
No. 10-15192

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEWART & JASPER ORCHARDS, *et al.*,
Plaintiffs-Appellants,

v.

KENNETH SALAZAR, *et al.*,
Defendants-Appellees,

and

NATURAL RESOURCES DEFENSE COUNCIL *et al.*,
Defendant-Intervenors-Appellees.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

Under the Endangered Species Act (ESA), the Section 9 take prohibition has a coercive effect on a Section 7 Biological Opinion. Federal Defendants-Appellees United States Fish and Wildlife Service, *et al.* (the Service), have warned the Bureau of Reclamation and the California Department of Water Resources that these agencies and their employees will face Section 9 liability if the restrictive terms and conditions of the Service's Section 7 Incidental Take Statement in the delta smelt Biological Opinion are not implemented. This has directly resulted in a severe reduction of irrigation water to Plaintiffs-Appellants Stewart & Jasper Orchards, *et al.* (Stewart Appellants), which they receive from Reclamation and the Department of Water Resources through their operations of the Central Valley Project and State Water Project, respectively. Accordingly, the Section 9 challenge is ripe and the Stewart Appellants have standing to contest the constitutionality of Section 9 as applied to the delta smelt.

Also, both the Stewart Appellants' Section 7 challenge (which is also properly before this Court) and Section 9 challenge must be analyzed from the standpoint of whether takes of the delta smelt, the activity which the Service is regulating, substantially affect interstate commerce. The Service and Defendant-Intervenors-Appellees Natural Resources Defense Council, *et al.* (Intervenors), are incorrect in their assertion that this Court need only determine whether the *overall effect* of the

ESA on interstate commerce is substantial. Such a standard for the exercise of Commerce Clause authority is devoid of limit and flips the Supreme Court's "substantial effects" test on its head.

Like gun possession in *United States v. Lopez*, 514 U.S. 549 (1995), and gender-motivated violence in *United States v. Morrison*, 529 U.S. 598 (2000), takes of delta smelt do not substantially affect interstate commerce. Therefore, the Service has no regulatory authority over such takes.

The Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), does not change this result because the Service is not regulating noncommercial, intrastate takes of delta smelt as a means of regulating a commercial market. Instead, the Service is regulating delta smelt takes in order to effectuate the ESA, a conservation statute wholly unlike the Controlled Substances Act in *Raich*. In other words, because the ESA differs from the statute in *Raich* in that it is not directed at quintessentially economic activities, the ESA can only be sustained in instances where the Act is applied to species having a substantial effect on interstate commerce.

Here, however, the Service is regulating the incidental and noncommercial taking of delta smelt. Such regulation is beyond the Service's *Commerce Clause* authority, and the district court's opinion must be reversed.

I

THE STEWART APPELLANTS' AS-APPLIED CHALLENGES TO SECTION 7 AND SECTION 9 OF THE ESA ARE PROPERLY BEFORE THIS COURT

The Service argues that the Stewart Appellants' Section 9 challenge is not properly before this Court because there is "no imminent imposition of [Section 9] liability" against them and that, as such, the Stewart Appellants have presented a "pre-enforcement challenge." *See* Federal Appellees' Answering Brief (Service Brf.) at 20, 25. The Service also claims that the Stewart Appellants have waived their Section 7 challenge. *See id.* at 26-28.

The Service, however, fundamentally misunderstands the nature of the Stewart Appellants' Section 9 challenge and the requirements for Article III standing and ripeness. In addition, the Service's claim that the Stewart Appellants have waived their Section 7 challenge is without merit.

A. The Supreme Court in *Bennett v. Spear* Explained How Application of Section 9 of the ESA Is Imminent in the Context of a Biological Opinion

The Service contends that the Stewart Appellants' lawsuit does not present a concrete and imminent application of Section 9 of the ESA, which prohibits any person (including federal and state agencies) from taking any threatened or endangered species in the United States. *See* 16 U.S.C. § 1538(a)(1)(B) and 50 C.F.R. § 17.31. The Service's contention is belied by the Supreme Court's decision in

Bennett v. Spear, 520 U.S. 154 (1997), in which the Court explained how the Service applies Section 9 in a coercive manner in order to give its biological opinions a “virtually determinative effect.” *See Bennett*, 520 U.S. at 169-71.

As *Bennett* makes clear, action agencies and their employees disregard the restrictive terms of a biological opinion and the potential for Section 9 liability *only* at their “own peril . . . for ‘any person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, *including imprisonment.*” *Id.* at 170 (citing 16 U.S.C. §§ 1540(a) and (b)) (emphasis added). The result of this coercive effect of Section 9 is that the action agency “rarely, if ever, chooses to disregard the terms and conditions of an Incidental Take Statement.” *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife, BLM*, 273 F.3d 1229, 1240 (9th Cir. 2001).

In this case, it makes little sense for the Service to warn that the delta smelt Biological Opinion’s Reasonable and Prudent Alternative and Incidental Take Statement “*must be implemented*” in order to preclude Section 9 liability, Excerpts of Record (ER) at 378 (emphasis added), and at the same time claim that effect of Section 9 is not imminent. *See Service Brf.* at 23. *See also Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1034 (9th Cir. 2007) (“As long as any takings comply with the terms and conditions of [an] Incidental Take Statement, the action agency is exempt from penalties for such takings.”) (citing 16 U.S.C. § 1536(o)(2)).

The reality is that the Service relies on the coercive effect of Section 9 to effectively dictate the water management actions of Reclamation and the Department of Water Resources. *Cf.* ER at 28. The critical question, discussed below, to establish Article III standing, is whether the threat of Section 9 liability, that effectuates the Biological Opinion, injures the Stewart Appellants in a fairly traceable manner.

