly, the Service “d[id] not refute . . . that invalidating . . . section 9 [on] the facts of this case would preclude enforcement of the BiOp,” ER at 27 (*Delta Smelt*, 663 F. Supp. 2d at 931 n.5), and even conceded at oral argument that “if the Court were to invalidate Section 9, it would affect the RPA and obviously the RPA is what’s causing the injury to the plaintiffs.” ER at 91.

Despite the fact that the invalidation of Section 9 in this case would prevent the precise injury the Stewart Appellants seek to redress, the district court held that the

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<sup>2</sup> There was also no dispute at the district court that the Stewart Appellants have standing to bring a Section 7 claim. ER at 29 (*Delta Smelt*, 663 F. Supp. 2d at 931). Likewise, the district court held that the Stewart Appellants’ Section 7 claim is ripe for adjudication. ER at 59 (*Delta Smelt*, 663 F. Supp. 2d at 948).

Stewart Appellants lacked standing to challenge the Biological Opinion under Section 9. According to the court, “[a]lthough Section 9 operates during the consultation process, Plaintiffs have not demonstrated that their injury is fairly traceable to any threatened Section 9 enforcement action.” ER at 28 (*Delta Smelt*, 663 F. Supp. 2d at 931).

But the inquiry for purposes of standing is not whether there is a present *enforcement* action, but instead is whether the conduct complained of *causes* the injury in a fairly traceable manner. *See Bennett*, 520 U.S. at 169 (“While, as we have said, it does not suffice if the injury complained of is the result of the *independent* action of some third party not before the court, that does not exclude injury produced by coercive or determinative effect upon the action of someone else.”) (internal quotations and citations omitted).

In this case, the purported authority to regulate delta smelt takes by means of Section 9 causes reduced water deliveries to the Stewart Appellants in a fairly traceable manner. The text of the Biological Opinion bears this out, as it states that the RPA and terms and conditions of the Incidental Take Statement “*must be implemented by Reclamation*, working with DWR under the [Coordinated Operations Agreement] and other interagency agreements, in order for the exemption in section 7(o)(2) to apply” and preclude Section 9 liability. ER at 378 (emphasis added). In other words, Section 9 has “a ‘powerful coercive effect’ in shaping the

policies of the federal agencies whose actions are at issue,” as evidenced by the fact that action agencies “rarely, if ever, choose[] to disregard the terms and conditions of an Incidental Take Statement.” *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, BLM*, 273 F.3d 1229, 1240 (9th Cir. 2001) (quoting *Bennett*, 520 U.S. at 169).

*Bennett* is instructive in light of the district court’s holding that the Stewart Appellants lack standing to challenge the Biological Opinion under Section 9. In that case, irrigation districts and two ranchers within those districts complained that “restrictions on water delivery ‘recommended’ by [a] Biological Opinion ‘adversely affect plaintiffs by substantially reducing the quantity of available irrigation water.’” *Bennett*, 520 U.S. at 160 (quoting App. to Pet. for Cert. 34). The federal government, however, argued that the plaintiffs in *Bennett* lacked standing to challenge the biological opinion, “contending that any injury suffered by [plaintiffs] is neither ‘fairly traceable’ to the Service’s Biological Opinion, nor ‘redressable’ by a favorable judicial ruling, because the ‘action agency’ (the Bureau) retains ultimate responsibility for determining whether and how a proposed action shall go forward.” *Bennett*, 520 U.S. at 168 (citing 50 C.F.R. § 402.15(a) (1995)).

The High Court rejected the government’s arguments, holding that the plaintiffs’ injury was fairly traceable to the Service’s biological opinion and likely to be redressed if the biological opinion were set aside. *Bennett*, 520 U.S. at 170-71. Causation and redressability were evident, for while the Service’s biological opinion

“theoretically serves an ‘advisory function,’ in reality it has a powerful coercive effect on the action agency.” *Id.* at 169 (citing 51 Fed. Reg. 19,928 (1986)).

The “powerful coercive effect” was not based on Section 7, but instead on the Service’s Section 9 authority over takes of endangered species: “a Biological Opinion must include a so-called ‘Incidental Take Statement,’ ” which “constitutes a permit authorizing the action agency to ‘take’ the endangered or threatened species so long as it respects the Service’s ‘terms and conditions.’ ” *Bennett*, 520 U.S. at 170. “The action agency is technically free to disregard the Biological Opinion . . . but it does so at its own peril (and that of its employees), *for ‘any person’ who knowingly ‘takes’ an endangered or threatened species* is subject to substantial civil and criminal penalties, including imprisonment.” *Id.* (emphasis added) (citing 16 U.S.C. § 1540(a) and (b) (authorizing civil fines of up to \$25,000 per violation and criminal penalties of up to \$ 50,000 and imprisonment for one year)).

The government’s standing arguments were wanting due to the Service being “keenly aware of the virtually determinative effect of its Biological Opinions.” *Id.* The Court focused on the Service’s Section 9 take authority, emphasizing that the biological opinion in *Bennett* “instruct[s] the reader that any taking of a listed species is prohibited unless ‘such taking is in compliance with this incidental take statement, and warn[s] that the measures described below are nondiscretionary, and must be taken by the Bureau.” *Id.* (brackets omitted). *Compare* ER at 378 (“The measures [in

the Incidental Take Statement] are nondiscretionary and must be implemented by Reclamation,” which has a “continuing duty to regulate the activities that are covered by this Incidental Take Statement for the life of the proposed action. If Reclamation fails to assume and implement the RPA and terms and conditions of this Incidental Take Statement . . . the protective coverage of section 7(o)(2) may lapse,” resulting in Section 9 liability.).

Thus, it is quite a misstatement to suggest, as did the court below, that “[e]ven if Section 7 and Section 9 overlap, the application of one does not necessarily implicate the other.” ER at 25-26 (*Delta Smelt*, 663 F. Supp. 2d at 930). **Rather, Section 7 imposes an affirmative duty upon federal agencies to prevent violations of Section 9.** See ER at 378 (“Reclamation has a continuing duty to regulate the activities that are covered by this Incidental Take Statement for the life of the proposed action.”). See also *Cattle Growers*, 273 F.3d at 1239 (“[I]f the terms and conditions of the Incidental Take Statement are disregarded and a taking does occur, the action agency or the applicant may be subject to potentially severe civil and criminal penalties under Section 9.”).

Further, as this Court has held, “[an] Incidental Take Statement [is] appropriate only where a taking will occur.” *Id.* at 1237. In this case, then, there is a direct causal chain that can be traced from the application of Section 9 to the Stewart Appellants’ harm: the Service believes it has Section 9 authority to regulate delta smelt takes, has

acted upon that purported authority by entering into Section 7 consultation and issuing the Incidental Take Statement, and consequently has deprived the Stewart Appellants of water. *See* ER at 377-78. *See also Bennett*, 520 U.S. at 178 (“[T]he Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions.”).

Thus, even though the delta smelt Biological Opinion “resulted from the consultation process required under Section 7,” the Stewart Appellants have standing to challenge the Biological Opinion under Section 9. ER at 25 (*Delta Smelt*, 663 F. Supp. 2d at 930). Section 9 has a “powerful coercive effect” on the implementation of a biological opinion, which is appropriate “only where a taking will occur.” *Cattle Growers*, 273 F.3d at 1240, 1237 (quoting *Bennett*, 520 U.S. at 169). The district court’s holding that the Stewart Appellants only have standing to challenge Section 7 and not Section 9 “wrongly equates injury ‘fairly traceable’ to the defendant with injury as to which the defendant’s actions are the very last step in the chain of causation.” *Bennett*, 520 U.S. at 168-69. Section 9 may not be the last step in the consultation process, but it is a major component of the delta smelt Biological Opinion, and accordingly the Stewart Appellants have standing to bring a challenge based on Section 9.

## II

### **THE STEWART APPELLANTS' CHALLENGE TO THE BIOLOGICAL OPINION, WHICH IS BASED ON SECTION 9 OF THE ESA, IS RIPE BECAUSE THE BIOLOGICAL OPINION RESULTS IN REDUCED WATER DELIVERIES TO APPELLANTS**

As explained above, Section 9 is currently being applied in a coercive manner, resulting in the “virtually determinative effect” of Reclamation’s implementation of the delta smelt Biological Opinion and reduced water deliveries to the Stewart Appellants. *See Bennett*, 520 U.S. at 170. Important for purposes for ripeness, the reduced water deliveries to the Stewart Appellants demonstrate that their Section 9 challenge presents a legal issue that is “concrete rather than abstract.” *Colwell v. HHS*, 558 F.3d 1112, 1123 (9th Cir. 2009) (citing *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)). This injury was undisputed in the court below, *Delta Smelt*, 663 F. Supp. 2d at 930, and establishes ripeness in the case at bar, in addition to standing. *See Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (“The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing’s injury in fact prong.”).

The district court based its ripeness analysis on the position that, “[e]ven if, *arguendo*, project operators faced imminent prosecution under Section 9,” the Stewart Appellants may not “stand in the shoes of project operators to challenge such section 9

enforcement proceedings.” ER at 28 (*Delta Smelt*, 663 F. Supp. 2d at 931). But *who* brought this lawsuit is irrelevant for purposes of ripeness—ripeness concerns only the timeliness of an action. *See Colwell*, 558 F.3d at 1123 (“[W]hereas ‘standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when that litigation may occur.’”) (quoting *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997)). As the delta smelt Biological Opinion is based on the current coercive effect of Section 9 and the resulting substantial and ongoing injury to the Stewart Appellants in the way of significant reductions in water deliveries, their Section 9 challenge is ripe.<sup>3</sup>

### III

#### THE MODERN “SUBSTANTIAL EFFECTS” STANDARD IS BASED ON CONCERNS FOR STATE SOVEREIGNTY AND FEDERALISM AND LIMITS THE COMMERCE POWER TO ECONOMIC ACTIVITY

The Founding Fathers wrote the Constitution to “create[] a Federal Government of enumerated powers.” *Lopez*, 514 U.S. at 552 (citing U.S. Const. art. I, § 8). “As James Madison wrote, ‘the powers delegated by the proposed Constitution to the

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<sup>3</sup> In addition to Article III ripeness, the Stewart Appellants’ Section 9 claim is also prudentially ripe because the Biological Opinion is a final agency action, *see Bennett*, 520 U.S. at 178, and because postponing review would deprive the Stewart Appellants of future water deliveries. *See Colwell*, 558 F.3d at 1124 (“[P]rudential ripeness is best seen in a twofold aspect, requiring [courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” (internal quotation omitted)).

federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.’ ” *Lopez*, 514 U.S. at 552 (quoting The Federalist No. 45, at 292-93 (James Madison)). Federalism is a “constitutionally mandated division of authority [that] ‘was adopted by the Framers to ensure protection of our fundamental liberties.’ ” *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

In distinguishing between federal and state authority, the federal government may not “pile inference upon inference in a manner that would bid fair to convert congressional authority under the *Commerce Clause* to a general police power of the sort retained by the States.” *Lopez*, 514 U.S. at 567. Likewise, the *Commerce Clause* may not be interpreted in a manner requiring courts “to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there will never be a distinction between what is truly national and what is truly local.” *Id.* See also *Morrison*, 529 U.S. at 619 n.8 (“[T]he Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.”).

