

In The
Supreme Court of the United States

STEWART & JASPER ORCHARDS, ARROYO
FARMS, LLC, and KING PISTACHIO GROVE,

Petitioners,

v.

KENNETH LEE SALAZAR, *et al.*,

Respondents.

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

**MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF AND AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

Mountain States Legal Foundation (“MSLF”), pursuant to Supreme Court Rule 37(2)(b), respectfully moves this Court, for leave to file the accompanying amicus curiae brief in support of Petitioners. Petitioners have filed in this Court a blanket consent to amicus curiae briefs, and Respondents, Kenneth Lee Salazar, Secretary, U.S. Department of the Interior, *et al.*, consent to the filing of MSLF’s amicus curiae brief. Respondent-Intervenors, Natural Resources Defense Council and The Bay Institute, have refused to consent. Notably, MSLF filed an amicus curiae brief in this case at the Ninth Circuit, *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011), with the consent of all parties.

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF’s members include individuals who live and work in every State of the Nation.

Central to the notion of a limited government is the constitutional principle of enumerated powers: those powers not explicitly delegated to the federal government are reserved for the States and the

people. These limited powers include Congress's commerce power, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

MSLF submits that Congress often exceeds its commerce power to justify vastly increasing the scope of congressional legislation beyond what is constitutionally permissible. Indeed, application of the Endangered Species Act ("ESA") to the delta smelt in the instant case is one such example. The result of such overreaching is a federal government that is no longer limited and ethical, and further erosion of individual liberty, the right to own and use property, and the free enterprise system. The ESA, in particular, continues this trend of congressional overreaching and adversely affects the lives and businesses of many of MSLF's members.

Therefore, since its inception in 1977, MSLF has engaged in litigation aimed at ensuring the proper interpretation and application of both the Commerce Clause and the ESA. *See, e.g., Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998) (ESA); *Rapanos v. United States*, 547 U.S. 715 (2006) (amicus curiae) (Commerce Clause); *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286 (D.C. Cir. 2004) (amicus curiae) (Commerce Clause and ESA); and *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (amicus curiae) (Commerce Clause and ESA).

In the instant case, the issue before the Ninth Circuit was whether the extension of the protections of the ESA to the delta smelt, a fish found only in

California that has no commercial value, exceeded Congress's power under the Commerce Clause. The Ninth Circuit held it did not exceed Congress's commerce power because the ESA's aggregated effects on interstate commerce "bear[] a substantial relation to commerce." *San Luis & Delta-Mendota Water Auth.* 638 F.3d at 1174. This was the only test applied. The Ninth Circuit neither considered the fact that the ESA is not a market regulatory scheme that regulates quintessentially economic activities in a recognized interstate commodities, nor the fact that the delta smelt has no commercial value and is not a commodity that has an interstate market in which it is distributed and consumed. *Id.* at 1174, 1177.

Petitioners have argued that the Ninth Circuit's test is contrary to this Court's precedent and that the correct test is whether the ESA is a market regulatory scheme that regulates quintessentially economic activities in a recognized interstate commodities market. Petition at 14-24. Because the ESA is not such a regulatory statute, it may not be applied to a purely intrastate species, here the delta smelt. *Id.*

MSLF fully agrees with Petitioners analysis as far as it goes. But MSLF wishes to bring to the attention of this Court an additional argument, not fully addressed by Petitioners or the Ninth Circuit, which would be of considerable help to this Court in deciding this case. The Ninth Circuit and Petitioners both focused their analyses on the nature and effect of the regulatory statute itself, without fully considering the importance to the constitutional analysis of the

nature of the activity regulated. MSLF desires to present to this Court the proposition that only economic activities may be regulated under Congress's commerce power. That is, Congress may regulate only an economic activity that relates to the production, distribution, and consumption of commodities in a recognized interstate market.

The delta smelt, an intrastate fish having no commercial value and no interstate market for its distribution or consumption, does not meet this test, and may not be protected under the ESA. MSLF contends that this result is required by *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Gonzalez v. Raich*, 545 U.S. 1 (2005).