B. The Threat of Section 9 Liability Injures the Stewart Appellants in a Fairly Traceable Manner

The Stewart Appellants readily concede that they do not face Section 9 liability themselves. *Cf.* Service Brf. at 20. That fact alone, however, is not fatal to the Stewart Appellants' challenge to Section 9 of the ESA as applied to the delta smelt. *See Bennett*, 520 U.S. at 169.

As the Court in *Bennett* explained, although standing is not established “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 determinative or coercive effect upon the action of someone else.*” *Id.* at 169 (emphasis added) (other emphasis, alterations, citations, and internal quotations marks omitted). The *Bennett* plaintiffs were allowed to pursue their Section 7 challenge despite not being subject to the requirements of Section 7. *See id.*, 520 U.S. at 169-71. Here, too, the Stewart

Appellants may pursue their Section 9 challenge even though they do not face Section 9 liability.¹

The Stewart Appellants' actual loss of irrigation water, diverted for the benefit of the delta smelt, was not disputed at the district court and is an injury-in-fact for purposes of Article III standing. *See Laub v. United States Dep't of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003) (“[L]oss of affordable irrigation water for [individual farmers'] agricultural lands” is an injury in fact.).

This loss of irrigation water can in turn be fairly traced to the coercive effect of the imminent threat of Section 9 liability if Reclamation and the Department of Water Resources do not comply with the Biological Opinion. These agencies are effectively compelled to withhold vital irrigation water from the Stewart Appellants under threat of Section 9 sanctions. *Cf. Bennett*, 520 U.S. at 169-71. Reclamation and the Department of Water Resource's implementation of the Biological Opinion's terms and conditions is the last step in the injuries claimed by Stewart Appellants. Therefore, the Stewart Appellants' injury can fairly be traced to Section 9 of the Act. *See Carver v. City of New York*, 2010 U.S. App. LEXIS 19753 *11 (2d Cir. 2010)

¹ The Service argues that *Bennett* does not support Section 9 standing because “the *Bennett* plaintiffs' claims did not require them to point to any imminent application of section 9 in order to allege injury-in-fact.” Service Brf. at 23 (citing *Bennett*, 520 U.S. at 167). The *Bennett* plaintiffs, of course, did not challenge the application of Section 9, but the Court nonetheless emphasized that the harm which established the plaintiffs' injury-in-fact was caused by the Service's coercive and imminent application of Section 9. *See Bennett*, 520 U.S. at 169-71.

("[C]ausation turns on the degree to which the defendant's actions constrained or influenced the decision of the final actor in the chain of causation.") (citing *Bennett*, 520 U.S. at 169).

That the coercive effect of Section 9 injures the Stewart Appellants in a fairly traceable manner is buttressed by the fact that the Service has not refuted "that invalidating section 9 [on] the facts of this case would preclude enforcement of the BiOp." ER at 27. As this Court has noted, redressability "is closely related to the requirement of a causal link between the threatened injury and the conduct to be modified by the relief claimed." *Ry. Labor Executives Assoc. v. Dole*, 760 F.2d 1021, 1023 (9th Cir. 1985). The Service, however, has completely failed to refute that "the invalidation of Section 9 in this case would prevent the precise injury the Stewart Appellants seek to redress," which is the loss of water. *See* Stewart Appellants' Opening Brf. at 14. The Service's uncontroverted recognition 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" thus underscores not only the redressability prong of Article III standing, but the injury-in-fact and fair traceability prongs as well. *See* ER at 91.²

² The Service suggests that a biological opinion "may or may not include an ITS with terms and conditions that, if complied with, would insulate the action agency from some section 9 liability." Service Brf. at 24. This ignores the fact that, in the delta smelt Biological Opinion, the Service *has* included an ITS that "*must* be (continued...)

C. The Stewart Appellants’ Section 9 Challenge Is Ripe Because the Coercive Effect of This Provision Is Reduced Irrigation Water Deliveries

The Service also argues that the Stewart Appellants’ Section 9 claim is unripe based on its misguided view that this lawsuit presents a “pre-enforcement challenge.” Service Brf. at 25. The Service relies on this Court’s decision in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), in support of its ripeness argument, but *Stormans* demonstrates that plaintiffs themselves need not face legal prosecution in order to challenge the enforcement of a statute or rule. *See id.* at 1123-24 (holding that individual pharmacists’ challenge to state rules was ripe because “the very existence of the new rules may cause an employer to terminate a pharmacist” and even though there was no “state action threatening [the individual pharmacists] and the new rules [did] not threaten them directly”).

Here, “[i]t is undisputed that the issuance of the BiOp has resulted in reduced water deliveries to” the Stewart Appellants, and the Service has not refuted “that invalidating the application of section 9 [on] the facts of this case would preclude

² (...continued)

implemented” in order to avoid Section 9 liability. ER at 378 (emphasis added). The Service misses the point that the way by which it “advises” action agencies to “abide by the restrictions imposed by [a] Biological Opinion” is through the coercive and imminent application of Section 9. *See Bennett*, 520 U.S. 167-71 (internal quotations and citations omitted). *See also id.* at 169 (“By the Government’s own account, while the Service’s Biological Opinion theoretically serves as an ‘advisory function,’ in reality it has a powerful coercive effect on the action agency.”) (citation omitted).

enforcement of the BiOp.” ER at 27, n.5. The Stewart Appellants have “suffered the consequences” of the Service’s coercive and imminent application of Section 9, and as they will continue do so until Section 9 is held to be invalid as applied to the delta smelt, their Section 9 claim is ripe. *See Stormans*, 586 F.3d at 1124.³

In sum, “legal consequences flow” from Section 9, which has a “determinative or coercive effect upon the action of someone else’ that in turn produced the [Stewart Appellants’] injury.” *Guerrero v. Clinton*, 157 F.3d 1190, 1994, 1995 (9th Cir. 1998) (quoting *Bennett*, 520 U.S. at 169). As recognized by the Service, invalidation of the application of Section 9 will make a “legal difference that will redress” the Stewart Appellants’ injury of reduced water deliveries. *See id.* Accordingly, the Stewart Appellants’ Section 9 challenge is properly before this Court.