Throughout the twentieth century, the Supreme Court took “long steps down [the] road” of treating the power to regulate interstate commerce as a general police power, “giving great deference to congressional action.” *Lopez*, 514 U.S. at 567. See also *Morrison*, 529 U.S. at 607. But in recent years the Court has taken a step back

toward a traditional understanding of the *Commerce Clause*, emphasizing that it “has always recognized a limit on the commerce power inherent in ‘our dual system of government.’” *Morrison*, 529 U.S. at 608 n.3 (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)). As this Court has explained, the High Court in *Lopez* and *Morrison* “significantly altered the landscape of congressional power under the *Commerce Clause*.” *United States v. Alderman*, 565 F.3d 641, 643 (9th Cir. 2009).

“In *Lopez* and its progeny, the Supreme Court delineated ‘three categories of regulation in which Congress is authorized to engage under its commerce power.’” *Id.* at 646 (quoting *Raich*, 545 U.S. at 16). Under these categories, Congress may regulate “‘(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce [or persons or things in interstate commerce]; and (3) activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.’” *Alderman*, 565 F.3d at 646 (quoting *United States v. Jones*, 231 F.3d 508, 514 (9th Cir. 2000)).

The Supreme Court developed this framework “in response to the unique federalism concerns that define congressional authority in the interstate context.” *United States v. Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006) (citing *Lopez*, 514 U.S. at 557). These concerns “cannot [be] ignore[d]” in light of “the Supreme Court’s shifting emphasis in its Commerce Clause jurisprudence,” as evidenced by *Lopez*, *Morrison*, and *Raich*. *Alderman*, 565 F.3d at 646. Indeed, “regardless of whether the

subject matter is drugs, gender-motivated violence, or gun possession,” courts must focus on “a prominent theme run[ning] throughout the interstate commerce cases: concern for state sovereignty and federalism.” *Clark*, 435 F.3d at 1111.

**A. Under *Lopez* and *Morrison*, Congress May Regulate Economic Activities That Substantially Affect Interstate Commerce**

Because neither Section 7 (consultation) nor Section 9 (takings) address, by their own terms, the use of channels of interstate commerce, or the instrumentalities of or things in interstate commerce, these Sections can be sustained in this case, if at all, only under the third category of *Commerce Clause* enactments—as a regulation of “activities that substantially affect interstate commerce.” *See Lopez*, 514 U.S. at 559. Therefore, this brief will only address this category.

**1. Under *Lopez*, the Regulated Activity Must Be Economic in Order To Substantially Affect Interstate Commerce**

The Supreme Court’s analysis in *Lopez* is predicated upon concerns for state sovereignty and federalism. *See Lopez*, 514 U.S. at 552. In *Lopez*, the Court considered the Gun-Free School Zones Act of 1990, which made it a “federal offense ‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’” *Id.* at 551 (quoting 18 U.S.C. § 922(q)(1)(A)). The term school zone was defined as “in, or on the grounds of, a public, parochial or private school” or within a distance of 1,000 feet of such a school. 18 U.S.C. § 921(a)(25).

The government prosecuted Lopez under the Act for arriving at a high school while carrying a concealed .38 caliber handgun and five bullets. *Lopez*, 514 U.S. at 551. But the government’s case tested federalism at its core—Lopez “was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement [for federal prosecution] that his possession of the firearm have any concrete tie to interstate commerce.” *Id.* at 567.

Without such a concrete tie to commerce, the Court chose to begin with “first principles,” *id.* at 552, citing the admonitions of *Jones & Laughlin Steel* that the commerce power is constrained by our dual system of federal and state government, and that it may not be stretched to encompass “‘indirect and remote’” effects on interstate commerce so as to extinguish “‘the distinction between what is national and what is local and create a completely centralized government.’” *Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37).

After laying the foundation of a limited commerce power, the Court in *Lopez* had no difficulty finding that the Gun-Free School Zones Act had exceeded Congress’s *Commerce Clause* authority and was constitutionally invalid. The framework the Court followed in reaching this conclusion is simple and straightforward.

The Court readily determined that *Lopez* was a “substantial effects” case. For that determination, the Court looked at the object of Section 922(q) and observed that

it did not purport to regulate the use of channels of interstate commerce or prohibit the interstate transportation of a commodity through the channels of commerce. *Id.* at 559. Likewise, because the statutory provision prohibited mere possession of a gun in a school zone, it could not be justified as a regulation to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Id.* at 561. If Section 922(q) was to be upheld, it would have to be under the third category of *Commerce Clause* enactments—“as a regulation of an activity that substantially affects interstate commerce.” *Id.* at 559.

For this analysis, the Court first looked at the text of the statute and found that Section 922(q) by its own terms had “nothing to do with ‘commerce’ or any sort of *economic* enterprise, however broadly one might define those terms.” *Id.* at 561 (emphasis added). This obvious conclusion was compelled by the express language of the Act which made the mere possession of a firearm in a school zone a crime.

The Court also found that the regulated activity, the possession of a gun, was “not an essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561 (emphasis added). In fact, Section 922(q) was a criminal statute that did not involve a commercial or economic regulatory scheme at all. *Id.* The Gun-Free School Zones Act could not be sustained, therefore, as a congressional regulation of activities “that arise out of or are connected with a commercial

transaction, which viewed in the aggregate, substantially affects interstate commerce.”

*Id.*

After rejecting the aggregation approach to sustaining the regulation of an intrastate activity that is not economic in nature, the Court sought next to determine whether Section 922(q) contained a “jurisdictional element” that would ensure on a case-by-case basis that the possession of a firearm substantially affects interstate commerce. *Id.* For that determination, the Court turned again to the language of the Act and found that it did not provide an express requirement that would “limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.” *Id.* at 562. Because no substantial effect was “visible to the naked eye” in the text of the Act itself, the Court also looked to the legislative history to locate any express congressional findings that demonstrated Congress’s belief that the possession of a gun in a school zone substantially affected interstate commerce. *Id.* at 563. But the Court found none.

Nevertheless, the government argued that Congress could rationally have concluded that Section 922(q) did substantially affect interstate commerce because possession of a gun in a school zone may result in violent crime and violent crime interferes with the national economy in two respects: (1) violent crime increases the cost of insurance throughout the nation and (2) violent crime deters people from traveling to unsafe areas. *Id.* at 563-64. The government also argued that guns in

school undermine the learning environment, producing less productive citizens, which hurts the national economy. *Id.* at 564. To underscore the limitations on the commerce power, the Court addressed the implications of those arguments.

The Court expressed deep concern over the government's acknowledgment that under the "costs of [] crime" argument that Congress could regulate any activity that might lead to violent crime no matter how remote the connection to interstate commerce. *Id.* at 563-64. Likewise, the Court found that under the government's "national productivity" argument, Congress could regulate anything *related to* individual economic productivity. *Id.* If these arguments were accepted, the Court would have been "hard pressed" to find any individual activity that Congress could not regulate under the commerce power. *Id.* "[D]epending on the level of generality," the Court observed, "any activity can be looked upon as commercial." *Id.* at 565.

This was the fallacy in the government's arguments; they provided no logical stopping point to congressional authority and converted the commerce power into a general police power like that enjoyed by the states. *Id.* at 567. Although some earlier cases leaned in that direction and suggested a possible expansion of the commerce power, the Court in *Lopez* set aside Section 922(q) as an invalid *Commerce Clause* enactment and declined to go any further. *Id.* To uphold the Gun-Free School Zones Act, the Court explained, "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that

there never will be a distinction between what is truly national and what is truly local.” *Id.* at 567-68 (citing *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat.) 1 (1824), and *Jones & Laughlin Steel*).

## **2. *Morrison* Affirmed Constitutional Limits on the Commerce Power Under the *Lopez* “Substantial Effects” Test**

*Morrison* is instructive because it confirmed the Court’s concern in *Lopez* that “Congress might use the *Commerce Clause* to completely obliterate the Constitution’s distinction between national and local authority.” *Morrison*, 529 U.S. at 615 (citing *Lopez*, 514 U.S. at 564). The Court in *Morrison* considered the Violence Against Women Act of 1994, which provided a federal civil remedy for victims of gender-motivated violence and stated that “persons within the United States shall have the right to be free from crimes of violence motivated by gender.” 42 U.S.C. § 13981(b). The Act defined a crime of violence motivated by “gender” as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” *Id.* § 13981(d)(1). Antonio Morrison and James Crawford, the defendants, argued that Christy Brzonkala could not bring a claim against them under Violence Against Women Act because Congress lacked authority under the *Commerce Clause* to enact Section 13981. *Morrison*, 529 U.S. at 604.

Returning to “first principles,” the Court reaffirmed that all laws passed by Congress must find authority in the Constitution and that the powers of Congress are limited. *Morrison*, 529 U.S. at 607.

