

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 BRIEF OF *AMICUS CURIAE* AND
BRIEF OF *AMICUS CURIAE* OF
THE NATIONAL FEDERATION OF INDEPENDENT
BUSINESS SMALL BUSINESS LEGAL CENTER
IN SUPPORT OF THE PETITIONERS

— ♦ —
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**MOTION OF THE NATIONAL FEDERATION
OF INDEPENDENT BUSINESS SMALL
BUSINESS LEGAL CENTER FOR LEAVE TO
FILE PETITION FOR WRIT OF CERTIORARI
AS *AMICUS CURIAE***

Amicus curiae, the National Federation of Independent Business (“NFIB”) Small Business Legal Center, respectfully requests leave of this Court, pursuant to Supreme Court Rule 37.2(b), to file the following brief in the above captioned matter.

In support of the motion, NFIB states as follows:

1. NFIB requested the consent of petitioners and respondents to file its *amicus curiae* brief. Petitioners submitted consent in writing to the Court on June 27, 2011. Solicitor General Donald B. Verrilli, Jr. consented on behalf of the federal respondents. The Solicitor General’s consent letter is included with this motion. Respondents Natural Resources Defense Council and The Bay Institute refused to consent to the filing of NFIB’s brief.

2. The NFIB Small Business Legal Center is the legal voice of small business in America and represents small business’s interests in the nation’s courts. The Legal Center participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as this matter. NFIB is an organization of over 300,000 member businesses

in all 50 states. The members of NFIB are the small businesses that make up the backbone of the American economy. Small businesses account for over 99 percent of all employers in the country and provide more than one-half of all jobs in our economy. More importantly, small businesses produce two-thirds of new job growth.

3. In pursuit of its goal to support small business in America, NFIB and the NFIB Small Business Legal Center (formerly known as the NFIB Legal Foundation) have participated as *amicus curiae* in several cases before this Court including *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), *Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40 (2005), *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

4. NFIB is interested in the present case because the water pumping restrictions at issue affect many small businesses. A grant of certiorari in this case will significantly impact future water pumping restrictions and Commerce Clause lawsuits and legislation that may affect thousands of businesses. NFIB believes this brief will aid the Court's understanding of how the issues in this case substantially impact small businesses.

Given the serious ramifications of this case for the nation's small businesses, *amicus curiae* respectfully requests leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Did the Ninth Circuit err in holding that, under this Court's decision in *Gonzales v. Raich*, the Endangered Species Act is a comprehensive regulatory scheme that "bears a substantial relation to commerce," even though the Endangered Species Act, unlike the Controlled Substances Act in *Raich*, is not a market regulatory scheme that governs quintessentially economic activities?

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**STATEMENT OF IDENTITY AND
INTEREST OF *AMICUS CURIAE*¹**

The National Federation of Independent Business Small Business Legal Center (“NFIB Legal Center”) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small business.

The National Federation of Independent Business (NFIB) is the nation’s leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide, including approximately 23,000 in California. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will affect small businesses nationwide, such as this one. Excessive federal regula-

¹ Pursuant to Rule 37.2, *amicus curiae* provided counsel of record for all parties 10 days notice of its intention to file an amicus brief. Counsel for the petitioners and for federal respondents consented to the amicus brief in writing. Counsel for respondents Natural Resources Defense Council and The Bay Institute refused consent. Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any 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 the accompanying brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

tion of state and local issues, such as the regulations at issue in this case, adversely affect NFIB and its members.

**STATEMENT OF AUTHORITY TO
FILE *AMICUS CURIAE* BRIEF**

Amicus concurrently moves for leave of this Court to file this brief.

STATEMENT OF THE CASE

This brief is confined to the narrow issue of whether the application of Section 7(a)(2) or Section 9 of the Endangered Species Act to the delta smelt, a fish with no commercial value found only in California, exceeds federal authority under the Commerce Clause.

Fundamental constitutional principles of enumerated powers and federalism limit federal power under the Commerce Clause. Even the most expansive view of the federal Commerce Clause power has recognized that there are limits to the federal power to regulate commerce. Any regulation of local commerce, or of non-commercial activity, is valid **only** if the regulation is an essential part of a larger scheme to regulate interstate commerce. To be valid under this analysis, the regulated activity must undercut a valid regulation of interstate commerce.