D. The Stewart Appellants Plainly Raised Their Section 7 Challenge in Their Opening Brief on Appeal

The Service claims that the Stewart Appellants have waived their Section 7 challenge. *See* Service Brf. at 26-28. In support of this proposition, the Service oddly cites portions of the Stewart Appellants’ Opening Brief dealing only with the narrow legal issue of whether the Section 9 challenge is properly before this Court. *See id.*

³ This Court has also noted that the Supreme Court in *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43 (1993), recognized that a plaintiff’s potential liability is not the only way to establish ripeness. *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 708 (9th Cir. 2009) (ripeness established if “[h]ardship may result from past or imminent harm caused by the agency’s adoption of . . . regulations”) (emphasis added) (citing *Reno*, 509 U.S. at 63).

at 26-27. The Service would have the Stewart Appellants burden and confuse this Court by having them include their Section 7 merits argument in the same portion of their brief in which they argue that they have “‘standing to challenge the Biological Opinion under Section 9.’” *See id.* (quoting Stewart Appellants’ Opening Brief at 19).

Even more wayward is the Service’s claim that the Stewart Appellants failed “to raise [their Section 7 challenge] squarely in their opening brief on appeal.” Service Brf. at 27 (citing Stewart Appellants’ Opening Brief Section 9 ripeness argument at 20). The Service apparently did not read the Stewart Appellants’ Opening Brief too closely, which made clear several times that both Section 7 and Section 9 should be invalidated as applied to the delta smelt. *See, e.g.,* Stewart Appellants’ Opening Brief at 2 (third issue on appeal is whether “federal regulation of the delta smelt . . . under Section 7 or Section 9 of the Endangered Species Act [is] an invalid exercise of constitutional authority under the *Commerce Clause*”), *id.* at 58 (“[T]he 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 that the terms of the takings provision.”) (citing ER at 352), and *id.* at 59 (“[The] Section 7 claim must . . . be analyzed by

looking at takes of the delta smelt because . . . a Section 7 biological opinion is ultimately a regulation of a federal agency’s take of endangered species.”).⁴

The district court ruled that the Stewart Appellants have standing to pursue a Section 7 challenge, *see* ER at 59, and the Stewart Appellants maintained on appeal that application of Section 7 in this case is illegal. The Service’s claim that the Stewart Appellants waived their Section 7 challenge is meritless.

II

WHETHER AN ACTIVITY “SUBSTANTIALLY AFFECTS” INTERSTATE COMMERCE IS DETERMINED BY USING THE FOUR *MORRISON* FACTORS

The Supreme Court’s decision in *Morrison* “established *what is now the controlling four-factor test* for determining whether a regulated activity ‘substantially

⁴ The Stewart Appellants presented their Section 7 challenge at the district court in terms of this provision’s relationship with Section 9. *See* ER at 83-84 (“[T]he government itself within the briefing has stated that it is artificial to disjoin Section 7 from Section 9 and vice versa. And we believe also for that to be the case.”). This is a far cry from an abandonment of the Stewart Appellants’ Section 7 challenge, as the Service would have it. *See* Service Brf. at 27. Moreover, the district court squarely addressed the Section 7 challenge, *see* ER at 58-59, and entered partial final judgment in favor of the Service and the Intervenor on the Stewart Appellants’ Commerce Clause claim, which was that “application of *Sections 7(a)(2)* and 9 . . . to the delta smelt is an invalid exercise of Congress’ Commerce Clause authority.” *Id.* at 2 (citing Stewart Appellants’ Complaint) (emphasis added). As such, the Section 7 challenge was not an issue “passed upon below” and is now properly before this Court. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (internal citation omitted).

affects' interstate commerce." *United States v. Alderman*, 565 F.3d 641, 647 (9th Cir. 2009) (emphasis added) (internal citation omitted).

Contrary to the Service's contention otherwise, *see* Service Brf. at 54, the four *Morrison* factors are not optional, but serve as an essential guide to determine whether an activity regulated under the *Commerce Clause* substantially affects interstate commerce. *See Alderman*, 565 F.3d at 647 and *United States v. Latu*, 479 F.3d 1153, 1156-57 (9th Cir. 2007) (upholding 18 U.S.C. § 922(g)(5)(A) because "presence of . . . jurisdictional element satisfies . . . Commerce Clause concerns"). *See also United States v. Guzman*, 591 F.3d. 83, 89 (2d Cir. 2010) (*Morrison* provides the "four factors to be weighed in determining whether an activity substantially affects interstate commerce"); *United States v. Kukafka*, 478 F.3d 531, 535 (3d Cir. 2007) (the four *Morrison* factors "provide[] a framework to determine whether a law regulates intrastate activity that has a substantial effect on interstate state commerce [and] should [be] consider[ed]") (internal quotation and citation omitted); *United States v. Patton*, 451 F.3d 615, 622-34 (10th Cir. 2006) (considering four *Morrison* factors to determine whether 18 U.S.C. § 931 regulates an activity which substantially affects interstate commerce); and *United States v. Muga*, 441 F.3d 622, 627 (8th Cir. 2006) ("Whether an activity is one that substantially affects interstate commerce is determined by focusing on [the] four [*Morrison*] factors in particular.").