Thus, two independent tests must be met for Congress to regulate any particular activity: (1) the regulatory statute must be a market regulatory scheme that regulates quintessentially economic activity in a recognized interstate commodities market, as demonstrated by Petitioners; *and* (2) the particular activity regulated must deal with a commodity that has an interstate market for its production, distribution, and consumption. Therefore, because the ESA, as applied to the delta smelt, meets neither of these tests, the Ninth Circuit's decision conflicts with established precedent of this Court concerning an important federal question. Accordingly, as discussed in more detail in the accompanying amicus brief of

MSLF, this Court should grant the Petition for Writ of Certiorari.

WHEREFORE, Mountain States Legal Foundation respectfully requests that this Court grant MSLF leave to participate in this case as amicus curiae in support of Petitioners and to file the accompanying Amicus Curiae Brief.

DATED this 25th day of July 2011.

Respectfully submitted,

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QUESTION PRESENTED

Does Congress possess the power under the Commerce Clause to apply the Endangered Species Act to the delta smelt, a fish endemic to California, having no commercial value, and for which no interstate market exists?

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**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS¹

IDENTITY AND INTEREST
OF AMICUS CURIAE**

Mountain States Legal Foundation (“MSLF”) is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF’s members include individuals who live and work in every State of the Nation.

Central to the notion of a limited government is the constitutional principle of enumerated powers: those powers not explicitly delegated to the federal government are reserved for the States and the people. These limited powers include Congress’s commerce power, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

¹ All counsel of record received timely notice, pursuant to Supreme Court Rule 37(2)(a), of MSLF’s intent to file this brief. Petitioners and Respondents both consented. Intervenor-Respondents refused to consent.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

MSLF submits that Congress often exceeds its commerce power to justify vastly increasing the scope of congressional legislation beyond what is constitutionally permissible. Indeed, application of the Endangered Species Act (“ESA”) to the delta smelt in the instant case is one such example. The result of such overreaching is a federal government that is no longer limited and ethical, and further erosion of individual liberty, the right to own and use property, and the free enterprise system. The ESA, in particular, continues this trend of congressional overreaching and adversely affects the lives and businesses of many of MSLF’s members.

Therefore, since its inception in 1977, MSLF and its attorneys have engaged in litigation aimed at ensuring the proper interpretation and application of the Commerce Clause and the ESA. *See, e.g., Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998) (ESA); *Rapanos v. United States*, 547 U.S. 715 (2006) (amicus curiae) (Commerce Clause); *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286 (D.C. Cir. 2004) (amicus curiae) (Commerce Clause and ESA); and *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (amicus curiae) (Commerce Clause and ESA).

Mountain States Legal Foundation believes it can bring to the attention of this Court relevant matters not already brought to its attention and assist the Court in reaching a decision in this case.



STATEMENT OF THE CASE

The question raised in this case is whether Congress's commerce power is so extensive and far-reaching that it empowers Congress to regulate purely intrastate, non-economic activity, where no market regulatory scheme that addresses quintessentially economic activities in a recognized interstate commodities market is involved. Specifically, the question posed here is whether the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1540, may constitutionally be applied to regulate takes of an intrastate species, the delta smelt, that has no commercial value and no recognized interstate market in which it is distributed and consumed. If Congress may regulate such activity, then it is difficult to see what activity Congress may not regulate under such an expansive interpretation of the commerce power. Indeed, the concept of enumerated powers and federalism would become meaningless, and the distinction between what is national and what is local in the activities of commerce would be obliterated.

This case is important not only because the Ninth Circuit's opinion undermines the very concept of enumerated powers and federalism, but also because of the adverse effects on humans, communities, and commercial activity that usually follows from listing a species as endangered or threatened under the ESA. Petitioners, Stewart and Jasper Orchards, Arroyo Farms, LLC, and King Pistachio Grove (hereinafter "the Growers") have demonstrated the disastrous effects on them by the restriction of water

district deliveries to protect stream flow for the delta smelt. Petition at 2-3, 12-13. As the Growers demonstrated, “[t]he stakes are high, the harms to the affected human communities great, and the injuries unacceptable if they can be mitigated.” Petition at 3 (quoting *Consol. Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1070 (E.D. Cal. 2010)).

Nevertheless, the Ninth Circuit held that the Commerce Clause empowered Congress to apply the ESA to protect the delta smelt because the aggregated economic effects of “the ESA is substantially related to interstate commerce[.]” *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011). In doing so, the Ninth Circuit ignored this Court’s precedent and did not consider the fact that the ESA is not a market regulatory scheme that regulates quintessentially economic activities in a recognized interstate commodities market, which renders it unconstitutional as applied to the delta smelt. Petition at 12-23. MSLF agrees completely with the Grower’s reasoning, as far as it goes.

