Case 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,

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

On Appeal from the United States District Court
for the Eastern District of California

BRIEF *AMICI CURIAE* OF DEFENDERS OF WILDLIFE, INSTITUTE FOR FISHERIES RESOURCES, and PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS IN SUPPORT OF FEDERAL DEFENDANTS-APPELLEES FOR AFFIRMANCE

JASON C. RYLANDER
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, D.C. 20036
Telephone: (202) 682-9400
Facsimile: (202) 682-1331
jrylander@defenders.org

Counsel for *Amici Curiae* Defenders of Wildlife, Institute for Fisheries Resources, and Pacific Coast Federation of Fishermen's Associations

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* certify as follows:

Defenders of Wildlife is a non-profit corporation under the laws of the District of Columbia, registered with the Internal Revenue Service as a 501(c)(3) organization. The Pacific Coast Federation of Fishermen's Associations is a California tax exempt 501(c)(6) trade organization. The Institute for Fisheries Resources is a nonprofit California public benefit corporation tax exempt under the Internal Revenue Service Code as a 501(c)(3) organization. These organizations assert that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respectfully submitted this 7th day of October 2010.

By: /s/ Jason C. Rylander
Jason C. Rylander

Counsel for *Amici Curiae* Defenders of Wildlife, Institute for Fisheries Resources, and Pacific Coast Federation of Fishermen's Associations

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

This brief is submitted with the consent of all parties in accordance with Federal Rule of Appellate Procedure 29 and the rules of this Court.

Defenders of Wildlife ("Defenders") is a not-for-profit conservation organization recognized as one of the nation's leading advocates for wildlife and their habitat. Founded in 1947, Defenders is headquartered in Washington, D.C., with field offices across the country and approximately 950,000 members and activists. Defenders maintains a staff of wildlife biologists, attorneys, educators, research analysts, and other conservationists. Defenders advocates new approaches to wildlife conservation that will help keep species from becoming endangered and employs education, litigation, research, legislation, and advocacy to defend wildlife and their habitat. Its programs reflect the conviction that saving the diversity of our planet's life requires protecting entire ecosystems and ensuring interconnected habitats.

As an intervenor or *amicus curiae*, Defenders has successfully defended federal wildlife protections from similar constitutional challenges in such cases as *Alabama-Tombigbee Rivers Coal. v. Kempthorne ("ATRC")*, 477 F. 3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); *Nat'l Ass'n of Home Builders v. Babbitt ("NAHB"),* 130 F.3d 1041

(D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001); and *GDF Realty Invs., Ltd. v. Norton ("GDF Realty")*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005). Defenders has a keen interest in maintaining the stability of a legal system that has long recognized the ability of Congress to protect endangered wildlife under the Endangered Species Act ("ESA") and other federal laws.

Pacific Coast Federation of Fishermen's Associations ("PCFFA"), is a west coast nonprofit trade association originally incorporated in California, but with offices in both California and Oregon. PCFFA is federally tax exempt as a 501(c)(6) trade organization. PCFFA represents the economic interests of approximately 1,200 commercial fishing family business operations doing business as ocean commercial seafood harvesters all along the west coast, many of whom have in the past depended, or now depend, in total or in part for their livelihoods on commercial ocean harvests of anadromous salmon, of which California's Central Valley salmon stocks (which swim through the San Francisco Bay Delta) are typically the world's second largest populations. Several of the salmon stocks which historically have spawned and reared in the California Central Valley's San Francisco Bay Delta are also themselves federally

protected under the ESA, and suffer from many of the same environmental ills, including land and water development pressures, that have severely depressed existing populations of the Delta smelt, including excessive diversions of water from the Bay Delta for use by California Central Valley agriculture.

Institute for Fisheries Resources ("IFR") is a nonprofit California public benefit corporation organized under I.R.C. 501(c)(3). IFR has been the scientific research, environmental and marine conservation and protection affiliate of PCFFA since its founding by PCFFA in 1992. IFR has devoted considerable time and resources since its founding toward restoring the damaged salmon runs of the California Central Valley and San Francisco Bay Delta.

PCFFA and IFR are also co-plaintiffs in various ESA-related cases, including *Pacific Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1122 (E.D. Cal. 2008) and *The Consolidated Salmonid Cases*, Lead Case No. 1:09-cv-01053 (E.D. Cal.) (filed June 15, 2009), which are based on legal challenges to a parallel Central Valley/Bay Delta ESA-required Biological Opinion for salmon and steelhead very similar to that which protects the Delta smelt.