The Stewart Appellants demonstrated in their opening brief that the application of Sections 7 and 9 to the delta smelt may not be sustained under the “substantial effects” test. *See* Stewart Appellants’ Opening Brief at 58-74. But rather than repeat the appropriate application of the “substantial effects” test and the four controlling factors here, the Stewart Appellants explain below several fundamental errors of law put forth by the Service and Intervenors in their applications of the “substantial effects” test.

III

THE REGULATED ACTIVITY IN THIS CASE IS TAKES OF DELTA SMELT, NOT THE OPERATION OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT

As this Court must determine whether the Service is “regulat[ing] activity [which] ‘substantially affects’ interstate commerce,” *Lopez*, 514 U.S. at 559, the threshold and perhaps most important issue on the merits of this *Commerce Clause* challenge is what constitutes the regulated activity for purposes of the “substantial effects” test. *Cf.* Intervenors’ Answering Brf. (Intervenors’ Brf.) at 38.⁵ The Service and Intervenor both contend that the regulated activity “ ‘is the operation of the

⁵ Intervenors also contend that this case falls within the second category of *Commerce Clause* regulation, which is that Congress may “regulate and protect the instrumentalities of interstate commerce, and persons and things in interstate commerce.” Intervenors’ Brf. at 9 (internal quotation omitted). This category is inappropriate, however, as the ESA is wholly unlike federal protection of aircraft, or regulation of thefts from interstate commerce. *See Lopez*, 514 U.S. at 558.

[Central Valley Project] and [State Water Project],’” Service Brf. at 42 (quoting ER at 54), and that “controlling water distribution throughout a vast area of California[] plainly ha[s] a substantial effect on interstate commerce.” Intervenors’ Brf. at 44.

But the Service is not controlling water distribution *qua* water distribution. As explained below, the Service is regulating delta smelt takes under its Section 7 and Section 9 mandates, and has issued the Biological Opinion at issue because the operation of the Central Valley Project and State Water Project result in the take of delta smelt.

A. The Stewart Appellants’ Section 7 Claim Must Be Analyzed from the Standpoint of Section 9 Because the Service May Not Regulate Federal Actors Through Section 7 Incidental Take Statements Absent Section 9 Authority

Similar to the Service’s standing and ripeness objections, the Service’s and Intervenors’ regulated activity analyses refuse to acknowledge the important role Section 9 plays in a Section 7 biological opinion. Intervenors in particular assert that a Section 7 incidental take statement is only “a creature of Section 7” despite conceding that an incidental take statement “exempts the federal agency from Section 9 liability.” Intervenors’ Brf. at 41.

But this Court has made clear that the Service’s restriction of federal agency action through a Section 7 incidental take statement, as has occurred here, “is appropriate only where a taking will occur” because “[a]bsent an actual or

prospective taking under Section 9, there is no situation that requires a Section 7 safe harbor provision.” Cattle Growers, 273 F.3d at 1237, 1240 (emphasis added) (internal quotation omitted).

As *Cattle Growers* explains, a restrictive Section 7 incidental take statement is tied directly to Section 9 liability. *See id.* at 1233 (“We hold, based on the legislative history, case law, prior agency representations, and the plain language of the [ESA], that an Incidental Take Statement must be predicated on a finding of an incidental take.”). Moreover, the Service may not restrict federal agency action through an Incidental Take Statement if it does not have Section 9 authority: “[I]f [the] Service could issue an Incidental Take Statement even when a taking in violation of Section 9 was not present, those engaging in legal activities would be subjected to the terms and conditions of such statements. The [district] court [found] no authority for this result nor do we.” *Id.* at 1240. (internal quotations omitted).

Thus, the regulated activity in the Stewart Appellants’ challenge to the application of Section 7 is takes of delta smelt because the Service may not restrict federal actors under this provision unless takes in violation of Section 9 are occurring. “Section 7 of the [ESA] imposes an affirmative duty to prevent violations of Section 9 upon federal agencies,” and it would accordingly make little sense for this Court to

determine Section 7’s constitutionality in this case independent of Section 9’s validity as-applied to delta smelt takes. *Id.* at 1238-39.⁶

B. The Terms of Section 9 Regulate Take of Threatened and Endangered Species, Irrespective of the Commercial Nature of the Actor

When the Service regulates takes under the ESA, it is blind as to the nature of the actor. Section 9 does not apply to particular actors, but regulates a specific action—that is, the take of a threatened species in any and all circumstances. *See* 16 U.S.C. § 1538(a)(1)(B), 50 C.F.R. § 17.31(a). Congress’s broad definition of “take” further demonstrates that the Service regulates takes of species, irrespective of the actor. *See* 16 U.S.C. § 1532(19).