But of equal importance, the Ninth Circuit did not consider the fact that the delta smelt has no commercial value and therefore there is no recognized interstate market in which it is distributed and consumed. Because it has no commercial value and no interstate market, the ESA may not constitutionally protect the delta smelt. Thus, the Ninth Circuit’s decision is contrary to this Court’s long-established precedent. No law may constitutionally regulate activity affecting a commodity that is purely intrastate,

is not economic, and has no effect on interstate commerce markets. MSLF submits this amicus brief to bring to the Court's attention this issue, which was not fully addressed by the Growers or the Ninth Circuit.



REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON THE IMPORTANT FEDERAL QUESTION OF WHETHER CONGRESS MAY REGULATE NON-ECONOMIC INTRASTATE ACTIVITY UNDER ITS LIMITED COMMERCE POWER.

A. The Power Of Congress To Legislate Under The Commerce Clause Is Limited.

The Constitution delegates to Congress the power “[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. The analytical framework for determining the nature and scope of that authority as it relates to purely intrastate activity is provided by *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Lopez*, 514 U.S. 549 (1995); and *United States v. Morrison*, 529 U.S. 598 (2000).²

² *Gonzalez v. Raich*, 545 U.S. 1 (2005), on which the Ninth Circuit primarily relied, is commonly cited as well, but it simply relies on and follows the principles of *Wickard*, as discussed below.

In *Lopez*, this Court began its discussion of Commerce Clause authority by reaffirming the principle that the powers of Congress are limited to those powers specifically enumerated in the U.S. Constitution:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I § 8. As James Madison wrote: “The powers delegated in the proposed Constitution of the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” This constitutionally mandated division of authority “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)). Thus, the commerce power “is subject to outer limits.” *Id.* at 557. The analytical framework for determining those outer limits is set forth below.

B. The Commerce Power May Apply To Intrastate Activity Only If That Activity Is Economic In Nature.

In *Lopez*, this Court established “three broad categories of activity that Congress may regulate under its Commerce power.” 514 U.S. at 558. Only the third, the “power to regulate those activities having a substantial relation to interstate commerce,” is at issue here. *Id.* Intrastate economic activity is subject

to regulation, but only if it has a substantial economic effect on interstate commerce:

“Even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial *economic* effect on interstate commerce[.]”

Id. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)) (emphasis added). Furthermore, even if the activity itself does not substantially affect interstate commerce, it may when aggregated with other similar activities:

[A]though [the farmer’s] own contribution to the demand for wheat may have been trivial by itself, that “was not enough to remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, is far from trivial.”

Lopez, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 127-28). This Court emphasized that such activity, to be constitutionally aggregated and regulated, must be economic in nature. *Lopez*, 514 U.S. at 560 (“Where *economic* activity substantially affects interstate commerce, legislation regulating that conduct will be sustained.”) (emphasis added). This Court has “upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected interstate commerce.” *Id.* at 559 (emphasis added).

To illustrate the furthest reaches of the commerce power over intrastate economic activity, this Court, in *Lopez*, again referred to *Wickard*: “Even *Wickard*, which is perhaps the most far reaching example of the commerce power over intrastate activity, *involved economic activity*[.]” *Lopez*, 514 U.S. at 560 (emphasis added). *Wickard* considered the Agricultural Adjustment Act, which was designed to “regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices.” *Id.* One wheat farmer retained some of his wheat for home consumption. *Id.* This Court held that even though this activity might not be “regarded as commerce,” *id.* at 556, it was still subject to regulation because even the private consumption of a commercial commodity that was sold in established commercial markets could affect that economic market:

“One of the primary purposes of the Act in question was to . . . limit the volume [of wheat] that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would

otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.”

Id. at 560-61 (quoting *Wickard*, 317 U.S. at 128). Thus, both the decision to hold a commercial commodity off the market and the decision to sell it are economic decisions. Such decisions, when aggregated, can have a substantial effect on recognized interstate commodities markets.