Because Section 13981 focused “on gender-motivated violence wherever it occurs” and was not directed at the instrumentalities of interstate commerce or interstate markets, or even things or persons in interstate commerce, the majority determined that the Act fell within the third category of *Commerce Clause* enactments and could only be sustained as a regulation of activity that substantially affects interstate commerce. *Id.* at 609. To conduct its analysis, the Court concluded that *Lopez* provided the appropriate framework. *Id.*

According to the Court in *Morrison*, four factors contributed to the decision in *Lopez*. The first factor was that the Gun-Free School Zones Act of 1990, by its terms, had nothing to do with commerce or an economic enterprise; that is, the Act did not purport to regulate an economic activity. *Id.* at 610. The second factor was that the Act contained “‘no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.’” *Id.* at 611-12 (quoting *Lopez*, 514 U.S. at 562). This factor was important to establish that the Act was in “pursuance of Congress’ regulation of interstate commerce.” *Id.* at 612. The third factor was that neither the statute “nor its legislative history contain[ed] express congressional findings regarding

the effects upon interstate commerce” of the regulated activity. *Id.* And, the fourth factor was that the connection between the regulated activity and a substantial effect on interstate commerce was remote. *Id.*

With this framework underlying the Court’s *Commerce Clause* analysis, resolution of the *Morrison* case was clear. *Id.* at 613. First, the Court held that the Violence Against Women Act, by its terms, had nothing to do with commerce: “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” *Id.* As a result, gender-motivated crimes are not the type of activity that, through repetition elsewhere, would substantially affect interstate commerce. *Id.* at 610-11.

As the majority observed, the noneconomic, criminal nature of the prohibited activity in *Lopez* was central to its decision in that case. *Id.* at 610. But the Court in *Morrison* did not stop there. To further illustrate the importance of this factor, the Court stated, as a matter of historical fact, that it had upheld federal regulation of intrastate activity based on its “substantial effects” on interstate commerce *only* when the regulated activity was economic in nature. *Id.* at 611, 613.

Next, the Court held that the Violence Against Women Act did not contain an express “jurisdictional element” establishing that Congress was attempting to regulate interstate commerce. *Id.* at 613. Rather than limit its reach to a discrete set of gender-motivated violent crimes that had an explicit connection with or effect on

interstate commerce, Section 13981 was drawn too broadly and included purely intrastate violent crime. *Id.* The language of the Act did not support the conclusion, therefore, that Section 13981 was adequately tied to interstate commerce. *Id.*

Unlike the situation in *Lopez*, however, the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce. *Id.* at 614. Among others, those effects included deterring victims from traveling interstate or engaging in interstate business, diminishing national productivity, and increased medical costs. *Id.* at 615. But the Court held that these findings were insufficient to uphold the Act under the *Commerce Clause*: “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” *Id.* at 614 (quoting *Lopez*, 514 U.S. at 557 n.2). That determination, the majority held, is for the courts to decide. *Morrison*, 529 U.S. at 614.

Finally, because Congress followed the but-for causal chain from the original violent act to every remote effect upon interstate commerce, the Court decided that Congress’s findings were faulty and relied on a “method of reasoning” that obliterates the distinction between what is national and what is local and which the Court had already rejected in *Lopez*. *Morrison*, 529 U.S. at 615. The Court was unwilling to allow Congress to regulate noneconomic activity, such as gender-motivated acts of violence, based only on that activity’s attenuated effects on interstate commerce. *Id.*

at 617. Therefore, the Court held that Congress did not have authority under the *Commerce Clause* to enact Section 13981 of the Violence Against Women Act. *Id.* at 619.

**B. Under *Raich*, Congress May Determine That a Noncommercial Activity Substantially Affects Interstate Commerce If That Activity Is Regulated as Part of a Comprehensive Regulatory Scheme for Economic Activity**

At first glance, the circumstances in *Raich* appear similar to those in *Lopez* and *Morrison*. Just as the *Lopez* and *Morrison* decisions concerned federal regulation of noneconomic activity, the defendants in *Raich* engaged in the production and consumption of marijuana for noncommercial reasons, which was prohibited by the Controlled Substances Act (CSA). *Raich*, 545 U.S. at 7.

Moreover, as in *Lopez* and *Morrison*, the Court analyzed the defendants' *Commerce Clause* challenge to the CSA under the "substantial effect[s]" test. *Id.* at 17. The Court confirmed the "three general categories of regulation in which Congress is authorized to engage under its commerce power," that the third category is Congress's power "to regulate activities that substantially affect interstate commerce," and noted that "[o]nly the third category is implicated in the case at hand." *Id.* (citing *Perez v. United States*, 402 U.S. 146, 150 (1971), and *Jones & Laughlin Steel Corp.*, 301 U.S. at 37).

Despite the apparent similarities to *Lopez* and *Morrison*, the Court in *Raich* held that the federal regulation of the noncommercial, intrastate production and consumption of marijuana was permissible under the *Commerce Clause*. *Raich*, 545 U.S. at 32-33. The difference, however, was not the *activity* of local production and consumption of marijuana, but instead was the *statute* to which the federal regulation of this activity was tied. *See id.*

As the Court explained, “[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic.” *Id.* at 25. Based on a definition of “economics” that “refers to ‘the production, distribution, and consumption of commodities,’ ” the High Court held that the CSA “is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.” *Id.* at 26 (quoting *Webster’s Third New International Dictionary* 720 (1966)).

Under this comprehensive statutory regulation of a commercial market, Congress was permitted to conclude that “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational . . . means of regulating commerce in that product.” *Raich*, 545 U.S. at 26. In other words, “[b]ecause the CSA is a statute that *directly regulates economic, commercial activity*, our opinion in *Morrison* casts no doubt on its constitutionality” as-applied to noncommercial activity. *Id.* at 26 (emphasis added).

*Wickard v. Filburn*, 317 U.S. 111 (1942), was “of particular relevance” to the Court in *Raich*. *Raich*, 545 U.S. at 17. Like the CSA in *Raich*, the Agricultural Adjustment Act (AAA) in *Wickard* was designed to control the market for a commodity—wheat. *Id.* As the *Raich* Court noted, Filburn’s homegrown production and consumption of wheat was enough to bring him within federal jurisdiction under the *Commerce Clause*: “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” *Id.* at 18 (quoting *Wickard*, 317 U.S. at 127-28).

But more important for the Court in *Raich* was that “[j]ust as the Agricultural Adjustment Act was designed ‘to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses’ and consequently control the market price,” *Raich*, 545 U.S. at 18-19 (quoting *Wickard*, 317 U.S. at 115), the CSA’s primary purpose was to “control the supply and demand of controlled substances in both lawful and unlawful drug markets.” *Raich*, 545 U.S. at 19 (citation omitted).

In both cases, Congress’s intent was to regulate commercial transactions in an interstate market: “While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial

transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety.” *Raich*, 545 U.S. at 19.

Thus, the regulation of the noncommercial production and consumption of marijuana could be sustained due to Congress’s interest in regulating supply and demand. In *Wickard*, there was “no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions.” *Id.* And in *Raich*, “Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.” *Id.* More precisely, the concern “making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market.” *Id.*

Accordingly, the regulations in *Wickard* and *Raich* were “squarely within Congress’s commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.” *Id.*

**C. Economic Activity: *Lopez*, *Morrison*, and *Raich*'s Common Denominator**

*Raich* was not a departure from modern *Commerce Clause* jurisprudence, for it merely confirmed “Congress’ power to regulate purely local activities that are part of an *economic* ‘class of activities’ that have a substantial effect on interstate commerce.” *Id.* at 17 (citing *Perez*, 402 U.S. at 151, and *Wickard*, 317 U.S. at 128-29) (emphasis added). Indeed, *Wickard* had already established that “Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity,” *Raich*, 545 U.S. at 18. *Cf. United States v. Comstock*, No. 08-1224, slip op. at 6 (U.S. May 17, 2010) (“[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”) (citing *Raich*, 545 U.S. at 22, and *Lopez*, 514 U.S. at 557) (other internal citations omitted). The Court in *Raich* simply applied this rule to the CSA’s “comprehensive regime to combat the international and interstate traffic in illicit drugs.” 545 U.S. at 12.

The Court in *Raich* distinguished the CSA from the statutes in *Lopez* and *Morrison* by emphasizing the commercial nature of the CSA. The classification of

marijuana as a Schedule I drug, “unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many ‘essential parts of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’” *Id.* at 25 (quoting *Lopez*, 514 U.S. at 561) (emphasis added; brackets omitted). *Morrison* held the Violence Against Women Act unconstitutional “because, like the statute in *Lopez*, it did not regulate *economic* activity.” *Raich*, 545 U.S. at 25 (emphasis added).

Together, *Lopez*, *Morrison*, and *Raich* identified “a clear pattern of analysis: ‘Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained.’” *Id.* (quoting *Morrison*, 529 U.S. at 610) (emphasis added).

This Court recognizes that the *sine qua non* of the Supreme Court’s decisions in *Lopez*, *Morrison*, and *Raich* was the regulation of economic activity, or the lack thereof. *See, e.g., United States v. McCalla*, 545 F.3d 750, 754 (9th Cir. 2008) (“The Court distinguished *Raich* from *Lopez* and *Morrison* in part based on the fact that in those cases, the statutes in question had no connection to commerce or economic enterprise.”) (citing *Raich*, 545 U.S. at 23-25).

In light of economic activity as the common denominator in modern *Commerce Clause* jurisprudence, it is evident that “*Raich* did not alter the [Supreme Court’s] fundamental three-prong rubric.” *Clark*, 435 F.3d at 1112. Post-*Raich*, the tripartite

framework remains: “Congress can regulate three categories of economic activity under its commerce power: (1) ‘the use of the channels of interstate commerce,’ (2) ‘the instrumentalities of interstate commerce’ and (3) ‘those activities having a substantial relation to interstate commerce.’” *United States v. Stewart*, 451 F.3d 1071, 1073 (9th Cir. 2006) (quoting *Lopez*, 514 U.S. at 558-59).