In its answering brief, the Service unintentionally confirms that it is regulating delta smelt takes, rather than Central Valley Project and State Water Project operations. As the Service explains, Section 9 “*directly prohibits harm*—broadly defined—to listed species, thereby affecting ‘a vast range of economic and social

⁶ Given that Section 7’s jeopardy and adverse modification prohibitions are ultimately designed to prevent species extinction, it would be absurd to require action agencies to prevent jeopardy to species or adverse modification to critical habitat for species over which the Service has no constitutional authority. *See* 50 C.F.R. § 402.02 (defining “jeopardize the continued existence of” to mean the engagement “in an action that reasonably would be expected, directly or indirectly, *to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species*” and “destruction or adverse modification” to mean “a direct or indirect alteration that appreciably diminishes the value of critical habitat for *both the survival and recovery of a listed species*”) (emphasis added).

enterprises and endeavors.’” Service Brf. at 52 (emphasis added) (quoting *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 707 (1995)).⁷ In other words, Section 9 prohibits harm to species. Economic effects, if any, are incidental and not a prerequisite to the Section 9 prohibition. By its own terms, Section 9 forbids the taking of a delta smelt by any person, whether a corporate entity or a lone fisherman in the middle of the Sacramento-San Joaquin Delta. *See Palila v. Hawaii Dep’t of Land & Natural Res.*, 639 F.2d 495, 497 (9th Cir. 1981) (“To prove a violation of the Act . . . it must be shown that the alleged activity had some prohibited impact on an endangered species.”) (citation omitted).

C. Designating the Operation of the Central Valley Project and State Water Project as the Regulated Activity Would Give Congress Virtually Unlimited Power Under the *Commerce Clause*

The Service’s regulated activity analysis is fatally flawed because it looks at the *effect* of the ESA before considering what it is that the agency is actually regulating.

If, as the Service repeatedly contends, the application of a statute passes the “substantial effects” test because the “statute[] at issue ha[s] a substantial effect on

⁷ Likewise, application of Section 7, the challenge to which must be analyzed from the standpoint of delta smelt takes, is not conditioned on whether the action agency is engaged in a commercial matter—the provision instead is “absolute.” *See* Service Brf. at 51-52. *See also* 50 C.F.R. § 402.02 (“Action means *all activities or programs of any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.”) (emphasis added).

interstate commerce,” Service Brf. at 35, then federal authority under the *Commerce Clause* would be “defined solely by the political branches [and] the scope of legislative power limited only by public opinion and the legislature’s self-restraint.” *Morrison*, 529 U.S. at 616, n.7. See also *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) (“[A]sk[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*].”).

More fundamentally, the Service is charged with regulating takes of endangered species and not water delivery operations—which is Reclamation and the Department of Water Resource’s responsibility—and “[n]either 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.” *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003).

Here, the Service would have this Court “sustain[] the application of the [ESA] in this case because [the delivery of water] constitutes interstate commerce and the regulation impinges on that [delivery], not because the incidental taking of [the delta smelt] can be said to be interstate commerce.” *Rancho Viejo II*, 334 F.3d at 1160

(Roberts, J., dissenting from denial of petition for rehearing en banc). But this approach would stand in sharp contrast to the Supreme Court’s instructions for defining the regulated activity in the “substantial effects” test and should be rejected accordingly.

IV

THE TAKE OF DELTA SMELT IS NOT AN ECONOMIC ACTIVITY

Although the Service and Intervenors dispute that the regulated activity is delta smelt takes, they nonetheless attempt to show that delta smelt takes are economic in nature. *See* Service Brf. at 47 and Intervenors’ Brf. at 30-36. However, the Service and Intervenors mischaracterize the value of the delta smelt which, when compared to true commercial species, demonstrates that takes of this noncommercial, intrastate fish are not commercial in nature. Quite simply, when any person or thing takes a delta smelt, interstate commerce continues unaffected.⁸

⁸ The Service and Intervenors have declined to address the merits of the Stewart Appellants’ criticisms of the circuit court decisions that have rejected *Commerce Clause* challenges to the application the ESA. Intervenors label these criticisms as “frivolous,” although they are the same criticisms made by the dissenting judges in those circuit decisions. *See* Intervenors’ Brf. at 37.

A. Takes of Certain Species May Fairly Be Characterized as Economic and as Having a Substantial Effect on Interstate Commerce

Of course, certain fish species are commercial in nature and their catch may fairly be characterized as economic activity. *Cf. GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 293 (5th Cir. 2004) (*GDF Realty II*) (Jones, J., dissenting from denial of rehearing en banc) (“[M]any applications of the ESA may be constitutional, but this one simply goes too far.”).⁹ But the delta smelt is a “small and relatively obscure fish” which is neither consumed nor fished commercially. *See* ER at 176.

Intervenors attempt to bring the delta smelt within the realm of commercial fish species by suggesting that “the delta smelt was the object of a lucrative bait fishery in the nineteenth and early twentieth centuries.” Intervenors’ Brf. at 31. But whether the delta smelt itself was the object of commercial endeavors during this time period

⁹ Relatedly, Congress’s authority to “regulate purely intrastate activity on the basis of the substantial *aggregate* effect that all instances of that class of activity have on interstate commerce, even if the particular instance lacks such an effect” extends only to insignificant *economic* activity. *See* Service Brf. at 29. As the Supreme Court held in *Perez v. United States*, 402 U.S. 146 (1971), “[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial individual, instances’ of the class. Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.” *Id.* at 154 (emphasis omitted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). But *Perez* presupposes that every activity within the regulated class is commercial (*i.e.*, every regulated act must be an instance of extortionate credit transactions potentially local and economically insignificant), and thus its *de minimis* principle is inapplicable to the noncommercial delta smelt takes at issue here.

is uncertain, at best, when the delta smelt was not even classified as a distinct species until the mid-twentieth century, as the Service has recognized. *See* ER at 355.