In *Morrison*, this Court emphasized the importance of the economic nature of intrastate activity:

[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of *economic* endeavor.

Id. at 611 (emphasis added). Indeed, this Court stressed that, even in cases sustaining federal regulation of economic activity “under the aggregation principle in *Wickard v. Filburn*, the regulated activity was of an apparent *commercial* character.”³ *Id.* (emphasis added) (internal citations omitted). This Court then observed that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of

³ In *Morrison*, the Court reiterated that *Wickard* “involved economic activity” and was “the most far reaching example of Commerce Clause authority over intrastate activity[.]” 529 U.S. at 610.

intrastate activity only where that activity is *economic* in nature.” *Id.* at 613 (emphasis added).

Thus, *Lopez* and *Morrison* hold that if intrastate activity is not economic in nature it may not be regulated under the commerce power.

C. The Ninth Circuit Ignored The Critical Importance Of The Economic Activity Requirement Of *Wickard*, *Lopez*, And *Morrison*, And Relied On *Raich* For A Proposition That *Raich* Does Not Support.

The Ninth Circuit relied primarily on *Raich* to hold that the focus of the inquiry is not on the economic nature of the regulatory statute or of the economic nature of the activity regulated, but is rather on whether the statute in question “bears a substantial relation to commerce,” irrespective of the nature of the regulatory statute or the activity regulated. *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1174 (citing *Raich*, 545 U.S. at 17). To determine whether a statute has a substantial relation to commerce, the Ninth Circuit ruled that a court must “evaluate the aggregate effect of the statute [on interstate commerce] . . . in determining whether the statute relates to commerce or any sort of economic enterprise.” *Id.* Having found that the ESA’s aggregated effect on interstate commerce “bears a substantial relation to commerce,” the Ninth Circuit held that the ESA may be constitutionally applied to the delta smelt. *Id.* at 1174, 1177. In doing so, the Ninth

Circuit ignored the non-economic nature of the ESA and the non-economic nature of the activity regulated in violation of this Court's teachings in *Wickard*, *Lopez* and *Morrison*.

Indeed, “ask[ing] whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so . . . seems inconsistent with the Supreme Court's holdings in *Lopez* and *Morrison*.” *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J. dissenting from denial of rehearing en banc) (citations omitted) (emphasis in original). Thus, “looking beyond the regulated activity [to the regulating statute] . . . would ‘effectually obliterate’ the limiting purpose of the commerce clause[.]” *Id.* (quoting *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634-35 (5th Cir. 2003)).

Moreover, the Ninth Circuit misapplied *Raich*, ignoring the fact that *Raich* affirms the critical importance of the economic nature of the activity regulated, as pronounced in *Wickard*, and discussed at length in both *Lopez* and *Morrison*. *Lopez*, 514 U.S. at 560-61; *Morrison*, 529 U.S. at 611. In *Raich*, this Court determined that the Controlled Substances Act (“CSA”) may constitutionally be applied to the home cultivation and home consumption of marijuana. In so doing, this Court ruled that “our case law firmly establishes Congress's power to regulate purely local activities that are part of an *economic class of activities* that have a substantial effect on interstate commerce.” *Raich*, 545 U.S. at 17 (internal quotations

omitted).⁴ Then, this Court expressly relied on *Wickard*: “Our decision in *Wickard* . . . is of particular relevance[, and] [t]he *similarities between this case and Wickard are striking*.” 545 U.S. at 17-18 (emphasis added). That is, “[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, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.” *Id.* at 18-19 (internal quotations omitted).

This Court found it critical that, like the farmer in *Wickard*, the “respondents are cultivating for home consumption a *fungible commodity for which there is an established, albeit illegal, interstate market*.” *Id.* at 18 (emphasis added). This Court further elaborated on the importance of the economic and commercial nature of marijuana:

[O]ne concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the *interstate market*, resulting in lower market prices. *Wickard*, 317

⁴ Remarkably, this same sentence is quoted by the Ninth Circuit, even though the Ninth Circuit rejected the very concept that the regulated activity must be economic in nature, focusing instead on the aggregated effects of the regulating statute on interstate commerce. *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1174, 1177.

U.S. at 128. The *parallel 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. 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.

Id. at 19 (all emphases added). Thus:

In both cases, the regulation is squarely within Congress' 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. (emphasis added).