Likewise, this Court applies “the controlling four-factor test for determining whether a regulated activity ‘substantially affects’ interstate commerce.” *Alderman*, 565 F.3d at 647 (internal quotation omitted). The four “substantial effects” factors are: (1) Is the challenged federal regulation in furtherance of commerce or an economic enterprise; that is, does the regulation purport to regulate an economic activity? *Morrison*, 529 U.S. at 610. (2) Is the federal regulation supported by an express “jurisdictional element” which might limit its reach to a discrete set of activities that “additionally have an explicit connection with or effect on interstate commerce”? *Id.* at 611-12. (3) Is the federal action backed by express legislative “findings regarding the effects upon interstate commerce” of the regulated activity? *Id.* at 612. And, (4) is the connection between the regulated activity and a substantial effect on interstate commerce attenuated? *Id.*

#### IV

### **THE DISTRICT COURT ERRED BY RELYING ON CIRCUIT COURT DECISIONS THAT INCORRECTLY APPLIED THE “SUBSTANTIAL EFFECTS” TEST**

In considering whether the federal government may regulate noncommercial, intrastate species like the delta smelt under the commerce power, this Court must not fall into the same trap into which the district court fell. In upholding the delta smelt Biological Opinion against the Stewart Appellants’ constitutional challenge, the district court relied on the fact that *Commerce Clause* challenges to the Endangered Species Act “have been universally unsuccessful before other courts.” ER at 59 (*Delta Smelt*, 663 F. Supp. 2d at 948). That fact is interesting, but misleading.

Although several circuit courts have declined to invalidate the ESA as-applied to noncommercial, intrastate species, those decisions are wrong and inconsistent. *See Nat’l Ass’n of Home Builders*, 130 F.3d 1041; *Gibbs*, 214 F.3d 483; *Rancho Viejo*, 323 F.3d 1062; *GDF Realty*, 326 F.3d 622; and *Tombigbee*, 477 F.3d 1250. They have “applied different and, sometimes, clearly contradictory rationales to justify regulation of endangered species.” Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. Colo. L. Rev. 375, 378 (2007). More importantly, the analyses behind these decisions cannot be squared with the Supreme Court’s *Commerce Clause* decisions in *Lopez*, *Morrison*, and *Raich*.

**A. *Home Builders* Did Not Command a Rationale That Was Supported by a Majority of Panel Judges**

In *Home Builders*, a coalition of development groups and local governments sought to enjoin application of Section 9 of the ESA as-applied to the Delhi Sands flower-loving fly (fly), an endangered species located only in California. *Home Builders*, 130 F.3d at 1043-44 (Wald, J., lead opinion). The coalition desired the construction of a hospital in the San Bernardino area of California. *Id.* But when the County of San Bernardino informed the Service of its plans to redesign an intersection near the new hospital in order to provide adequate emergency vehicle access, the Service replied to the County that the redesign of the intersection would likely cause a take of the fly in violation of Section 9. *Id.* at 1045.

The D.C. Circuit in *Home Builders* considered whether Section 9 of the ESA as-applied to takes of the fly was constitutional under the *Commerce Clause*. While the three judges on the panel offered divergent views on the *Commerce Clause* issue, each agreed that, in the ESA context, the activity upon which the “substantial effects” analysis is based is the take of the relevant species. *Home Builders*, 130 F.3d at 1049 (Wald, J.) (“the [regulated] activity at issue [is] . . . the taking of endangered species”); *id.* at 1059 (Henderson, J., concurring) (“the ‘taking’ of endangered species ‘substantially affects’ interstate commerce”)<sup>4</sup>; *id.* at 1067 (Sentelle, J., dissenting).

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<sup>4</sup> While Judge Henderson additionally held that Section 9(a)(1)’s “protection of the  
(continued...) ”

The problem, however, was that each judge offered alternative explanations for whether the activity regulated by the government substantially affected interstate commerce. Judge Henderson was particularly clear that, although she agreed with Judge Wald's conclusion "that the 'taking' prohibition in Section 9(a)(1) of the [ESA] constitutes a valid exercise of the Congress's authority to regulate interstate commerce under the *Commerce Clause*," she did not "agree entirely with either of her grounds for reaching the result and instead arrive[d] by a different route." *Home Builders*, 130 F.3d at 1057 (Henderson, J., concurring).

Even more problematic is that neither Judge Wald nor Judge Henderson offered an analysis that comports with the Supreme Court's decisions in *Lopez* and *Morrison*. For example, Judge Wald declared that "[e]ach time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes." *Id.* at 1053 (Wald, J.). Judge Wald's analysis was speculative. *See id.* at 1058 (Henderson, J., concurring) ("I do not see how we can say that the protection of an endangered species has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic

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<sup>4</sup> (...continued)

flies regulates and substantially affects commercial development activity which is plainly interstate," neither of the other two judges on the panel held that the regulated activity was the commercial development. *See Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring).

value.”). Her reasoning ran afoul of the first “substantial effects” factor because it turned on whether there are “potential economic consequences flowing from [a] threat,” *Lopez*, 514 U.S. at 565, not whether a statute “by its terms” regulates “‘commerce’ or any sort of economic enterprise.” *Id.* at 561. As Judge Sentelle explained, permitting Judge Wald’s analysis would allow Congress to regulate “any action that might conceivably affect the number or continued existence of any item whatsoever.” *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting). But with such logic, “[t]here is no stopping point. If we uphold this statute under Judge Wald’s first rationale, we have indeed not only ignored *Lopez* but made the Commerce Clause into what Judge Kozinski suggested: the ‘hey-you-can-do-whatever-you-feel-like clause.’” *Id.* (quoting Alex Kozinski, *Introduction to Volume Nineteen*, 19 Harv. J.L. & Pub. Pol’y 1, 5 (1995)).

Judge Henderson argued that, given the “interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species (like the Delhi Sands Flower-loving Fly) will therefore substantially affect land and objects that are involved in interstate commerce.” *Home Builders*, 130 F.3d at 1059 (Henderson, J., concurring).

But by failing to demonstrate how the take of a fly is economic activity in and of itself, Judge Henderson's rationale fails the "substantial effects" test "as completely as does Judge Wald's." *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting). As Judge Sentelle explained, "there is no showing, but only the rankest of speculation, that a reduction or even complete destruction of the viability of the Delhi Sands Flower-Loving Fly will in fact 'affect land and objects that are involved in interstate commerce,' let alone do so substantially." *Id.* (quoting Opinion of Judge Henderson). Both Judge Wald and Judge Henderson neglected to show how Section 9 regulates economic activity:

the Commerce Clause empowers Congress "to regulate commerce" not "ecosystems." The Framers of the Constitution extended that power to Congress, concededly without knowing the word "ecosystems," but certainly knowing as much about the dependence of humans on other species and each of them on the land as any ecologist today. An ecosystem is an ecosystem, and commerce is commerce.

*Id.*

**B. *Rancho Viejo's Regulated Activity Analysis Cannot Be Squared With the Supreme Court's Decisions in *Lopez* and *Morrison****

The D.C. Circuit has also upheld federal authority over the arroyo toad, another species located in California. *See Rancho Viejo*, 323 F.3d at 1080. *Rancho Viejo* arose as a result of the Service's determination that Rancho Viejo's excavation of a burrow area for a development project would result in takes of and jeopardy to the arroyo toad species. *Id.* at 1065. Contrary to *Home Builders*, the D.C. Circuit in

*Rancho Viejo* applied the “substantial effects” test by engaging in a step-by-step analysis of the four *Lopez* and *Morrison* factors. *See id.* at 1068-70.

But the outcome in *Rancho Viejo* was essentially predetermined when the court issued the only circuit analysis holding that, for purposes of the “substantial effects” test in the ESA context, the regulated activity is something other than the take of an endangered species. *Id.* at 1072. According to the court, “that regulated activity is Rancho Viejo’s planned commercial development, not the arroyo toad that it threatens.” *Id.* What mattered to the court was not takes of the arroyo toad *per se*, but *who* was doing the taking: “[T]he prohibited taking is accomplished by commercial construction, and the unlawful taker is Rancho Viejo . . . . [B]oth the ‘actor,’ a real estate company, and its ‘conduct,’ the construction of a housing development, have a plainly commercial character.” *Id.* at 1072.

But as then-Judge Roberts later remarked, looking solely to the commercial nature of the development stands in contrast to the Supreme Court’s decisions in *Lopez* and *Morrison*. *See Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (*Rancho Viejo II*) (Roberts, J., dissenting from denial of petition for rehearing en banc). Under the panel’s approach in *Rancho Viejo*, “if the defendant in *Lopez* possessed the firearm because he was part of an interstate ring and had brought it to the school to sell it,” or “the defendant in *Morrison* assaulted his victims to promote interstate extortion, then clearly the challenged regulations in those cases

would have substantially affected interstate commerce, and the facial Commerce Clause challenges would have failed.” *Id.* Judge Sentelle argued that *Rancho Viejo* was wrongly decided for similar reasons. *See Rancho Viejo II*, 334 F.3d at 1159 (Sentelle, J., dissenting from denial of petition for rehearing en banc).

Notwithstanding the D.C. Circuit’s decision in *Rancho Viejo*, the Fifth Circuit in *GDF Realty* soundly rejected the notion that, in ESA cases, the regulated activity is something other than takes of an endangered species: “Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.” *GDF Realty*, 326 F.3d at 634. The problem the court found with this approach is two-fold: first, it “would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors”; and second, “looking primarily beyond the regulated activity in such a manner would ‘effectually obliterate’ the limiting purpose of the Commerce Clause.” *Id.* at 634-35 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37).

Thus, *Rancho Viejo*’s “substantial effects” analysis is devoid of a limit to the federal government’s commerce power and conflicts with Supreme Court and Fifth Circuit precedent. *See Rancho Viejo II*, 334 F.3d at 1159 (Sentelle, J., dissenting from

denial of rehearing en banc) (“Despite the valiant efforts of my colleagues on the panel, the notion that the rationale of the present decision has a stopping point fails. It is at odds, most importantly, with the Supreme Court. It is also conspicuously in conflict with [the Fifth Circuit].”).