The regulation at issue in this case, which prohibits the taking of delta smelt, a purely local species with no commercial value, is not an essential part of regulating interstate commerce. There is no market for delta smelt anywhere, let alone outside of California, and the regulation of interstate species would not be undercut by the taking of delta smelt. Therefore, the regulation as applied to the taking of delta smelt exceeds federal authority under the Commerce Clause.

**REASONS FOR GRANTING THE
PETITION FOR WRIT OF CERTIORARI**

This Court should grant the petition for certiorari and review the decision by the Ninth Circuit because the rule announced in that decision would take away from small businesses a vital and oft-used tool that encourages the alienability of real property. The absence of that tool will depress the prices of land subject to suspect zoning ordinances, reduce the supply of viable commercial properties, and jeopardize the financing of small businesses that borrow against the value of their land.

I. Water pumping restrictions in the central valley have exacerbated existing drought conditions, destroying jobs and businesses.

The water pumping restrictions ordered for the San Joaquin Valley are devastating small businesses that were already suffering from natural drought conditions. One study estimates the yearly

economic losses for Central Valley agriculture alone to be \$1.2 to \$1.6 billion, with losses to all business in the region reaching as high as \$2.2 billion. Richard E. Howitt et al., *Economic Impacts of Reductions in Delta Exports*, 12-3 Giannini Found. of Agric. Econ. (Jan./Feb. 2009). The same study estimates job losses in the Central Valley at 60,000 to 80,000 with some areas seeing increases in unemployment of up to 30 percent. *Id.* Worse, these job losses fall disproportionately on poor and unskilled workers with few other employment opportunities. *Id.*

These estimates are borne out by the harsh realities faced by local farmers, businesses, and governments. Estimates show that approximately 100,000 acres of farmland was left fallow in 2008. *Water Shortage In The Central Valley*, Mar. 29, 2009, <http://abclocal.go.com/kfsn/story?section=news/local&id=6734504>. In 2009, the amount of fallow land jumped to 750,000 acres. *Id.*

The entire local economy is collapsing as shops, banks, and service providers are forced to close. *Id.* Unemployment has already reached as high as 40 percent in the community of Mendota. Malia Wollan, *Hundreds Protest Cuts in Water in California*, NEW YORK TIMES, Apr. 16, 2009, <http://www.nytimes.com/2009/04/17/us/17march.html?adxnnl=1&adxnnlx=1311279602-AUrdBmNKhYp016da14xxw>. In March 2009, the state of California estimated the drought would result in the loss of 23,700 full-time employee jobs and \$477 million dollars of revenue. *Id.*

The high unemployment rates in Mendota result in a cruel irony: in the region that once produced more food than anywhere else in the country, food lines have become regular occurrences. Katie Paul, *Dying on the Vine*, Newsweek.com, April 24, 2009 (<http://www.newsweek.com/id/211381>). Mendota, which was once the “cantaloupe capital of the world” has a new motto: “No water, no work.” *Id.* Water pumping restrictions are not the exclusive cause of Mendota’s hardship, instead the cause is a combination of environmental restrictions, unsustainable growth, political neglect, and natural factors. *Id.* However, the “man-made drought” imposed by water pumping restrictions is weakening Mendota’s tenuous hold on its way of life. *Id.*

II. There are limits to the federal Commerce Clause power.

“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” James Madison, *The Alleged Danger From the Powers of the Union to the State Governments Considered*, Federalist Paper No. 45, January 26, 1788. With this statement, Madison laid out two fundamental and related principles of the Constitution. First, the federal government is one of limited and enumerated powers. Second, the states retain a general police power that the federal government does not have.

These principles must apply to the interpretation of the Commerce Clause, which gives Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes. U.S. Const. art. I, § 8. Any interpretation of the Commerce Clause which would convert the federal Commerce Clause power into a general regulatory power must be incorrect. *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) (“The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.”). Similarly, any interpretation that would destroy the general police power retained by the states must also be incorrect. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 621 (1937) (“That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.”).