In fact, catching a delta smelt does not equate to commercial activity, but only an incidence thereof. *See* ER at 361 (“[T]he delta smelt may be harvested as a *non-target* by-catch in commercial bait fisheries for other baitfish species.”) (emphasis added).¹⁰ Delta smelt takes may thus only be fairly characterized as noneconomic.¹¹

¹⁰ Intervenors claim that there is “no authority for the absurd proposition that a commercial market for delta smelt together with other baitfish is not a commercial market for delta smelt.” Intervenors’ Brf. at 32 n. 11. Again, the fact that delta smelt “may be harvested as a non-target by-catch in commercial bait fisheries for other baitfish species” is not proof that there ever has been or ever will be a market for delta smelt by themselves. *See* ER at 361. Intervenors’ rejoinder is that this simple exercise in logic “is like claiming that the sale of mixed nuts provides no evidence of the existence of a commercial market for cashews.” Intervenors’ Brf. at 32 n.11. But of course no one would make such a claim given that it is common knowledge that there is demand for cashews in and of themselves. Intervenors’ comparison of the delta smelt to cashews is laughable. Likewise, the commercial value of the American alligator cannot be compared to that of the delta smelt—nothing in the record supports the notion that there has been or ever will be a “vigorous trade” in delta smelt, as there currently is for American alligator hides. *See* Intervenors’ Brf. at 32 (citing *Gibbs v. Babbitt*, 214 F.3d 483, 495 (4th Cir. 2000)).

¹¹ The delta smelt is readily distinguishable from a formerly abundant commercial species which requires ESA protections due to the threat of extinction. *Cf. Gibbs v. Babbitt*, 214 F.3d 483, 498 (4th Cir. 2000) (“It would be perverse indeed if a [commercial] species nearing extinction were found to be beyond Congress’s power to protect while [commercially] abundant species were subject to full regulatory power.”).

B. Any Connection Between the Take of Delta Smelt and Interstate Commerce Is Tenuous

Confronted with the reality that the delta smelt is not a commercial species, the Service attempts to show that a take of a delta smelt *could* affect interstate commerce at some point. *See* Service Brf. at 48. The delta smelt, the argument goes, are *potential* resources, and thus federal regulation of takes of this species is needed to prevent the delta smelt's extinction, because “‘each 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 48-49 (quoting *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053 (D.C. Cir. 1997) (Wald, J.) (brackets omitted)).

This is, however, “no more than the ‘but-for-causal-chain’ approach twice rejected by the Supreme Court in *Lopez* and *Morrison*.” *GDF Realty II*, 362 F.3d at 292 (Jones, J., dissenting from the denial of rehearing en banc). As the Court explained in *Morrison*, Congress may not regulate an activity based on “the but-for causal chain from the initial occurrence” of the activity “to every attenuated effect upon interstate commerce.” *Morrison*, 529 U.S. at 615. Such a “‘view of causation . . . would obliterate the distinction between what is national and what is local in

activities of commerce.’” *Lopez*, 514 U.S. at 567 (quoting *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)).¹²

Indeed, one can easily substitute the Service’s “biodiversity” reasoning for the dissent’s expansive reasoning in *Lopez*: “(1) [delta smelt takes are] a serious problem; (2) that problem, in turn, has an adverse effect on [ecosystems]; and (3) that adverse effect on [ecosystems], in turn, represents a substantial threat to trade and commerce.” *See Lopez*, 514 U.S. at 565. *See also United States v. Comstock*, 130 S. Ct. 1949, 1966 (2010) (Kennedy, J., concurring) (“[I]nferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of ‘this is the house that Jack built.’”) (quoting Letter from Thomas Jefferson

¹² The Service’s attempt to show that delta smelt takes are economic due to the species serving as “*potential* prey for the introduced striped bass” is similarly tenuous. *See Service Brf.* at 49 (emphasis added). Relatedly, Intervenor contend that “intense scientific interest in the delta smelt generates jobs, as well as travel, lodging, food, and related expenditures for researchers not located within the Delta.” *Intervenor’s Brf.* at 35. Yet the ESA does not regulate the job market, although it perhaps manufactures scientific interest through the listing of species. *See Decl. of Charles A. Simenstad, Supplemental Excerpts of Record* at 2, ¶ 1 (“Much of my research is motivated and financially supported by the issues around at-risk fisheries and ecologically related species (*e.g.*, ESA-listed), especially those (*e.g.*, ESA-listed) species that have critical life history stages dependent on estuarine/coastal habitats.”). Such bootstrapping is not countenanced under modern Commerce Clause jurisprudence, and in no way does it demonstrate that Congress is regulating an activity that substantially affects interstate commerce. *See Lopez*, 514 U.S. at 559.

to Edward Livingston (Apr. 30, 1800), 31 *The Papers of Thomas Jefferson* 547 (B. Oberg ed. 2004) and citing *Patton*, 451 F.3d at 628).¹³

But the take of delta smelt is an activity that has “no foreseeable economic character at all, except upon . . . bald[] (though admittedly most humorous) . . . speculation.” *Gibbs v. Babbitt*, 214 F.3d 483, 508-09 (4th Cir. 2000) (Luttig, J., dissenting). *See also Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting) (“[T]he Commerce Clause empowers Congress ‘to regulate Commerce’ not ‘ecosystems.’”), and *Schechter Poultry*, 295 U.S. at 554 (Cardozo, J., concurring) (“Activities local in their immediacy do not become interstate and national because of distant repercussions.”). Here, the Service is regulating a purported threat to a local ecosystem “and the potential economic consequences flowing from that threat.” *Lopez*, 514 U.S. at 565. This attenuated reasoning cannot be sustained under modern *Commerce Clause* jurisprudence.

¹³ Incidentally, the Supreme Court has rejected the “inelegantly styled ‘ecosystem nexus’” standing theory in ESA cases, reasoning that “[t]o say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66 (1992).