SUMMARY OF THE ARGUMENT

Federally listed in 1993 as threatened with extinction, the Delta smelt (*Hypomesus transpacificus*) is precisely the kind of species the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.,* is designed to protect. A small fish now confined to the delta area of the Sacramento and San Joaquin rivers, the Delta smelt was once so abundant that it was harvested commercially. *Final Rule to List the Delta Smelt as Threatened*, 58 Fed. Reg. 12,854, 12,858 (March 5, 1993). According to the California Department of Fish and Game, "the delta smelt was one of the most common and abundant pelagic fish" caught in trawl surveys as recently as the 1970s. *Id.* Now one of the rarest fish species in North America, the Delta smelt's population has been decimated to the point of near extinction because of "large freshwater exports from the Sacramento River and the San Joaquin River diversions for agricultural and urban use." *Id.* at 12,854.

Appellants assert the U.S. Constitution does not permit protection of species like the Delta smelt. They claim the FWS's Delta smelt Biological Opinion is based on unlawful take authority over a noncommercial intrastate fish. Appellants are wrong. Their argument relies on faulty assumptions about the ESA and the relationship of wildlife protection to interstate commerce, misreads and ignores relevant Supreme Court precedent, and has

been repeatedly rejected by multiple federal courts of appeal. As this brief will show, there can be no doubt: Congress has the constitutional authority to protect rare species like the Delta smelt via the Endangered Species Act.

In five separate cases, the Eleventh, District of Columbia, Fourth, and Fifth circuits have upheld the authority of Congress to protect endangered and threatened species under the Constitution's Commerce Clause, U.S. Const. art. I, § 8.[1] Similar wildlife protections have been upheld as valid exercises of federal power in this Circuit.[2] Notwithstanding what appears to be very settled law, Appellants and their *amici* ask this Court to hold that federal protections for the Delta smelt are constitutionally impermissible. This challenge must fail.

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[1] *ATRC*, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008) (upholding protections for the Alabama sturgeon); *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004) (upholding protections for the arroyo toad); *GDF Realty*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005) (six species of cave invertebrates); *NAHB*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (Delhi Sands flower-loving fly); *see also Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001) (red wolves).

[2] *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the constitutionality of the Bald and Golden Eagle Protection Act ("BGEPA")). Analogizing BGEPA to the ESA, Bramble cited "with approval" another case from this Circuit that upheld the application of ESA Section 9 to Hawaiian bird species. *Id.* (quoting *Palila v. Haw. Dep't of Land & Nat. Res.*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981) (",[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species . . . .'")).

Neither *United States v. Lopez*, 514 U.S. 549 (1995), nor *United States v. Morrison*, 529 U.S. 598 (2000), prohibit Congress from acting to protect the nation's rich biodiversity heritage, including intrastate species of little present commercial value, through the ESA. Indeed, every court to have considered the question since *Lopez* and *Morrison* found that protection of the species at issue did not exceed the powers of Congress. In each case, the courts found that, regardless of present commercial value, the subject species substantially affected interstate commerce. The same is true of the Delta smelt, which, when abundant, was commercially harvested and remains the subject of scientific research.

Even if protection of the Delta smelt did not substantially affect interstate commerce, Congress can reasonably regulate even non-economic intrastate activities under the Commerce Clause, in conjunction with the Necessary and Proper Clause, U.S. Const. art. I, § 8, as part of a comprehensive scheme to address activities that in the aggregate substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1 (2005); *Lopez*, 514 U.S. at 558 ("„Where a *general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.'" (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)). Under this principle,

Congress may properly protect the Delta smelt and all endangered species, including intrastate species and those with no current commercial value, because the ESA is a comprehensive statute intended to preserve interdependent species and ecosystems that collectively have a tremendous impact on interstate commerce.

Appellants and their *amici* support a radical reinterpretation of the Commerce Clause that would undermine far more than just federal authority to protect endangered species.[3] Their policy preferences, however, have no constitutional basis. With *Raich*, the Supreme Court has made clear the Commerce Clause remains, as it has since *Gibbons v. Ogden*, 22 U.S. 1 (1824), and *Wickard v. Filburn*, 317 U.S. 111 (1942), a broad grant of power to Congress to address issues of national significance that affect and are affected by commerce.[4] Accordingly, this Court should affirm the lower

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[3] *See, e.g.*, *U.S. v. McCalla*, 545 F.3d 750, 752 (9th Cir. 2008), *cert. denied* 129 S. Ct. 1363 (2009) and *U.S. v. Maxwell*, 446 F.3d 1210, 1215 (11th Cir. 2006), *cert. denied* 549 U.S. (2006) (upholding the Child Pornography Prevention Act against claims that regulation of non-economic, intrastate conduct was unconstitutional); *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006) (following *Raich* in upholding a statutory ban on intrastate gun possession);

[4] The *Raich* majority chided the respondents in that case for their "myopic focus" and "heavy reliance" on *Lopez* and *Morrison*, noting that they read these precedents "far too broadly." *Raich*, 545 U.S. at 23, 23 n.34. Similarly, Justice Scalia wrote that "those decisions [*Lopez* and *Morrison*] do not declare noneconomic intrastate activity to be categorically beyond the reach of the Federal Government. Neither case involved the power of

court's decision and uphold the constitutionality of the ESA as applied to the Delta smelt.