**C. *Gibbs* Used Strained Reasoning To Find a Connection Between Red Wolf Takes and a Substantial Effect on Interstate Commerce**

In *Gibbs*, the Service issued regulations limiting the take of members of experimental populations of endangered red wolves in North Carolina and Tennessee. *Gibbs*, 214 F.3d at 488. A group of plaintiffs challenged the federal government’s authority to protect red wolves on private land. *Id.* at 491. In particular, they argued that the federal government “cannot limit the taking of red wolves on private land because this activity cannot be squared with any of the three categories that Congress may regulate under its commerce power.” *Id.* at 492.

The Fourth Circuit examined the plaintiffs’ claim under the “substantial effects” test and began its analysis by asking “whether the taking of red wolves on private land is ‘in any sense of the phrase, economic activity.’” *Id.* at 492 (quoting *Morrison*, 529 U.S. at 613). But while the court answered this question in the affirmative, it did so by looking at the *reason* behind takes, not by finding that takes *per se* were commercial activity. *See Gibbs*, 214 F.3d at 492. But this sort of reasoning suffers from the same flaws as the D.C. Circuit’s regulated activity analysis in *Rancho Viejo*

because it “would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors.” *GDF Realty*, 326 F.3d at 634.

The Fourth Circuit’s most significant error, however, is its reliance upon attenuated reasoning instead of a methodological application of the *Lopez* and *Morrison* factors. The court concluded that “[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf tourism, no scientific research, and no commercial trade in pelts. We need not ‘pile inference upon inference’ to reach this conclusion.” *Gibbs*, 214 F.3d at 492-93 (quoting *Lopez*, 514 U.S. at 567).

Each of these rationales relied upon the *effect the regulation of wolf takes* has upon interstate commerce. *See, e.g., Gibbs*, 214 F.3d at 494 (“Such regulation is necessary to conserve enough red wolves to sustain tourism.”); *id.* (“Protection of the red wolves on private land thus encourages further research that may have inestimable future value, both for scientific knowledge as well as for commercial development of the red wolf.”). But as the Supreme Court has emphasized, the inquiry under *Lopez* and *Morrison* does not concern the *effect of a regulation*, but whether the regulated activity *itself* substantially affects interstate commerce. *See, e.g., Morrison*, 529 U.S. at 614 (“As we stated in *Lopez*, ‘Simply because Congress may conclude that a *particular activity substantially affects interstate commerce* does not necessarily make it so.’”) (quoting *Lopez*, 514 U.S. at 557 n.2) (internal quotation omitted; emphasis

added). And as Judge Luttig remarked, only speculation could sustain a determination that the take of a red wolf was economic activity. *See Gibbs*, 214 F.3d at 508-09 (Luttig, J., dissenting) (The take of a red wolf is activity that has “no foreseeable economic character at all, except upon the baldest (though admittedly most humorous) of speculation that the red wolf pelt trade will once again emerge as a centerpiece of our Nation’s economy.”).

The Fourth Circuit also purported to uphold the regulation of wolf takes based on its “sustainab[ility] as ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’ ” *Gibbs*, 214 F.3d at 497 (majority opinion) (quoting *Lopez*, 514 U.S. at 561). This standard was an accurate pre-cursor to the Supreme Court’s holding in *Raich* that Congress may regulate noncommercial activities under statutes that regulate “the production, distribution, and consumption of commodities for which there is an established, and lucrative interstate market.” *Raich*, 545 U.S. at 25-26.

The Fourth Circuit, however, did not explicitly determine that the ESA directly regulates economic activity. It could not, for as the court recognized, the ESA’s “overall congressional goal [is] restoring red wolves and endangered species generally.” *Gibbs*, 214 F.3d at 498. Rather than a market regulatory scheme like the statutes discussed in *Raich*, the ESA is a “comprehensive and far-reaching piece of legislation that aims to conserve the health of our national environment.” *Id.* at 497.

*See also id.* at 498 (describing ESA as “a broad scheme for the conservation of endangered species”).

In short, the Fourth Circuit in *Gibbs* did not find a direct connection between red wolf takes and interstate commerce. It likewise concluded that the ESA is an economic regulatory scheme despite relying only on noncommercial congressional purposes. Accordingly, its analysis in upholding the ESA as-applied to intrastate, noncommercial species is unpersuasive.

#### **D. *GDF Realty* Is Unpersuasive Because It Is Self-Contradictory**

The Fifth Circuit in *GDF Realty* considered Section 9’s constitutionality as-applied to six species of subterranean invertebrates (Cave Species). *GDF Realty*, 326 F.3d at 624. There is no commercial market for Cave Species, and they are found only in Texas. *Id.* at 625. The plaintiffs in *GDF Realty* challenged the application of Section 9 under the *Commerce Clause* after the Service concluded that their proposed property development would result in takes of Cave Species. *Id.* at 626-27.

The court first addressed “what constitutes ‘the regulated activity’ ” for purposes of the “substantial effects” test. *Id.* at 633. It concluded that looking at the plaintiffs’ commercial motivations was inappropriate for this inquiry. *Id.* at 633-34. As the court noted, “the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. But Congress, through [the] ESA, is not directly regulating commercial development.” *Id.* at 634.

Accordingly, the court held that the regulated activity was Cave Species takes, as concluding that the regulated activity was the plaintiffs' commercial development "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors." *Id.* The court likewise held that "Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture." *Id.* at 638.

Curiously, however, the court concluded later in its opinion that the ESA's take provision "is economic in nature." *Id.* at 640. According to the court, the application of Section 9 as to Cave Species takes could be upheld because "the interdependence of species compels the conclusion that regulated takes under [the] ESA do affect interstate commerce." *Id.* at 640.

But in light of the panel's regulated activity analysis, this later conclusion is "confusing and self-contradictory." *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 291 (5th Cir. 2004) (*GDF Realty II*) (Jones, J., dissenting from the denial of rehearing en banc). As then-Judge Jones explained, the panel in *GDF Realty* "attempt[ed] to convert the ESA to an economic regulatory statute by opining that the majority of species takes would result from economic activity, and 'the Cave Species takes would occur as a result of plaintiffs' planned commercial development.'" *Id.* (quoting panel opinion, 326 F.3d at 639). But the panel "had, however, rejected this argument earlier, when it found that the regulated activity is the take, not the planned

commercial land development.” *GDF Realty II*, 362 F.3d at 291 (Jones, J., dissenting from the denial of rehearing en banc) (citing panel opinion, 326 F.3d at 633-34).

Indeed, while the panel held that the ESA “is an economic regulatory scheme,” it did so based on the conjecture that “takes of any species threaten the ‘interdependent web’ of all species.” *GDF Realty*, 326 F.3d at 640. This analysis falls well short of *Raich*’s requirement that, in order to be an economic regulatory scheme, a statute must “regulate[] the production, distribution, and consumption of commodities for which there is an established, and lucrative interstate market.” *Raich*, 545 U.S. at 25-26.

Moreover, the court’s “interdependent web” theory “is no more than the ‘but-for-causal chain’ approach twice rejected in *Lopez* and *Morrison*.” *GDF Realty II*, 362 F.3d at 292 (Jones, J., dissenting from the denial of rehearing en banc). “An even more obvious dissonance between the panel opinion and *Lopez*, *Morrison*, and the Constitution is that the *Commerce Clause* regulates commerce, not ecosystems.” *Id.*

In light of this dissonance between Supreme Court precedent and the Fifth Circuit’s upholding of the application of Section 9 to Cave Species takes, *GDF Realty*’s holding that the ESA is an economic regulatory scheme must be rejected.

**E. *Tombigbee*'s Failure To Evaluate the *Lopez* and *Morrison* "Substantial Effects" Factors Resulted in an Improper Analysis**

While the district court cited the above four decisions in rejecting the Stewart Appellants' *Commerce Clause* challenge, ER at 43 (*Delta Smelt*, 663 F. Supp. 2d at 938), it relied most heavily on the Eleventh Circuit's decision in *Tombigbee*. See ER at 43-51 (*Delta Smelt*, 663 F. Supp. 2d at 938-45) (transcribing *Tombigbee*, 477 F.3d at 1271-77). As the district court correctly noted, *Tombigbee* "rejected a Commerce Clause challenge to the listing under ESA § 4 of the Alabama sturgeon, a purely-intrastate fish species with little, if any commercial value." ER at 43 (*Delta Smelt*, 663 F. Supp. 2d at 938 (quotation omitted)).

But the district court erred in rejecting the Stewart Appellants' *Commerce Clause* challenge based on *Tombigbee*. Simply put, *Tombigbee* is fatally flawed for two reasons: its failure to apply the *Lopez* and *Morrison* "substantial effects" factors, and its strained reasoning that leaves the federal government's commerce power without limits.

**1. *Tombigbee* Conflicts With Supreme Court Precedent Because It Did Not Directly Evaluate Any of the *Lopez* and *Morrison* "Substantial Effects" Factors**

"[T]he unique federalism concerns that define congressional authority in the interstate context" make the proper application of the "substantial effects" test fundamentally important. *Clark*, 435 F.3d at 1103. Under *Lopez* and *Morrison*,

courts use “the controlling four-factor test for determining whether a regulated activity ‘substantially affects’ interstate commerce.” *Alderman*, 565 F.3d at 647 (citation omitted).

Despite the significance of the *Lopez* and *Morrison* factors, the Eleventh Circuit in *Tombigbee* failed to apply them in conducting its “substantial effects” analysis. *See Tombigbee*, 477 F.3d at 1271-77. Strangely, *Tombigbee* found a substantial effect on interstate commerce “without directly evaluating *any* of the four *Lopez* factors.” ER at 42-43 (*Delta Smelt*, 663 F. Supp. 2d at 938) (emphasis added).

Indeed, rather than find that the ESA “directly regulate[s] economic, commercial activity,” *Raich*, 545 U.S. at 25, the Eleventh Circuit determined that “the necessary first step in addressing [the *Commerce Clause*] challenge is an examination of the total economic *impact* of the Endangered Species Act itself.” *Tombigbee*, 477 F.3d at 1272 (emphasis added). Because the court could not cite any statutory findings that the goal of the ESA is to address “a substantial and direct effect upon interstate commerce,” *Raich*, 545 U.S. at 13 n.20 (quoting 21 U.S.C. § 801(3)), the court looked at legislative history concerning the commercial *impact* of the Endangered Species Act. *See Tombigbee*, 477 F.3d at 1273 (citing H.R. Rep. No. 93-412, at 4 (1973)). The Eleventh Circuit did not even attempt to find a jurisdictional element in the ESA, even though a jurisdictional hook “limit[s] the reach of a

particular statute to a discrete set of cases that substantially affect interstate commerce.” *Alderman*, 565 F.3d at 647.