In recent years, this Court has twice struck down statutes enacted under the Commerce Clause for violating the principles of enumerated powers and federalism. “The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” *United States v. Morrison*, 529 U.S. 598, 607 (2000) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803) (Marshall, C.J.)). “To uphold the Government’s contentions here . . . would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *United States v. Lopez*, 514 U.S. 549, 567 (1995).

These cases also show that the judicial branch enforces these limitations on federal power. *Morrison*, 529 U.S. at 616 (“[T]he limitation of congressional authority is not solely a matter of legislative grace.”). Neither the federal legislature nor public opinion may dictate what is or is not interstate commerce. *Id.* at 616 n.7 (“[T]he Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution’s provisions would not be defined solely by the political branches . . .”).

While judicial deference to federal power under the Commerce Clause has expanded over the years in response to “industrial development and an increasingly interdependent national economy,” there are still limits. *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). Even in *Raich*, this Court’s most expansive interpretation of the Commerce Clause, the Court acknowledged that the Commerce Clause power is limited to three areas:

First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.”

Id. at 16-17 (internal citations omitted). Nor did *Raich* overrule or undermine the fundamental limits on federal Commerce Clause power established in

Lopez and *Morrison*. *Id.* at 38 (Scalia, J., concurring).

In fact, *Raich* affirmed the holding in *Lopez* that “Congress may regulate non-economic intrastate activities only where the failure to do so ‘could ... undercut’ its regulation of interstate commerce.” *Id.* (quoting *Lopez*, 514 U.S. at 561). This Court held that a regulation was within federal power if the regulation was an “essential part of the larger regulatory scheme” that substantially affected interstate commerce. *Id.* at 24-25. This regulatory power does not derive from the Commerce Clause itself, but rather from the Necessary and Proper clause. *Id.* at 34 (Scalia, J., concurring). As a result, Congress may regulate non-economic intrastate activities only where the failure to do so would undercut its regulation of interstate commerce. *Id.* at 34 (Scalia, J., concurring).

III. The regulation of intrastate species with no commercial value exceeds federal authority under the Commerce Clause.

In a Commerce Clause analysis, a court must first determine the precise object of the regulation at issue, as well as the relationship between the regulation and its commercial purpose. Bradford C. Mank, *After Raich: Is the ESA Constitutional?* 78 U. Colo. L. Rev. 403 (citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)). The regulation at issue in this case

is one that prevents the “take”² of delta smelt. *In re Delta Smelt Consolidated Cases*, 663 F. Supp. 2d 922, 931 (E.D. Cal. 2009). The delta smelt is a small, non-descript fish, found only in California, with no commercial value. 58 Fed. Reg. 12,854-60 (Mar. 5, 1993).

The regulation at issue in this case fails outside even the expansive view of the Commerce Clause advanced in *Raich*. There are two key distinctions between the regulation of marijuana and the regulation of the delta smelt. First, preventing the take of delta smelt is not necessary to avoid undermining a larger regulation of interstate commerce. Second, unlike marijuana, which is both grown and consumed in all 50 states, there is no commercial market for delta smelt and delta smelt are found only in California.

A. The regulation of intrastate species is not an essential part of a larger regulatory scheme.

The defendants urged the district court to analyze not just the economic effect of delta smelt regulations, but rather the listing of all species currently covered by the Endangered Species Act. (Def. Mem. Supp. Summ. J. at 15). However, that analysis is inconsistent with the approach used by this

² “Take” is defined as “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). The take prohibition also applies to persons engaged in activities that are not intended or designed to take species listed under the ESA, but which may nevertheless take species incidentally. See 16 U.S.C. § 1539.

Court in *Raich*. In *Raich* this Court did not consider the effect of intrastate production and consumption of all drugs listed under Schedule I of the Controlled Substances Act. *Raich*, 541 U.S. at 5. Instead, this Court focused the entirety of its analysis on the effect of the regulation as applied to the plaintiff's local cultivation and use of marijuana. *Id.* (The majority opinion makes 97 references to "marijuana" but only one reference to "cocaine" and only two references to "opiates," which are also Schedule I substances.). Critically, *Raich* never analyzes the economic impact of listing drugs on Schedule I.