Notably, in *Raich*, this Court found it decisive that the “activities regulated by the CSA [including home cultivation and home consumption of marijuana] are *quintessentially economic* in nature.” 545 U.S. at 25 (emphasis added). The Court then explained that the term “economic” “refers to the production, distribution, and consumption of commodities.” *Id.* at 26. Of course, home-grown wheat for private consumption in *Wickard* and home-grown marijuana for private consumption in *Raich* meet this definition.

The delta smelt does not meet this definition. It is a fish species found only in California that has no commercial value. 58 Fed. Reg. 12854, 12860 (March 5, 1993). Having no commercial value, there is no commercial interstate market for its distribution and consumption. Having no commercial value and no interstate market, it cannot have any economic effect on interstate commerce even when aggregated with other intrastate, commercially valueless species. Consequently, the ESA may not be applied constitutionally to the delta smelt, as the Ninth Circuit erroneously held.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON THE IMPORTANT FEDERAL QUESTION OF WHAT ACTIVITY HAS A SUBSTANTIAL ECONOMIC EFFECT ON INTERSTATE COMMERCE.

This Court's precedent empowers federal regulation of intrastate economic activity only when that activity has a "*substantial economic* effect on interstate commerce." *Lopez*, 514 U.S. at 556 (emphasis added). The Ninth Circuit proceeded to determine that all threatened or endangered intrastate species that have no present commercial value may one day acquire such value, and, therefore, may have a substantial economic effect on interstate commerce, thereby justifying the present application of the ESA to such species:

- The ESA protects the *future and unanticipated* interstate-commerce values of species.
- Regeneration of a threatened species *might* allow *future* commercial utilization of the species.
- Because Congress could not anticipate which species might have *some undiscovered* scientific and economic value, it made sense to protect all those species[.]
- The *genetic diversity* provided by endangered or threatened species improves agriculture and aquaculture.⁵

San Luis & Delta-Mendota Water Auth., 638 F.3d at 1176 (emphasis added) (internal citations omitted).

Such speculation conflicts with the established precedent of this Court that the economic effect on interstate commerce must be substantial and direct. The economic effect on interstate commerce may not be “so indirect and remote that to embrace [it] . . . would effectively obliterate the distinction between what is national and what is local[.]” *Lopez*, 514 U.S. at 557. To establish such a connection, Congress 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.” *Id.* at 567. In other

⁵ This is an unexplained and dubious speculation at best.

words, Congress may not adopt a “view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.” *Id.* (quoting *United States v. A.L.A. Schechter Poultry*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)). In fact, if such “but for” causation were permissible, “it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education[.]” *Id.* at 564.

In *Morrison*, this Court again emphasized the need for tangible, direct economic effects on interstate commerce:

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence . . . to every attenuated effect upon interstate commerce. If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide aggregated impact of that crime has substantial effects on employment, production transit, or consumption.

* * *

Petitioners’ reasoning, moreover, . . . may . . . be applied equally well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childbearing on the national economy is undoubtedly significant. . . . Under our written Constitution, however, the

limitation of congressional authority is not solely a matter of legislative grace.

529 U.S. at 615.

The Ninth Circuit’s rank speculation concerning some *undiscovered, unanticipated, future* effect on interstate commerce that does not exist presently goes far beyond the attenuated “but for” analysis condemned by this Court. Indeed, the Ninth Circuit did not even suggest that the hypothetical future economic effects would be substantial. If a court may find a substantial economic effect on interstate commerce by speculating that there might be some undiscovered, future economic effect of undetermined scope, then there is nothing that Congress may not regulate under its commerce power.

Furthermore, it “seems clear that biodiversity is a condition of nature, not a human activity” to which the commerce power may apply. *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 292 n.4 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc) (writing for six judges). Thus, the Ninth Circuit’s speculation on unforeseeable, future possibilities “bid[s] fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States,” forbidden by this Court. *Lopez*, 514 U.S. at 567. Consequently, the Ninth Circuit’s decision conflicts with the longstanding precedent of this Court on an important federal question.



CONCLUSION

This Court should grant the Petition for Writ of Certiorari to correct the conflict of the Ninth Circuit's decision with longstanding precedent of this Court on important federal issues.

DATED this 25th day of July, 2011.

Respectfully submitted,
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