Furthermore, the word “attenuation” is noticeably absent from the Eleventh Circuit’s opinion in *Tombigbee*. It is not surprising, then (and as explained below), that the court engaged in a “method of reasoning” that obliterates the distinction between what is national and what is local. *Morrison*, 529 U.S. at 615.

**2. *Tombigbee*’s “Biodiversity” Rationale Was Offered Without Regard for the *Lopez* and *Morrison* “Substantial Effects” Factors and Is Based on Strained Logic**

In upholding the listing of the Alabama sturgeon under Section 4 of the ESA, the Eleventh Circuit putatively relied on *Raich* and held that “the Endangered Species Act is a general regulatory statute bearing a substantial relation to interstate commerce.” *Tombigbee*, 477 F.3d at 1273. There are two problems with this analysis.

First, to qualify as an economic regulatory scheme under *Raich*, the statute must “directly regulate[] economic, commercial activity.” *Raich*, 545 U.S. at 26. This is evidenced by the regulation of a market in commodities, not a statute’s mere relation to interstate commerce. *See McCalla*, 545 F.3d at 755. Moreover, under *Raich*, a statute’s commercial *impact* on interstate commerce is irrelevant. *Cf. Tombigbee*, 477 F.3d at 1273. If the application of a statute can be sustained simply because it impacts

or relates to interstate commerce, then the limiting purpose of the *Commerce Clause* is “effectually obliterate[d].” *Jones & Laughlin Steel*, 301 U.S. at 37.

Thus, regardless of a statute’s effect on interstate commerce, it is the nature of the regulated activity that counts, contrary to the Eleventh Circuit’s emphasis on the ESA’s impact. *See Raich*, 545 U.S. at 25-26.<sup>5</sup> This is so because the Supreme Court “emphasized [in *Raich*] that ‘unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic.’” *McCalla*, 545 F.3d at 754 (quoting *Raich*, 545 U.S. at 25).

The second problem with the Eleventh Circuit’s conclusion that the ESA fits within *Raich*’s economic regulatory scheme framework is that it is based on a tortured analysis. The court reached to find a connection to interstate commerce:

An insect with no apparent commercial value may be the favorite meal of a spider whose venom will soon emerge as a powerful and profitable anesthetic agent. That spider may in turn be the dietary staple of a brightly colored bird that people, who are notoriously biased against creepy crawlers and in favor of winsome winged wonders, will travel to see as tourists. Faced with the prospect that the loss of any one species could trigger the decline of an entire ecosystem, destroying a trove of

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<sup>5</sup> Contrary to its opinion in *Tombigbee*, the Eleventh Circuit in *United States v. Maxwell* correctly interpreted *Raich* in holding that “where Congress comprehensively regulates economic activity, it may constitutionally regulate intrastate activity, whether economic or not, so long as the inability to do so would undermine Congress’s ability to implement effectively the overlying *economic* regulatory scheme.” 446 F.3d 1210, 1215 (11th Cir. 2006) (emphasis added). The court in *Tombigbee*, however, noticeably failed to reconcile its analysis with its earlier opinion in *Maxwell*.

natural and commercial treasures, it was rational for Congress to choose to protect them all.

*Tombigbee*, 477 F.3d at 1275. The Eleventh Circuit’s reasoning echoes Justice Breyer’s argument for upholding federal regulation of firearm possession in *Lopez*: “the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce.” *Lopez*, 545 U.S. at 565.

The problem with Justice Breyer’s reasoning, and that of the Eleventh Circuit in *Tombigbee*, is that it “lacks any real limits because, depending upon the level of generality, any activity can be looked upon as commercial.” *Id.* See also *GDF Realty II*, 362 F.3d at 293 (Jones, J., dissenting from the denial of rehearing en banc). As Judge Sentelle recognized, if application of the ESA could be sustained based on the “biodiversity” rationale, then Congress could not be prohibited from regulating “any action that might conceivably affect the number or continued existence of any item whatsoever.” *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting). Of course, “[a] creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce.” *Id.* But with such logic, “[t]here is no stopping point.” *Id.*

Indeed, *Tombigbee* “rests on the false implication that all takes of all species necessarily relate to an ecosystem, which by its very grandiosity must at some point be ‘economic’ in actuality or in effect. This is precisely the reasoning rejected by the Supreme Court.” *GDF Realty II*, 362 F.3d at 293 (Jones, J., dissenting from the denial of rehearing en banc). Accordingly, *Tombigbee*’s reasoning must also be rejected.

V

**TAKES OF THE DELTA SMELT  
DO NOT SUBSTANTIALLY  
AFFECT INTERSTATE COMMERCE**

As explained above, the *Commerce Clause* authorizes Congress to regulate “ ‘(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce . . .; and (3) activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.’ ” *Alderman*, 565 F.3d at 646 (quoting *Jones*, 231 F.3d at 514).

In this case, the Stewart Appellants’ claims that “Sections 7(a)(2) and 9 of the ESA . . . are invalid exercises of constitutional authority” require this Court to conduct the *Commerce Clause* analysis by looking at the terms of the takings provision. *See* ER at 352. The takings provision of Section 9 expressly prohibits the “take of any [threatened or endangered] species within the United States or the territorial sea of the United States.” *See* 16 U.S.C. § 1538(a)(1)(B) and 50 C.F.R. § 17.31.

Stewart Appellants' Section 7 claim must likewise be analyzed by looking at takes of the delta smelt because, as discussed above, a Section 7 Biological Opinion is ultimately a regulation of a federal agency's take of endangered species. *See Bennett*, 520 U.S. at 169-71. Moreover, the analysis for the Section 7 and Section 9 claims are the same because there is no statutory authority for the application of Section 7 independent of the existence of Section 9 liability. *Cf.* The Stanford Environmental Law Society, *The Endangered Species Act* 128 (2001) ("Under Section 7 of the ESA, federal agencies . . . can circumvent the strict Section 9 prohibition against takes by entering into Section 7 consultations with the Service.").

Section 9 makes it unlawful for any person to "take [i.e., harm] any such [listed] species within the United States" without federal approval. 16 U.S.C. § 1538(a)(1)(B). By its terms, the challenged provision does not purport to regulate a channel of interstate commerce or an instrumentality or thing in interstate commerce. Therefore, as applied to the delta smelt, the take prohibition must be sustained, if at all, under the third category of commerce regulation—as a regulation of activity that "substantially affects interstate commerce." *See Lopez*, 514 U.S. at 559.<sup>6</sup>

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<sup>6</sup> There was no dispute in the court below that the "substantial effects" category is the appropriate *Commerce Clause* category in this case. *See* ER at 31-32 n.6 (*Delta Smelt*, 663 F. Supp. 2d at 933 n.6).

*Lopez, Morrison, and Raich* set forth the controlling framework for determining the validity of a *Commerce Clause* regulation like the ESA. Nevertheless, every court that has analyzed the ESA under the “substantial effects” rubric has misapplied the test. A model application of the “substantial effects” test does appear, however, in the Tenth Circuit case of *United States v. Patton*, 451 F.3d 615 (10th Cir. 2006), although in a different, non-ESA context. *See Alderman*, 565 F.3d at 645 (noting *Patton*’s “exhaustive review of Supreme Court and circuit precedent” on the *Commerce Clause* and citing *Patton*’s “substantial effects” analysis approvingly).

Here, the “substantial effects” analysis must begin with the Biological Opinion, which is based on the premise that, without the Service’s authorization, takes of the delta smelt that occur as a result of coordinated Central Valley Project and State Water Project operations would violate Section 9 of the Endangered Species Act. *See* 16 U.S.C. § 1538(a)(1)(B). *See also* ER at 378 (noting that the RPA and terms and conditions of the Incidental Take Statement “must be implemented by Reclamation, working with DWR under the [Coordinated Operations Agreement] and other interagency agreements, in order for the exemption in section 7(o)(2) to apply” and preclude Section 9 liability).

The problem with this premise is that the Service has no authority under the *Commerce Clause* to regulate the taking of a noncommercial, intrastate species like the delta smelt. While Article I, Section 8, of the Constitution provides that Congress

and authorized agencies may “regulate Commerce . . . among the several States,” this enumerated power has a limit:

[T]he scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”

*Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37).

And so it is with the delta smelt—the effects of take of this species are so insubstantial that to permit federal regulation “would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Lopez*, 514 U.S. at 567. Under *Lopez*, *Morrison*, and *Raich*, delta smelt takes do not substantially affect interstate commerce. Therefore, the regulation of this species under Sections 7 and 9 of the ESA is an invalid exercise of the commerce power.

#### **A. The Regulated Activity Is Takes of the Delta Smelt**

Supreme Court precedent holds that the first step in determining “whether the regulated activity ‘substantially affects’ interstate commerce,” *Lopez*, 514 U.S. at 559, is to define the “regulated activity” at issue. *Morrison*, 529 U.S. at 610.

The proper focus for the “substantial effects” test is on the activity that is directly prohibited or regulated by the explicit terms used in the statute. For example,

in *Lopez*, the Court examined the constitutionality of the Gun Free School Zones Act that expressly prohibited individuals from possessing a firearm in a school zone. *Lopez*, 514 U.S. at 551. Therefore, the Court had to determine whether the actual prohibited act—possession of a gun in a local school zone—substantially affected interstate commerce. *See Lopez*, 514 U.S. at 567.

Here, in the Endangered Species Act, Congress has expressly prohibited takes of endangered species. *See* 16 U.S.C. § 1538(a)(1)(B) (“[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered or threatened] species within the United States”). *See also* 50 C.F.R. § 17.31. Thus, the ESA’s text is decisive: Section 9 regulates takes, and this Court must accordingly analyze whether takes of the delta smelt substantially affect interstate commerce. This is the proper standpoint from which to begin the Court’s analysis, as the Service’s Biological Opinion is based on the assumption that it has jurisdiction under the ESA’s take prohibition, 16 U.S.C. § 1538(a)(1)(B), to regulate delta smelt. *See* ER at 378.