The distinction is an important one, because it goes to whether the regulated activity is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 36 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561). There is no doubt that the listing of species as endangered is an essential part of the Endangered Species Act. *In re Delta Smelt*, 663 F. Supp. 2d at 940 ("If the process of listing endangered species is an essential part of a larger regulation of economic activity, then whether that process ensnares some purely intrastate activity is of no moment" quoting *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1271 (11th Cir. 2007) (internal quotations omitted)). However, this is not the relevant consideration under this Court's analysis in *Raich*. Instead, the relevant consideration is whether the aggregate effect of delta smelt taking has a substantial effect on interstate commerce.

Because of the inherently local and non-commercial nature of delta smelt, the effect of delta smelt takings, even in the aggregate, still has no impact on interstate commerce. The inability of the Fish and Wildlife service to regulate the delta smelt would not undercut its effort to regulate species that do travel interstate, or do have commercial value.

B. Unlike marijuana, which has a thriving national market, the take of delta smelt in California has no effect on interstate commerce.

There are many similarities between the regulation of delta smelt at issue in this case and the marijuana regulations at issue in *Raich*. Both cases involve regulations that target non-commercial, intrastate activity. *Raich*, 541 U.S. at 8; *In re Delta Smelt*, 663 F. Supp. 2d at 925. However, two key factors that allowed this Court to uphold the regulation of intrastate, non-commercial marijuana in *Raich* are not present in this case. First, unlike marijuana, for which there is a thriving black market, there is no commercial market for delta smelt. Second, while marijuana is grown and consumed in all 50 states, the delta smelt is endemic only to California and substantially affects only California ecosystems.

1. There is no commercial market for delta smelt.

In *Raich* one of the primary factors that made regulation of marijuana appropriate under the Commerce Clause was the fact that the marijuana was a highly valuable product, with high demand in

the interstate market. *Raich*, 504 U.S. at 19. “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.” *Id.* What made it appropriate to regulate the purely local and non-commercial activity at issue in *Raich* was the risk that the regulated product would end up in the interstate market. *Id.* But this is not true for the delta smelt, which has no commercial value and is not bought or sold in interstate commerce. 58 Fed. Reg. 12,854-60 (Mar. 5, 1993).

2. Take of delta smelt does not have a substantial effect on interstate commerce.

In *Raich*, this Court noted that California could not “surgically excise” or “hermetically seal” the effect of marijuana use in California from “the larger interstate marijuana.” *Raich*, 541 U.S. at 30. But the opposite is true in this case. Delta smelt are in fact entirely confined to the state of California. The take of delta smelt in California does not have a substantial effect on delta smelt populations or fresh water ecosystems in any state other than California. 58 Fed. Reg. 12,854 (Mar. 5, 1993) (listing only ecosystems contained wholly within California, the Suisun Bay and the Sacramento-San Joaquin estuary system, as affected by the delta smelt).

Defendants counter that the take of delta smelt will affect other species in the delta smelt’s ecosystem, which will in turn affect the entirety of those localized ecosystems, which will in turn affect

larger interstate ecosystems, which in turn affects interstate commerce. (Def. Mem. Supp. Summ. J. at 15). This is the “everything affects commerce” argument this Court rejected in *Lopez*. “To uphold the Government’s contention . . . would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States.” *Lopez*, 514 U.S. at 567.

Under the government’s view, any change to the natural environment anywhere in the country would be subject to federal Commerce Clause jurisdiction. Such an interpretation would drastically expand the scope of the Commerce Clause, and violate fundamental principles of federalism and enumerated powers, and cannot be correct.

CONCLUSION

Even under the expansive view of the Commerce Clause adopted in *Raich*, the regulation of delta smelt exceeds federal authority. The regulation at issue in *Raich* targeted a drug with a thriving commercial market that is produced or consumed in all 50 states. By contrast, the regulation of the delta smelt targets something that exists only in one state and has no commercial value. The regulation of delta smelt is not comparable to the regulation of marijuana. Rather, the regulation is akin to listing as a Schedule I controlled substance a small weed that grows only in a remote section of California and that no one has ever bought or sold. The analysis applied

in *Raich* would not allow for federal regulation of this hypothetical weed, nor would it allow for regulation of the delta smelt.

DATED: July 25, 2011

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