V

REGULATION OF THE NONCOMMERCIAL DELTA SMELT SPECIES CANNOT BE SUSTAINED BECAUSE UNDER THE SUPREME COURT’S DECISION IN *GONZALES v. RAICH* THE ESA IS NOT A COMPREHENSIVE ECONOMIC REGULATORY SCHEME

According to the Service, the federal government is entitled to what one may label “double rational basis” deference when faced with a *Commerce Clause* challenge to the regulation of noncommercial, intrastate activity. *See* Service Brf. at 31. The Service claims that Congress has the power to regulate noncommercial, intrastate activity “if it has a rational basis for believing that: (1) the regulated intrastate activity is part of a larger class of economic activity that has a substantial aggregate effect on interstate commerce; and (2) failure to regulate intrastate instances of that activity would undercut the overall regulatory scheme.” *Id.*

The Service’s “double rational basis” standard is purportedly based on the Supreme Court’s decision in *Raich*, but *Raich* provides for no such lenient standard. Under *Raich*, the rational basis standard is appropriate for determining whether a regulation of noncommercial activity is a rational (or necessary and proper) means of effectuating an economic regulatory scheme. *See, e.g., Raich*, 545 U.S. at 19 (“Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”).

But whether a statute constitutes an economic regulatory scheme is a distinct question of law which courts answer without deference to Congress or agencies. As explained below, what makes a comprehensive regulatory scheme economic in nature is the regulatory scheme's regulation of "quintessentially economic" activities. *Raich*, 545 U.S. at 25. The ESA, however, is not comprehensive economic regulatory scheme; it is a conservation statute aimed at activities which are not necessarily and quintessentially economic.

A. *Raich* Permits Regulation of Noneconomic Activity Only as a Necessary and Proper Means of Regulating Quintessentially Economic Activity

The Service posits in a heading that "Congress Had a Rational Basis for Determining that the ESA's Comprehensive Regulatory Scheme Has a Substantial Effect on Interstate Commerce." Service Brf. at 46. But that is a post hoc argument. Nowhere in the ESA is a determination that the statute is a comprehensive regulatory scheme that has a substantial effect on interstate commerce. Moreover, the Service has once again misstated the "substantial effects" test, which is not whether a *statute* substantially affects interstate commerce, but is "[w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." *Raich*, 545 U.S. at 25 (emphasis added) (internal quotations and citations omitted).

Equally important, however, is that the rational basis standard plays no part in determining whether a statute constitutes “comprehensive legislation to regulate the interstate market in a fungible commodity.” *Id.* at 22. For example, the Court in *Raich* independently assessed the economic nature of the Controlled Substances Act (CSA). *See id.* at 23-33. Rather than suggest that it was rational for Congress to believe that the CSA “would be commercially and economically beneficial to the Nation,” Service Brf. at 46, or that the statute “has a substantial effect on interstate commerce,” *id.* at 37, the Court made clear that *the essence of the CSA was the regulation of commerce in fact*: “The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.” *Raich*, 545 U.S. at 26. *See also id.* (“[T]he CSA is a statute that *directly* regulates economic, commercial activity.”) (emphasis added), and *United States v. McCalla*, 545 F.3d 750, 754 (9th Cir. 2008) (*Raich* “emphasized that ‘[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. ‘Economics’ refers to ‘the production, distribution, and consumption of commodities.’”) (quoting *Raich*, 545 U.S. at 25).

Once a reviewing court independently determines that a statute constitutes an economic regulatory scheme, only then does it consider whether the prohibition of a noncommercial, intrastate activity “is a rational . . . means of regulating commerce.” *Raich*, 545 U.S. at 26. *See also id.* at 37 (Scalia, J., concurring) (“Congress may

regulate . . . noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”), and *United States v. Comstock*, 130 S.Ct. at 1956-57 (“[W]e look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”). Cf. Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/2010/10/05/gonzales-v-raich-and-the-individual-mandate> (Oct. 5, 2010 1:10 AM EST) (“[I]t cannot be the case that the rational basis test is triggered by the mere invocation of the Commerce Clause by the government. If it were, then the Court would have had to overrule cases such as [*Lopez*] and [*Morrison*], both of which failed to apply the rational basis test.”).

Ultimately, however, courts have a duty to “independent[ly] evaluat[e] [a statute’s] constitutionality under the Commerce Clause.” *Lopez*, 514 U.S. at 562. Thus, this Court must independently evaluate whether the ESA is a “comprehensive regulatory regime *specifically* designed to regulate” interstate commerce. *Raich*, 545 U.S. at 27 (emphasis added).

B. *Raich* Is Inapplicable to the Noncommercial Delta Smelt Species Because the ESA Does Not Regulate Quintessentially Economic Activity

The Supreme Court has recognized the power of Congress to regulate noncommercial, intrastate activity as “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. In *Raich*, the Court first reaffirmed Congress’s

power over noncommercial, intrastate activity as “ ‘parts of a larger regulation of economic activity,’ ” *Raich*, 545 U.S. at 24-25 (quoting *Lopez*, 514 U.S. at 561) (brackets omitted). The Court then explained what makes a statute a comprehensive economic regulatory scheme:

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. “Economics” refers to “the production, distribution, and consumption of commodities.” Webster’s Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. . . . Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

Raich, 545 U.S. at 25-26. See also *McCalla*, 545 F.3d at 754.