ARGUMENT

I. Congress Has Ample Authority to Regulate the Conduct of Federal Agencies in Furtherance of National Objectives.

Appellants present this case as though it were a constitutional challenge to the ESA's regulation of private conduct pursuant to Section 9's prohibition on the take of listed species. In reality, the subject of this case is a Biological Opinion, prepared by the U.S. Fish and Wildlife Service ("FWS") under Section 7 in consultation with another federal agency, to guide that agency's actions to protect a listed species. Because the action challenged in this case is merely the preparation of a document that primarily relates to the operations of the federal government, Appellants strain to establish standing, let alone stake out a valid constitutional objection. Fed. App. Br. at 19-26. Appellants' constitutional claims thus face an even higher burden than in cases where application of the Section 9 take provision was directly at issue.

Courts have emphasized that "[t]he *heart of the Endangered Species Act* lies in *section 7*." *Fla. Key Deer v. Stickney*, 864 F. Supp. 1222, 1226

Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation." *Id.* at 2218 (Scalia, J., concurring).

(S.D. Fla. 1994). Section 7(a)(1) of the ESA imposes a duty on federal agencies to "utilize their authorities in furtherance of this chapter by carrying out programs for the conservation of endangered species and threatened species. 16 U.S.C. § 1536(a)(1). Section 7(a)(2) states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

Formal consultation with FWS or the National Marine Fisheries Service ("NMFS") is the primary means by which a federal agency fulfills its duties under Section 7(a)(2). If the agency's proposed action is likely to affect a listed species, FWS or NMFS prepares a Biological Opinion detailing the potential impacts of the action on the species and its habitat. If FWS or NMFS finds the project may jeopardize the continued existence of the species, the Biological Opinion may suggest reasonable and prudent alternatives to the proposed action. FWS or NMFS may then issue, under certain circumstances, an "Incidental Take Statement" authorizing takes of species incidental to the planned activity. 16 U.S.C. § 1536(b)(4)(C)(i)-(iv); § 1539(a)(2)(B)(i)-(v). "The terms of an Incidental Take Statement *** are integral parts of the statutory scheme, determining, among other things,

when consultation must be reinitiated." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1251 (9th Cir. 2001).

Section 9 is also "an integral part of the overall federal scheme." *Gibbs*, 214 F.3d at 492. Section 9(a)(1)(B) makes it unlawful for any person to "take any [endangered] species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such activity." 16 U.S.C. § 1532(19); *see Babbitt v. Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 696-708 (1995) (upholding FWS's definition of harm).

Congress's power to protect listed species from actions of the federal government via Sections 7 and 9 are grounded in multiple provisions of the Constitution, even apart from the well-established authority under the Commerce Clause. *See, e.g.*, U.S. Const. art. I, § 8, cl. 1 (the power to spend money to provide for "the general Welfare of the United States"); art. I, § 8, cl. 14 (the power "to make Rules for the Government and Regulation of the land and naval Forces"); art. IV, § 3, cl. 2 (the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Most notably, the Necessary and Proper Clause, art. I, § 8, cl. 18, gives Congress broad power to legislate

where the means chosen are "reasonably adapted to the attainment of a legitimate end" under another enumerated power. *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010); *Raich*, 545 U.S. at 34 (Scalia, J. concurring).

When it comes to the administration of the government itself, the Constitution very clearly empowers Congress to direct Executive Branch agencies to conform their own activities to further national objectives. The Constitution does not in any way require vacatur of the Biological Opinion in this case; to hold otherwise would frustrate a major part of the ESA's regulatory scheme—that the federal government ensure its own actions do not contribute to the causes of species extinction.

Perhaps recognizing that Congress has broad power to guide the conduct of federal agencies to further national goals, Appellants attempt to frame this case as a constitutional challenge to the application of the ESA's take prohibition to *their own* activities as users of water drawn from the Sacramento and San Joaquin rivers under federal permits.[5] No matter how Appellants style their argument, however, the case law is well settled. The Constitution's Commerce Clause, among other provisions, provides

[5] As the Federal Defendants' brief discusses, Appellants have failed to point to any actual application of Section 9 that threatens their activities. Nor are they presently at risk of liability for take under the provision. Fed. App. Br. at 20.

Congress ample authority to protect the Delta smelt and all imperiled species from the adverse impacts of both governmental and private conduct.