The district court, however, held that the regulated activity “is the operation of the CVP and SWP, not the listing, or even the take, of individual species.” ER at 54 (*Delta Smelt*, 663 F. Supp. 2d at 946). Rather than examine what is expressly regulated by the text of the ESA—that is, takes, 16 U.S.C. § 1538(a)(1)(B)—the district court simplistically looked at the *effects* of regulating takes: “Application of the ESA to Project operations undeniably regulates the conditions under which water

is provided to contractors. The direct and secondary effects on interstate commerce of the regulated activity (operation of the Projects) are undeniable.” ER at 54-55 (*Delta Smelt*, 663 F. Supp. 2d at 946).

But as the Fifth Circuit explained in *GDF Realty*, to accept that the regulated activity is something other than individual takes of an endangered species “would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors.” 326 F.3d at 634. “Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity . . . solely because non-regulated conduct . . . by the actor engaged in the regulated activity will have some connection to interstate commerce.” *Id.*

In short, the district court’s holding that the regulated activity is the coordinated operations of the Central Valley Project and State Water Project misses the point of *Lopez* and *Morrison*, which is not that Congress can regulate “any activity if the act of regulating catches an entity or an action that is itself commercial independent of the noncommercial nature of the regulated entity and activity. It is rather that ‘where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.’” *Rancho Viejo II*, 334 F.3d at 1159 (Sentelle, J., dissenting from denial of petition for rehearing en banc) (quoting *Morrison*, 529 U.S. at 610) (internal quotation omitted). The district court’s regulated activity analysis suffers from the same flaws as the D.C. Circuit’s regulated activity analysis in *Rancho*

*Viejo*—neither can be squared with the Supreme Court’s decisions in *Lopez* and *Morrison*. Under the express terms of the ESA and the Biological Opinion, the regulated activity is delta smelt takes.

### **B. The Take of a Delta Smelt Is Not a Commercial Activity**

After determining the regulated activity at issue, courts then use “the controlling four-factor test for determining whether a regulated activity ‘substantially affects’ interstate commerce.” *Alderman*, 565 F.3d at 647 (internal citation omitted). Under *Lopez* and *Morrison*, this Court must consider the following: (1) Is the challenged federal regulation in furtherance of commerce or an economic enterprise; that is, does the regulation purport to regulate an economic activity? *Morrison*, 529 U.S. at 610. (2) Is the federal regulation supported by an express “jurisdictional element” which might limit its reach to a discrete set of activities that “additionally have an explicit connection with or effect on interstate commerce?” *Id.* at 611-12. (3) Is the federal action backed by express legislative “findings regarding the effects upon interstate commerce” of the regulated activity? *Id.* at 612. And, (4) is the connection between the regulated activity and a substantial effect on interstate commerce attenuated? *Id.*

“The first factor determines whether the regulated activity falls within the definition of ‘commerce,’” and “[w]here the regulated activity is noncommercial, the last three factors are significant.” *Patton*, 451 F.3d at 623-24. “[W]here the regulated activity is not commercial in nature, Congress may regulate it only where there are

‘substantial’ and ‘not attenuated’ effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce.” *Id.* at 625 (citing *Morrison*, 529 U.S. at 614-16). But because the district court felt that it could follow *Tombigbee* and complete the “substantial effects” test “without directly evaluating *any* of [the] four *Lopez* factors,” whether the court completed this important step is unclear, at best. ER at 43 (*Delta Smelt*, 663 F. Supp. 2d at 938) (emphasis added).

In contrast to the district court’s disorderly application of the “substantial effects” test, the Tenth Circuit in *Patton* began its analysis by looking at the terms of the statute in question (18 U.S.C. § 931), determining that the regulated activity at issue was the possession of body armor, and asking “Is the regulated activity [at issue] commercial?” *Patton*, 451 F.3d at 624. As the court correctly noted, “[t]he distinction between what is and is not commercial . . . lies at the heart of the Commerce Clause.” *Id.*

For a definition of “commerce,” the court turned to “[t]he best historical scholarship,” which indicated that “in addition to its primary sense of buying, selling, and transporting merchandise, the term ‘commerce’ was understood at the Founding to include the compensated provision of services as well as activities in preparation for selling property or services in the marketplace, such as the production of goods for sale.” *Id.* at 624 (internal citations omitted).

Based upon this definition of “commerce,” the Tenth Circuit stated that the Supreme Court’s holding in *Lopez* that “possession of firearms, in itself, is not commercial or economic . . . makes sense, because the mere possession of a firearm does not constitute the buying, selling, production, or transportation of products or services, or any activity preparatory to it.” *Id.* at 624-25 (citing *Lopez*, 514 U.S. at 560, and *United States v. Price*, 265 F.3d 1097, 1107 (10th Cir. 2001)). Accordingly, the Tenth Circuit held that there was “no reason that mere possession of body armor by a felon would be deemed commercial when the mere possession of a firearm near a school was not.” *Patton*, 451 F.3d at 625.

Here, the take of a delta smelt is in no way a commercial activity. As the Service itself recognized, the possibility that the delta smelt could be overutilized for commercial purposes is nonexistent. ER at 361 (58 Fed. Reg. 12,860). A take of a delta smelt is not the “buying, selling, and transporting [of] merchandise,” nor does it constitute the “compensated provision of services as well as activities in preparation for selling property or services in the marketplace.” *Patton*, 451 F.3d at 624.<sup>7</sup> Section 9 prohibits takes of threatened and endangered species without regard to a take’s

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<sup>7</sup> The district court pointed out in a footnote that “ ‘delta smelt were harvested commercially with other smelt (Osmeridae) and silverside (Atherinidae) species during the 19th and early 20th centuries in a prosperous ‘smelt’ fishery (Skinner 1962) (Sweetnam and others 2001).’ ” ER at 53 n.9 (*Delta Smelt*, 663 F. Supp. 2d at 946 n.9) (quoting ER at 177). But this does not prove the existence of a past commercial market in delta smelt, but only a commercial market existence “in delta smelt . . . harvested commercially with other smelt.” *Id.*

effect on interstate commerce and without any connection to a sale or transportation. *See* 16 U.S.C. § 1538(a)(1)(B) and 50 C.F.R. § 17.31. Thus, Section 9’s take prohibition “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Lopez*, 514 U.S. at 561.

Indeed, the Service prohibits takes of all threatened and endangered species without regard to a take’s effect on interstate commerce. *See* 16 U.S.C. § 1538(a)(1)(B) and 50 C.F.R. § 17.31. This includes commercially harvested species that travel interstate, like certain salmon populations, as well as a rare species of fish, like the delta smelt, that is found within a single state and has no economic value or commercial use. *See* ER at 361 (58 Fed. Reg. at 12,860). The take of this species is a local activity that cannot fairly be described as economic. *See* ER at 355 (58 Fed. Reg. at 12,854) (the delta smelt “is the only smelt endemic to California”). Whereas certain intrastate activities are economic, the noncommercial nature of the delta smelt necessitates a finding that delta smelt takes are not an economic activity.

**C. The Section 9 Take Prohibition Contains No “Jurisdictional Element” That Would Limit the Prohibition to Takes That Have an Explicit Connection to Interstate Commerce**

*Lopez* and *Morrison* next require courts to consider whether the authorizing statute for federal regulation contains an “express jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce.” *Lopez*, 514 U.S. at 562. But even

a jurisdictional statement “is not always ‘a talisman that wards off constitutional challenges.’” *McCalla*, 565 F.3d at 648 (quoting *Patton*, 451 F.3d at 632).

The ESA states that “it is unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered or threatened] species within the United States” without regard to the effect a take may have on interstate commerce. *See* 16 U.S.C. § 1538(a)(1)(B) and 50 C.F.R. § 17.31. Therefore, the regulation of delta smelt takes does not include any sort of jurisdictional limit that would ensure that the regulation prohibits a take that substantially affects interstate commerce and that the government was acting “in pursuance of Congress’ power to regulate interstate commerce.” *See Morrison*, 529 U.S. at 613.

**D. The Regulation of Delta Smelt Takes Is Not Supported By Express Legislative Findings Regarding the Effects of Takes of Intrastate, Noncommercial Species**

The “substantial effects” test also demands consideration of whether the authorizing statute for federal regulation or the statute’s legislative history contains “express congressional findings” regarding the regulated activity’s effects upon interstate commerce. *Lopez*, 514 U.S. at 562. Under the ESA, neither the take prohibition nor the rest of the statute contain findings regarding the effects of takes of intrastate, noncommercial endangered or threatened species on interstate commerce. *See* 16 U.S.C. §§ 1531-1544.

Congress's silence is confirmed by the Service's final rule listing the delta smelt as a threatened species, which contains no recitation that demonstrates a relationship between delta smelt takes and any commercial activity. *See* ER at 355 (58 Fed. Reg. 12,854). In short, Congress has provided no explanation for why a take of a noncommercial species like the delta smelt would ever substantially affect interstate commerce. *See Lopez*, 514 U.S. at 563.

#### **E. The Connection Between Takes of the Delta Smelt and Interstate Commerce Is Attenuated**

Attenuation between a regulated activity and its effect on interstate commerce is fatal to the federal government's authority to regulate that activity. Although there may be an effect on interstate commerce but-for the regulation of a noncommercial activity, "but-for reasoning" is insufficient to uphold federal regulation under the *Commerce Clause*. *See Morrison*, 529 U.S. at 613. As the Supreme Court explained in *Morrison*, Congress may not "follow the but-for causal chain from the initial occurrence of [an activity] to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615.