The Court in *Raich* further determined that the CSA met the requirement of a regulation of “quintessentially economic” activities “[g]iven the findings in the CSA and the undisputed magnitude of the commercial market for marijuana.” *Raich*, 545 U.S. at 33. As the Court had already made clear, “Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels,” finding that a “major portion of the traffic in controlled substances flows through interstate and foreign commerce” and that “[i]ncidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local

distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce.” *Raich*, 545 U.S. at 12-13 & n.20.

Importantly, the Court also noted other examples of statutes that “[p]rohibit[] the intrastate possession or manufacture of an article of commerce [as] a rational . . . means of regulating commerce in that product.” *Raich*, 545 U.S. at 26 & n.36. The Court conspicuously included the Eagle Protection Act but not the Endangered Species Act. *See id.*, at n.36 (citing 16 U.S.C. § 668(a) and not 16 U.S.C. §§ 1531, *et seq.*).

This makes sense because, as the Court had previously explained, “[t]hroughout the [Eagle Protection Act] the distinct concepts of possession, transportation, taking, and sale or purchase are treated with precision. The broad prescriptive provisions of the Eagle Protection Act were consistently framed to encompass a full catalog of prohibited acts, *always including sale or purchase.*” *Andrus v. Allard*, 444 U.S. 51, 56-57 (1979) (emphasis added) (citations omitted).

In other words, the Eagle Protection Act is an economic regulatory scheme under *Raich* because it “prohibits a class of activities, *e.g.*, sale, purchase, or possession, and is aimed at controlling the interstate market for eagle feathers and parts by creating criminal liability for those who create the demand for them.” *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996) (internal quotation and citation omitted). Indeed, “the activities regulated by the [Eagle Protection Act] are

quintessentially economic,” *Raich*, 545 U.S. at 25, as demonstrated by Congress’s concern over “the threat to the golden eagle posed by demand for eagle feathers as religious artifacts and tourist souvenirs.” *Bramble*, 103 F.3d at 1481.

In contrast, while some provisions of the ESA do regulate economic activity, *see* 16 U.S.C. § 1538(a)(1)(A), (C)-(F), the suite of activities and the statute’s legislative findings do not support classifying the ESA as a regulation of “quintessentially economic” activities. *Raich*, 545 U.S. at 25.

The best evidence of the ESA’s noneconomic nature is, of course, the statute itself. The ESA sets forth three purposes: first, “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”; second, “to provide a program for the conservation of such endangered species and threatened species”; and third, “to take such steps as may be appropriate to achieve the purposes of the treaties and conventions” dealing with the conservation of flora and fauna to which the United States is a party. *See id.* § 1531(b).

None of these statutory purposes concerns the regulation of interstate markets *per se*. The first purpose confirms the Act’s conservationist ethic. The second purpose merely sets forth the means by which the first purpose is to be achieved. The third purpose reiterates existing treaty commitments. Nowhere is the need for regulation of interstate markets in endangered species mentioned. *Compare Raich*, 545 U.S. at 13, n.20 (“The illegal importation, manufacture, distribution, and

possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”) (citing 21 U.S.C. § 801(2)).¹⁴

To be sure, Congress identified economic activity as one cause for the decline of some species. *See* 16 U.S.C. § 1531(a)(1). And commercial overuse is an authorized ground for listing a species. *See id.* § 1533(a)(1)(B). But it is one thing to hold that the purpose of a statute is to regulate markets or economic activity, and quite another to hold that a statute which sometimes regulates economic activity, oftentimes not, necessarily converts the *entire* statutory regime into a regulation of economic activity. Indeed, the ESA is plainly inconsistent with that interpretation, for it states that endangered “species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people” without mention of commerce or economics. *See id.* § 1531(a)(3).

It would be an unjustified expansion of *Raich* to argue that, so long as just a portion of the class of the regulated activity is economic in nature, regulation of the correlative noneconomic portions of the class of regulated activity is thereby justified in order to vindicate a noncommercial overarching regulatory scheme. Indeed, unlike

¹⁴ While it is true that “[t]he motive and purpose of a regulation of interstate commerce are matters for . . . legislative judgment,” the Service and Intervenors fail to comprehend that any congressional beneficence under the *Commerce Clause* must be based on a regulation of commerce *in fact*. *United States v. Darby*, 312 U.S. 100, 115 (1941).

the statute at issue in *Raich*, that regulated an entire market, the ESA is not “quintessentially economic.” *See Raich*, 545 U.S. at 25. While the ESA is comprehensive, it is not comprehensive in the economic sense, nor is it “specifically designed” to regulate a commercial market. *See Raich*, 545 U.S. at 27. *See also Tennessee 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). Therefore, regulation of noncommercial, intrastate takes of the delta smelt cannot be justified under *Raich*’s economic regulatory scheme rationale. *Compare Raich*, 545 U.S. at 13, n.20 (“Incidents of the [drug] traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce.”) (quoting 21 U.S.C. § 801(3)).

CONCLUSION

The Service’s regulation of delta smelt takes in its Biological Opinion is not a regulation of activity which substantially affects interstate commerce. Instead, the Service is regulating noneconomic activity as a means of enforcing a noneconomic statute. But the Supreme Court’s and this Court’s precedent do not allow for such an unlimited reading of the federal government’s *Commerce Clause* authority.

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

DATED: November 10, 2010.

Respectfully submitted,

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FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 10-15192

Form Must Be Signed By Attorney or Unrepresented Litigant *and Attached to the Back of Each Copy of the Brief*

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DATED: November 10, 2010.

s/ Brandon M. Middleton

Signature of Attorney or
Unrepresented Litigant

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2010, I electronically filed the foregoing PLAINTIFFS-APPELLANTS' REPLY 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.

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BRANDON M. MIDDLETON