II. Endangered Species Protection Is Economic and Commercial.

As every court to examine the issue has found, the ESA is "a general regulatory statute bearing a substantial relation to commerce." *ATRC*, 477 F.3d at 1273; *accord GDF Realty*, 326 F.3d at 640 (stating that the "ESA's take provision is economic in nature and supported by Congressional findings to that effect."); *Gibbs v. Babbitt*, 214 F.3d at 496 (Congress could rationally find that "conservation of endangered species and economic growth are mutually reinforcing."). In passing the ESA, Congress drew a clear link between economic activity and the extinction of species, noting that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," 16 U.S.C. § 1531(a)(1), and that "these species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id*. § 1531(a)(2).

Indeed, the ESA contains several provisions that directly speak to the regulation of economic activity and interstate commerce. These include the definition of "commercial activity" to include "all activities of industry and

trade" and "the buying and selling of commodities and activities conducted for the purpose of facilitating such buying and selling," 16 U.S.C. § 1532(2); the requirement that overutilization for commercial purposes be considered in determining whether a species is endangered, 16 U.S.C. § 1533(a)(1)(B); authorizing the Secretaries of the Interior and Commerce to regulate trade in non-listed species that closely resemble listed species, 16 U.S.C. § 1533(e); declaring the supremacy of the ESA over state law when the two conflict regarding interstate commerce in endangered and threatened species, 16 U.S.C. § 1535(f); and prohibiting the transport or sale of endangered species in interstate commerce, 16 U.S.C. § 1538(a)(1)(E), (F).

The legislative history likewise blames "the pressures of trade" for threatening the nation's fish, wildlife, and plants. H.R. Rep. No. 93-412, at 2 (1973), *reprinted in* Comm. on Environment and Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 149 (1982). As the House Report details, Congress recognized the importance of controlling commercial activities that impact endangered species:

> Man can threaten the existence of species of plants and animals in any number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. … Restrictions upon the otherwise unfettered trade in these plants and animals are a significant weapon in the arsenal of those who are interested in the protection of these species.

H.R. Rep. No. 93-412, at 5 (1973).

Taken together, the legislative history, findings, and substantive provisions of the ESA demonstrate that Congress very plainly intended to regulate economic activities that negatively impact endangered species. This should not be surprising. Species and habitat loss—including the decline of the Delta smelt—occur principally as a consequence of economic activity.[6] In finding the ESA economic in nature, the Fifth Circuit noted that "[a]side from the economic effects of species loss, it is obvious that the majority of takes would result from economic activity." *GDF Realty*, 326 F.3d at 639. Likewise, the *Gibbs* majority concluded, "of course, natural resource conservation is economic and commercial." *Gibbs*, 214 F.3d at 506.

The ESA does not just protect the economic value of species themselves. It regulates economic activities that impact species, prevents

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[6] Judge Wilkinson's words are particularly apt: "It is within the power of Congress to regulate the coexistence of commercial activity and endangered wildlife in our nation and to manage the interdependence of endangered animals and plants in large ecosystems. It is irrelevant whether judges agree or disagree with congressional judgments in this contentious area…. Congress could find that conservation of endangered species and economic growth are mutually reinforcing. It is simply not beyond the power of Congress to conclude that a healthy environment actually boosts industry by allowing commercial development of our natural resources." *Gibbs*, 214 F.3d at 496.

externalities stemming from economic activities, and preserves resources for future economic use. To put it another way, "[e]nvironmental laws inevitably regulate and affect commerce because the nation's natural resources supply, after all, what are literally the basic ingredients of commercial life." Richard J. Lazarus, *The Making of Environmental Law* 205 (2005).

III. The Economic Value of Wildlife Protection Is Incalculable.

Indeed, the known and potential economic value of biodiversity in itself and as commodities traded in interstate commerce is enormous. Wild fish species support a multi-billion dollar industry that contributes to the livelihood of millions of people worldwide. In 2008 alone, the Pacific Region's seafood industry generated $9.1 billion in sales impacts in California, $3.7 billion in Washington, and $960 million in Oregon. NOAA Fisheries, Fisheries Economies of the U.S. (2008), *available at* http://www.st.nmfs.noaa.gov/st5/publication/econ/2008/Pacific_ALL_Econ.pdf.

The pharmaceutical industry also depends on biodiversity to a great degree. Of the top 150 prescription drugs used in the United States, 118 are derived in whole or in part from natural sources: 74% from plants, 18% from fungi, 5% from bacteria, and 3% from one vertebrate snake species. Nine of the top ten drugs are based on natural plant products. Ecological Society of

America, *Ecosystem Services: Benefits Supplied to Human Societies by Natural Ecosystems*, Issues in Ecology 6 (1997); *see also* Norman Myers, *Biodiversity's Genetic Library, in Nature's Services: Societal Dependence on Natural Ecosystems* 263, 263 (Daily, Gretchen C. ed., 1997). The commercial value of plant-derived drugs to developed nations alone during the 1990s amounted to some $500 billion. Myers, *supra*, at 264.