##### **1. The Connection Between a Noncommercial Activity and Interstate Commerce Is Attenuated Unless It Is Regulated as Part of a Comprehensive Regulatory Scheme for Economic Activity**

"[W]here the regulated activity is not commercial in nature, Congress may regulate it only where there are 'substantial' and not 'attenuated' effects on other

states, on the national economy, or on the ability of Congress to regulate interstate commerce.” *Patton*, 451 F.3d at 625 (citing *Morrison*, 529 U.S. at 614-16). This showing is demonstrated if the regulation of the noncommercial activity “is an essential part of ‘comprehensive legislation to regulate the interstate market in a fungible commodity,’” *Patton*, 451 F.3d at 627 (quoting *Raich*, 125 S. Ct. at 129).<sup>8</sup>

In other words, the noncommercial activity must relate to the market for a good, and Congress may regulate that activity only “as a necessary and proper means of controlling its supply or demand. For example, the federal government may elect to prohibit the possession of eagle feathers as a practical means of drying up the market for them, and thus protecting against the killing of eagles.” *Patton*, 451 F.3d at 626 (citing *Andrus v. Allard*, 444 U.S. 51, 58 (1979)). *See also Stewart*, 451 F.3d at 1076-77 (“*Raich* stands for the proposition that Congress can [regulate a noncommercial activity] where it has a rational basis for concluding that [activity] might bleed into the interstate market and affect supply and demand.”), and *McCalla*, 545 F.3d at 755 (citing *Maxwell*, 446 F.3d at 1217 n.7 (“[T]he CSA was constitutionally ‘comprehensive’ in that it regulated an entire market for a commodity.”) (other

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<sup>8</sup> In addition, Congress may regulate possession of a good depending upon how the use of a good affects interstate commerce. *See Patton*, 451 F.3d at 626. “For example, no one would doubt Congress’s authority to prohibit the civilian possession of surface-to-air missile launchers, on the theory that their only possible use would substantially affect interstate commerce.” *Id.*

internal quotations and citations omitted)). *Cf. United States v. Comstock*, No. 08-1224, slip. op. at 6 (U.S. May 17, 2010).

**2. The Connection Between the Noncommercial Activity of Delta Smelt Takes and Interstate Commerce Is Attenuated Because the Endangered Species Act Is Not a Comprehensive Economic Regulatory Scheme**

In order for a statute to constitute an economic regulatory scheme under *Raich*, the law at issue must clearly establish that Congress was concerned with an interstate commercial market. *Raich*, 545 U.S. at 12-13 n.20. While the ESA includes “Congressional findings and [a] declaration of purposes and policy,” 16 U.S.C. § 1531(a)(b), one looks in vain at these provisions for any finding that the goal of the ESA is to address “a substantial and direct effect upon interstate commerce.” *Raich*, 545 U.S. at 13 n.20 (quoting 21 U.S.C. § 801(3)).

The ESA looks nothing like the CSA in *Raich* that was designed to regulate an entire market of commodities. *See McCalla*, 545 F.3d at 755 (holding that 18 U.S.C. § 2251(a) was comprehensive under *Raich* “in that it seeks to regulate (more accurately, exterminate) the entire child pornography market” and that, “as in *Raich*, the statute addresses a commodity—child pornography—which, *Congress found*, ‘has become a highly organized, multimillion dollar industry that operates on a nationwide scale’”) (emphasis added; brackets omitted) (quoting S. Rep. No. 95-438, at 5 (1977)). Although some provisions of the ESA (that are not challenged here) do regulate

economic activity, *see* 16 U.S.C. § 1538(a)(1)(A), (C)-(F), the regulation of economic activity is not the purpose of the statutory scheme.

Instead, Congress, through the ESA, purported to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions” for endangered species. 16 U.S.C. § 1531(b).

But these altruistic concerns distinguish the ESA from statutes that directly regulate “the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.” *Raich*, 545 U.S. at 26.<sup>9</sup> More precisely, “the Commerce Clause empowers Congress ‘to regulate commerce’ not ‘ecosystems.’” *Home Builders*, 130 F.3d at 1064 (Sentelle, J., dissenting). *See also* Lee Pollack, Student Article, *The “New” Commerce Clause: Does Section 9 of the ESA Pass Constitutional Muster After Gonzales v. Raich?*, 15 N.Y.U. Envtl. L.J. 205, 241-42 (2007) (observing that the “legislative findings and statement of purpose of

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<sup>9</sup> Notably, the Court in *Raich* did not cite the Endangered Species Act as an example in which “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational . . . means of regulating commerce in that product.” *Raich*, 545 U.S. at 26 & n.36 (citing 16 U.S.C. § 668(a) (bald and golden eagles); 18 U.S.C. § 175(a) (biological weapons); § 831(a) (nuclear material); § 842(n)(1) (certain plastic explosives); § 2342(a) (contraband cigarettes)).

the ESA do not mention the potential commerce in endangered species specifically” and that “preserv[ation of] natural resources, [is] a non-commercial topic clearly outside of Congress’ power to regulate under the Commerce Clause”); David W. Scopp, Comment, *Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court’s Web of Confusion Traps More Than the Fly*, 39 U.S.F. L. Rev. 789, 814 (2005) (“Congress enacted the ESA with the intent of preserving individual species in order to protect biodiversity.”); Daniel J. Lowenberg, *The Texas Cave Bug and the California Arroyo Toad “Take” on the Constitution’s Commerce Clause*, 36 St. Mary’s L.J. 149, 183 (2004) (“[R]easonably speaking, the design of the ESA is to regulate species—not commerce.”); Justin Gregory Reden, Comment, *The Commerce Clause Appropriately Defined Within a Universe Without Distinction: The Federal Endangered Species Act’s Unconstitutional Application to Intrastate Species*, 25 T. Jefferson L. Rev. 649, 667 (2003) (“Neither the purpose nor the design of the ESA has a commercial nexus.”).

Here, *Raich* may not serve as a basis for regulating the intrastate activity of delta smelt takes because of the significant differences between the statutory schemes of the Endangered Species Act and that of the Controlled Substances Act and the Agricultural Adjustment Act (in *Wickard*). Far from serving to control an established and lucrative interstate market in endangered species, the ESA was enacted “to provide a means whereby the ecosystems upon which endangered species and

threatened species depend may be conserved.” 16 U.S.C. § 1531(b). Congress’s concern was not in regulating a substantial market in endangered species, but in protecting various species from extinction. *See id.* § 1531(a). *See also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (“[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the *preservation* of endangered species ever enacted by any nation.”) (emphasis added). *Cf. Maxwell*, 446 F.3d at 1217 n.7 (“[T]he CSA was constitutionally ‘comprehensive’ in that it regulated an entire market for a commodity.”), *cited in McCalla*, 545 F.3d at 755.<sup>10</sup>

Indeed, the purely local and noncommercial nature of the delta smelt precludes any federal regulation of this species. The take of a delta smelt “[is] not, in any sense of the phrase, [an] economic activity.” *Morrison*, 529 U.S. at 613. This Court should recognize as much by holding that such takes do not substantially affect interstate commerce.

## CONCLUSION

Thousands of Californians have suffered hardship due to the implementation of the delta smelt Biological Opinion. For the Stewart Appellants, the continued

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<sup>10</sup> Not only is the ESA’s statutory scheme fundamentally different from that of the CSA in *Raich* and the AAA in *Wickard*, so too are the specific regulated activities at issue. In *Raich*, the Court noted that, “[l]ike the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established . . . market.” *Raich*, 545 U.S. at 18. Here, of course, there is no lucrative market for the delta smelt, further demonstrating why *Raich* is inapplicable in the instant case. *See* ER at 361 (58 Fed. Reg. at 12,860).

enforcement of this decision will deprive them of needed water and threaten the viability of their farming operations.

The Stewart Appellants brought this *Commerce Clause* appeal in order to ensure the continued ability to earn a living off of their land. Under Supreme Court *Commerce Clause* jurisprudence, the taking of a delta smelt does not substantially affect interstate commerce. Thus, the delta smelt Biological Opinion is illegal because it is based on unlawful take authority over a noncommercial, intrastate fish.

Accordingly, the Service's delta smelt Biological Opinion should be invalidated, and the district court's opinion should be reversed.

DATED: July 15, 2010.

Respectfully submitted,

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**STATEMENT OF RELATED CASES:  
CIRCUIT RULE 28-2.6**

In *Natural Resources Defense Council v. Salazar*, No. 09-17661 (9th Cir. filed Nov. 27, 2009), the Plaintiffs-Appellants seek review of various issues relating to the 2005 United States Fish and Wildlife Service Biological Opinion on the effects the coordination operations of the Central Valley Project and State Water Project have on the delta smelt. The 2005 delta smelt Biological Opinion was invalidated and remanded to the Service by the Eastern District of California in *Natural Resources Defense Council (NRDC) v. Kempthorne*, No. 1:05-cv-1207 OWW GSA, 2007 U.S. Dist. LEXIS 91968 (E.D. Cal. Dec. 14, 2007). NRDC, *et al.*'s appeal in case No. 09-17661 seeks review of the district court's corollary rulings that they lack standing to challenge the Bureau of Reclamation's execution of and implementation of certain water contracts, and that Reclamation does not have sufficient discretion under Sacramento River Settlement Contracts to trigger the application of Endangered Species Act Section 7 requirements based on effects to the delta smelt.

Because case No. 09-17761 relates to federal authority over the delta smelt species, Plaintiffs-Appellants Stewart & Jasper Orchards, *et al.*, submit that it is related to this appeal, No. 10-15192. *See* Circuit Rule 28-2.6(c) and 28-2.6(d).

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s/ Brandon M. Middleton  
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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)  
CERTIFICATE OF COMPLIANCE WITH  
TYPE-VOLUME LIMITATION, TYPEFACE  
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.**

1. This \_\_\_\_\_ brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
- It contains \_\_\_\_\_ words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), or
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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
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3. The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because
- This brief complies with a page or size-volume limitation established by separate court order dated June 16, 2010, and is
- Proportionally spaced, has a typeface of 14 points or more and contains 17,977 words.

DATED: July 15, 2010.

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s/ Brandon M. Middleton  
Attorney for Stewart & Jasper  
Orchards, *et al.*, Plaintiffs-Appellants

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2010, I electronically filed the foregoing PLAINTIFFS-APPELLANTS' OPENING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Brandon M. Middleton  
BRANDON M. MIDDLETON