The noted biologist Edward O. Wilson reinforces the point. "It is fashionable in some quarters to wave aside the small and obscure, bugs and weeds, forgetting that an obscure moth from Latin America saved Australia's pastureland from overgrowth by cactus, that the rosy periwinkle provided the cure for Hodgkin's disease and childhood lymphocytic leukemia, that the bark of the Pacific yew offers hope for victims of ovarian and breast cancer, that a chemical from the saliva of leeches dissolves blood clots during surgery." Edward O. Wilson, *The Diversity of Life* 347 (1992). As the Eleventh Circuit found, "Inside fragile living things, in little flowers or even in ugly fish, may hidden treasures hide." *ATRC*, 477 F.3d 1274-75.

The value of wildlife for recreational pursuits is also extremely significant. A FWS report found that the nation's freshwater anglers spent $35.6 billion, recreational hunters spent $20.6 billion, and wildlife watchers spent $38.4 billion on *direct* expenditures in 2001 alone. *ATRC*, 477 F.3d at

1274 (citing U.S. FWS, National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 4 (2001)). A recent study estimated the total economic impact of recreational anglers at $108.4 billion, supporting 1.2 million jobs, and adding $5.5 billion to Federal and State tax revenues." *Id.* (quoting U.S. FWS, Final EIS Double-crested Cormorant Management in the United States 43 (2003)).

These numbers still do not capture the full contribution of biodiversity and intact ecosystems to interstate commerce. In enacting the ESA, Congress determined that endangered species are of "incalculable" value, including "the *unknown* uses that endangered species might have and the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA v. Hill*, 437 U.S. 153, 178-79 (1978); see also *Preseault v. ICC*, 494 U.S. 1, 17-18 (protection of potential future value in interstate commerce is within Congress's authority under the Commerce Clause). Edward O. Wilson explains:

> The traditional econometric approach, weighing market price and tourist dollars, will always underestimate the true value of wild species. None has been totally assayed for all of the commercial profit, scientific knowledge, and aesthetic pleasure it can yield. Furthermore, none exists in the wild all by itself. Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some,

> reducing or even extinguishing others, risking a downward spiral of the larger assemblage.

Wilson, *supra*, at 308; *NAHB*, 130 F.3d at 1052 n.11 (quoting the same). The more scientists and economists are able to translate these ecosystem services into monetary terms, the more readily grasped is their substantial impact on commerce. "All of the industries we have mentioned—pharmaceuticals, agriculture, fishing, hunting, and wildlife tourism—fundamentally depend on a diverse stock of wildlife, and the Endangered Species Act is designed to safeguard that stock." *ATRC*, 477 F.3d at 1274.

IV. ESA Protections Are Constitutional on Their Face and As Applied to Specific Species Like the Delta Smelt.

Appellants argument—rejected in *ATRC* and *GDF Realty*—is that protection of a purely intrastate species like the Delta smelt does not fall within any of the established categories of permissible regulation under the Commerce Clause. Appellants are wrong. The Commerce Clause empowers Congress to regulate three broad categories of activity: the channels of interstate commerce; the instruments of interstate commerce, and persons or things in interstate commerce; and activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. Although the parties' briefs all focus on the third category and this case can easily be resolved on that basis, *Amici* believe protection of endangered species may

also be first and second category activities. The regulation of water withdrawals from a navigable waterway affects the channels of interstate commerce. The Delta smelt itself has been and may yet be a thing in interstate commerce. Regulation of activities that may cause takes of the Delta smelt also substantially affect interstate commerce.

a. Protection of the Delta Smelt and Its Riverine Habitat Is a Constitutionally Permissible Regulation of the Channels of, and Things in, Interstate Commerce.

Protection of the Delta smelt may be a first category activity under the Commerce Clause. In *NAHB v. Babbitt*, Judge Wald held that prohibiting take of listed species was proper congressional control over the channels of interstate commerce because it regulated the interstate transport of listed species and kept the interstate channels free from immoral and injurious uses. *NAHB*, 130 F.3d at 1046-48; *ATRC*, 477 F.3d at 1271 n.2 (noting but not deciding whether protection of a fish species may be a first category activity). This rationale is even more persuasive here because the species at issue is a fish capable of being transported in interstate commerce, and its habitat is navigable water, the regulation of which, pursuant to the Clean Water Act and other statutes, is unquestionably legitimate under channels of

commerce theories.[7] Commercial activities that cause a loss of fish species due to overutilization or habitat destruction or that negatively impact riverine ecosystems as a whole can be injurious uses of a channel of commerce.

Protection of the Delta smelt also meets the *Lopez* criteria for a regulation that affects a thing transported in commerce. The Delta smelt was commercially fished in large numbers during the 19th and early 20th centuries (ER 177), and remains non-target by-catch in commercial bait fisheries to this day, 58 Fed. Reg. at 12,860. It would be ironic if the ESA's take provision were found to be unconstitutional as applied to a species that was no longer commercially viable because it had already been wiped out by commercial activity. Were the Delta smelt to recover, as the ESA intends, who can say that commercial harvest and trade could not resume? Potential trade is legitimate basis for regulation even where no current market exists. *Preseault v. ICC*, 494 U.S. at 19 (holding that Congress can maintain

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[7] The regulation of activities affecting the nation's waters is well within the ambit of the Commerce Clause. *See, e.g.*, *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) ("[T]he principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."); *United States v. Gerke Excavating, Inc*., 412 F.3d 804, 806 (7th Cir. 2005), *cert. denied*, 552 U.S. 810 (2007) (Posner, J.) (citing *Raich*, 545 U.S. at 15-19; *Wickard*, 317 U.S. at 118-29).

abandoned railroads even if there was no foreseeable future use); *Gibbs*, 214 F.3d at 492-93 (relying in part on the potential trade in wolf pelts to uphold the ESA).[8] This view is also consistent with the ESA's legislative history: "The protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed." S. Rep. No. 91-526, at 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1415.

b. Regulation of Activities Impacting the Delta Smelt Substantially Affect Commerce.

The impact of ESA protections can also be viewed through the lens of the commercial nature of the regulated take, and there can be little doubt that the actions of the government, Appellants, and other users of the delta ecosystem are third category activities that substantially affect interstate commerce. As commentators have noted, "distinguishing the actual act of taking from the purpose of the take … seems like an invitation to engage in legal legerdemain permitting judges to declare unconstitutional regulations they personally oppose." Michael C. Blumm & George A. Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species*

[8] *See also Palila*, 471 F. Supp. at 995 ("[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons … who come to a state to observe and study these species, that would otherwise be lost by state inaction.").

Act's Take Provision, 34 Envtl. L. 309, 349 (2004); *see also Gibbs*, 214 F.3d at 504 ("A judge's view of the wisdom of enacted policies affords no warrant for declaring them unconstitutional."). Indeed, in upholding the ESA's take provision, the Fourth and D.C. Circuits have both relied in part on the commercial nature of the development that was proposed, an approach that draws support both from the statute and Supreme Court precedent. Although both decisions were based primarily on biodiversity values, Judge Wilkinson noted the economic motivation of those who would take red wolves on private lands, *Gibbs*, 214 F.3d at 495, while Judge Henderson stressed the economic nature of the development of roads for the hospital at issue in the flower-loving fly case. *NAHB*, 130 F.3d at 1058-59 (Henderson, J., concurring). In the words of another D.C. Circuit opinion, "the ESA *regulates takings, not toads." Rancho Viejo v. Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003) ("The ESA does not purport to tell toads what they may or may not do. Rather [the ESA] limits the taking of listed species."). It was thus sufficient for constitutional purposes that the proposed housing development in *Rancho Viejo* affected interstate commerce, even if the toads themselves did not. *Id.* at 1072 ("Th[e] regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens.").

Here, Appellants are businesses engaged in commercial agricultural activities, involving receipt of valuable water resources from the Sacramento and San Joaquin rivers under the authority of federal permits. Excessive use of river water for economic gain degrades the habitat of Delta smelt and other species and may lead to the take and ultimate extinction of the Delta smelt. Appellants' activities are indisputably economic, clearly affect interstate commerce, and properly the subject of congressional regulation.

c. Regulation of Non-Commercial, Intrastate Species Is Constitutionally Permissible as Part of a Comprehensive Regulatory Program to Protect the Nation's Biodiversity.

Even if Appellants were correct that the regulation of water withdrawals, the smelt itself, and activities affecting the smelt are all non-commercial, federal regulation of noncommercial, intrastate activity is also constitutionally permissible under the Commerce Clause if the regulation 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." *Lopez*, 514 U.S. at 561. "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic ‚class of activities' that have substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (citing *Perez v. United States*, 402 U.S. 146 (1971); *Wickard*, 317 U.S. 111 (1942)).

This comprehensive scheme principle has been described, even by critics, as a "fourth distinct rationale" for finding consistency with the Commerce Clause. Randy E. Barnett, *Foreword: Limiting* Raich, 9 Lewis & Clark L. Rev. 743, 746 (2005). Lest there be any doubt, *Gonzales v. Raich* "firmly secur[ed]" this comprehensive scheme principle "in the Supreme Court's Commerce Clause jurisprudence." Michael C. Blumm & George A. Kimbrell, Gonzales v. Raich: *The "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 Envtl. L. 491, 493 (2005). The *Raich* Court held that a federal law prohibiting the manufacture and possession of marijuana may constitutionally extend to ban the personal cultivation and use of the drug for medicinal purposes, which was permitted under California law. *Raich*, 545 U.S. at 14-16. Writing for the majority, Justice Stevens held that the Controlled Substances Act "could be undercut" unless the government could regulate intrastate marijuana use as an "essential part" of the act's regulatory scheme. *Id*. at 24 (quoting *Lopez*, 514 U.S. at 561). Both the *Raich* majority and Justice Scalia in concurrence recognized that this comprehensive scheme principle flows equally from Congress's authority to "'make all Laws which shall be necessary and proper' to 'regulate Commerce … among the several States.'" *Id*. at 2209 (quoting U.S. Const.); *see also GDF Realty*, 236 F.3d at 641-42 (Dennis, J.

concurring) (noting that the Necessary and Proper Clause supports the constitutionality of the ESA).

As the Eleventh Circuit held, "this principle poses a problem for [Appellants'] as-applied challenge [to the ESA], because „when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *ATRC*, 477 F.3d at 1272 (quoting *Lopez*, 514 U.S. at 558). If the protection of a specific 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." *Raich*, 545 U.S. at 22.

d. The ESA's Comprehensive Regulatory Scheme Would Be Fundamentally Undercut If the Government Could Not Protect Intrastate Species Like the Delta Smelt, Which Are Essential to the ESA's Goal of Preserving the Nation's Biodiversity.

Protection of intrastate species is absolutely essential to the ESA's goal of preserving the nation's biodiversity. In fact, of the more than 1200 species currently listed as endangered or threatened in the United States, roughly 50% now occur only in one state. *NAHB*, 130 F.3d at 1052 (finding 521 of the 1082 species then listed to be wholly intrastate species).

When Congress passed the ESA in 1973, it grandfathered onto the endangered species list from its predecessor statute 109 species of wildlife

including 45 that inhabited only one state. This action and the legislative history make clear that Congress intended the ESA to protect all species, despite their limited range, because of their economic, ecological, and aesthetic values and because, absent national standards, protection of rare species at the state level could not be assured. As the floor manager of the bill, Sen. John Tunney (Calif.), remarked at the time:

> [N]o one State should be responsible for balancing its interests, with those of other States, for the entire Nation. Central authority is necessary to oversee the endangered species protection programs and to ensure that local political pressures do not lead to the destruction of a vital national asset.

119 Cong. Rec. 25,669 (1973) (statement of Sen. Tunney). Sen. Tunney's statement recognizes that exceptions to a statutory rule may sometimes be exploited to circumvent the overall enforcement scheme. Without national rules, states could engage in a race to the bottom in which species protections are compromised to compete for economic advantage. As the D.C. Circuit has twice noted, federal regulation of endangered species and their habitat is necessary to "arrest the ‚race to the bottom'" that would occur from interstate competition "‚whose overall effect would damage the quality of the national environment.'" *Rancho Viejo*, 323 F.3d at 1079 (quoting *Gibbs*, 214 F.3d at 501). And in *NAHB*, the D.C. Circuit explained:

> Congress was aware that no state could be expected to require significantly more rigorous labor standards or endangered

> species protection than other states, because for each individual state, the cost of providing better working conditions or preserving a species outweighs the benefits even though in aggregate, the benefits of better labor standards and biodiversity outweigh the costs.

NAHB, 130 F.3d at 1056; *see also Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281-82 (1981) (endorsing the race-to-the-bottom rationale in environmental law). Congress recognized, "[p]rotection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded." H.R. Rep. No. 93-412, at 7.

In *Raich*, the Supreme Court held that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole" in the applicable federal scheme. *Raich*, 545 U.S. at 22. Concurring separately in the judgment, Justice Scalia agreed that Congress "could reasonably conclude that its objective of prohibiting marijuana from the interstate market ‚could be undercut' if those activities were excepted from its general scheme of regulation." *Id.* at 42 (Scalia, J. concurring). Congress's decision to address the problem of interstate competition and inconsistent regulation in species

protection through the adoption of a categorical rule thus "is entitled to a strong presumption of validity." *Id.* at 28.

Moreover, *Raich* cabined the application of *Lopez* and *Morrison* to cases in which the parties assert that "a particular statute or provision [falls] outside Congress' commerce power in its entirety," and took pains to distinguish cases where the parties allege, as here, that "individual applications of a concededly valid statutory scheme" should be excised.[9] *Id.* at 23. The *Raich* Court called this distinction "pivotal for the Court has often reiterated that [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." *Id.* (internal quotations omitted). Justice Scalia further noted that *Lopez* and *Morrison* should not be understood to "declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government," because neither case "involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation." *Id*. at 38.

Under a unified reading of *Raich*, *Lopez*, and *Morrison*, Appellants' claim that protection of the Delta smelt specifically lacks a sufficient

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[9] *Wickard v. Filburn*, 317 U.S. 111 (1942), *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), were all as-applied challenges.

relationship to commerce must fail. To prevail under those precedents, Appellants must demonstrate that Section 7 and Section 9, the heart of the ESA's statutory scheme, lack sufficient connection to interstate commerce to qualify as a comprehensive economic regulatory program. But Appellants and their *Amici* do not seriously question the general authority of Congress to protect threatened and endangered species, nor can they. The ESA as a whole plainly falls within Congress's commerce power, and the take provision of the ESA, which applies to both commercial and non-commercial takes, is facially constitutional.

Given the number of species that reside in only one state, Congress could reasonably conclude that exclusion of such species from the ESA's coverage would "leave a gaping hole" in the statutory scheme, diminishing the nation's treasure trove of biodiversity and leading to potentially destructive interstate competition. *Raich*, 545 U.S. at 22. *See also Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981) ("It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test."). Under Appellants' view of the law, what would happen to all the historically interstate species that now occupy only a single state as a result of having been driven from the rest of their range by the very forces from which they

require protection? What would happen to species like the Alabama sturgeon in *ATRC*, or the red wolf in *Gibbs,* or the arroyo toad in *Rancho Viejo*, whose current ranges are wholly intrastate?

Under Appellants' theory, Congress's desire that protection of endangered species could "permit the regeneration of that species to a level where controlled exploitation of that species can be resumed," S. Rep. No. 91-526, at 3 (1969), would be completely frustrated. In words that apply equally to the Delta smelt, the Eleventh Circuit emphasized:

> The Alabama sturgeon is potentially an example of that congressional hope. It was once harvested commercially * * *. The protection the Endangered Species Act affords may one day allow the replenishment of its numbers and eventual controlled commercial exploitation of the fish. Indeed, this possibility underscores the fundamental irony in [Appellants'] position. Under [Appellants'] theory, Congress is free to protect a commercially thriving species that exists in abundance across the United States because it has economic worth, but once economic exploitation has driven that species so close to the brink of extinction that it desperately needs the government's protection, Congress is powerless to act.

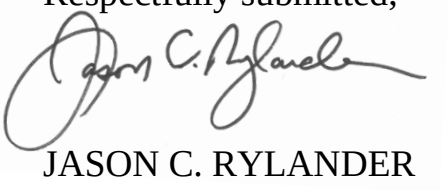
ATRC, 477 F. 3d at 1275. If the Commerce Clause does not permit federal regulation of such species, not only will the Delta smelt lose its last bulwark against extinction, but federal protections for half of all listed species in America could cease. Forever lost with them could be genetic, medicinal, and commercial values that we have yet to fully grasp. Judge Wilkinson properly termed such an outcome "perverse" because it would lead to the

absurd result that as species decline and their range and commercial potential become more limited, the federal protections available to prevent their extinction would diminish. *Gibbs*, 214 F.3d at 498. A ruling for Appellants thus would "eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head." *Id.*

CONCLUSION

Courts may invalidate a federal statute "only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607. Appellants have made no such showing. Under *Raich*, the decisions of four circuits, and the precedent of this Court, the judgment of the district court should be affirmed.

Respectfully submitted,



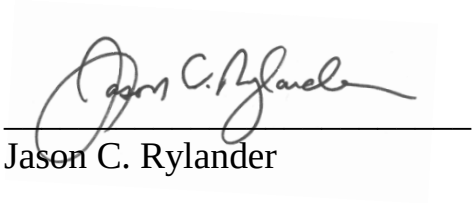
JASON C. RYLANDER
DEFENDERS OF WILDLIFE
1130 17th Street, NW
Washington, DC 20036
Telephone: (202) 682-9400
Facsimile: (202) 682-1331
jrylander@defenders.org

October 7, 2010

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)

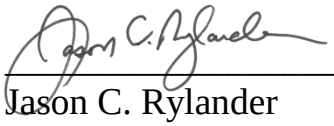
I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7), the attached Brief of *Amici Curiae* Defenders of Wildlife, Institute for Fisheries Resources, and Pacific Coast Federation of Fishermen's Associations in Support of Federal Defendants-Appellees is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 6988 words.



Jason C. Rylander

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2010, I electronically filed the foregoing Brief of *Amici Curiae* Defenders of Wildlife, Institute for Fisheries Resources, and Pacific Coast Federation of Fishermen's Associations with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.



Jason C. Rylander
Defenders of Wildlife
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 682-9400