No. 10-1551

IN THE

Supreme Court of the United States

STEWART & JASPER ORCHARDS, *ET AL.*

Petitioners,

v.

KENNETH LEE SALAZER, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE*

The Center for Constitutional Jurisprudence and the Cato Institute respectfully move for leave to file the following brief as *amici curiae* in support of the petition for certiorari. Petitioners have consented to the filing of this brief, as have the governmental defendants—all the original parties to the case. But the Natural Resources Defense Council and The Bay Institute, who were allowed to intervene as defendants below, have withheld their consent to the more modest involvement sought by *amici curiae* here. All parties were provided with the requisite 10-day notice of intent to file this brief.

Amici 's interest in this case arises from their respective missions to advance and support the original design of the Constitution. Both have participated in numerous cases of constitutional significance before this and other courts, as more fully described in the brief at pages 1-2.

This brief will elaborate on the meaning of the Commerce Clause, both as originally understand and as expanded (in conjunction with the Necessary and Proper Clause) during the New Deal era, in order to provide the Court with more of the historical context in which the current dispute arises.

Respectfully submitted,

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QUESTIONS PRESENTED

Even in its post-1937 Commerce Clause jurisprudence, this Court has repeatedly noted that there is an outer boundary to Congress's exercise of power under the Commerce Clause which must be respected and, if necessary, enforced by this Court in order to protect the constitutional distinction between national and state power and preserve to the states the police power to regulate and advance the health, safety and welfare of the people.

When it enacted the Endangered Species Act for an explicit police power purpose, Congress expressly advanced a police power rather than a Commerce Clause purpose. While the interstate commerce in some species would render the Act constitutional as applied to those species, the issues presented by this case are as follows:

1. Does the application of the Endangered Species Act to *wholly intrastate, non-commercial species* exceed Congress's power under the Commerce Clause and intrude upon traditional police powers that the Constitution reserves to the States?

2. Did the Ninth Circuit err in holding that, under the "substantial effects" prong of this Court's Commerce Clause jurisprudence, any regulation that itself creates a substantial effect on interstate commerce is a valid exercise of Commerce Clause power, even absent the comprehensive market regulatory scheme that was critical to the holding in *Gonzales v. Raich*?

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *Bond v. United States*, 131 S. Ct. 2355 (2011), *American Electric Power Co., Inc. v. Connecticut,* 131 S. Ct. 2527 (2011); *Reisch v. Sisney,* No. 09-953, *cert. denied*, 130 S. Ct. 3323 (2010); *Medellin v. Texas,* 552 U.S. 491 (2008); *Rapanos v. United States,* 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001); *Schaffer v. O'Neill,* No. 01-94, *cert. denied*, 534 U.S. 992 (2001); and *United States v. Morrison,* 529 U.S. 598 (2000). Of particular relevance to the precise issues presented by this case, the Center participated as *amicus curiae* in support of the petition in *GDF Realty Investments, Ltd. v. Nor-*

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution specifically for the preparation or submission of this brief. Notice of intent to file this brief was provided to counsel of record for all parties at least ten days prior to its due date, as required by Rule 37.2(a).

ton, No. 03-1619, *cert. denied*, 545 U.S. 1114 (2005), and its founder was counsel of record in *Rancho Viejo, LLC v. Norton,* No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g denied*, 541 U.S. 1006 (2004).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs in pivotal cases. This case is of central concern to Cato because it implicates structural constitutional protections for individual liberty.

REASONS FOR GRANTING THE WRIT

I. The Federal Government's Regulation of the Wholly Intrastate, Non-Commercial Species at Issue Here Exceeds Congress's Powers Under the Commerce Clause, Both as Originally Understood and As Recently Interpreted by this Court.

A. As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade.

For our nation's Founders, "commerce" was trade, and "commerce among the states" was interstate trade, not the ordinary activities of business enterprises in a single state or community. *See*, *e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823)

(Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *United States* v. *Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield,* 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 529 U.S., at 616 n.7). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. *A fortiori*, any claim that the Commerce Clause encompassed a federal power effectively to

supersede a State's own environmental, land- and water- use regulations,[2] dramatically altering the balance between environmental and livelihood concerns that the State chose to make for its own citizens, in order to regulate wholly intrastate species that have nothing to do with interstate commerce, would have been beyond the pale.

This understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895), because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.*, at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate

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[2] California has its own Endangered Species Act, Cal. Fish & Game Code §§ 2050 *et seq*., and pursuant to that Act, it has listed the Delta Smelt as either threatened or endangered since 1993. Cal. Dept. of Fish & Game, State & Federally Listed Endangered & Threatened Animals of California 5 (Jan. 2011), available at http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/TEAnimals.pdf (last visited July 23, 2011), But California allows for the incidental take of threatened and endangered species if incidental to otherwise lawful activities, Cal. Code of Regs. Title 14 §§783.2 *et seq.*; it allows for takes incidental to routine and ongoing agricultural activities, Cal. Code of Reg. Title 14, Div. 1, Subd. 3, Ch. 6, Art. 2; and pursuant to the California Administrative Procedures Act, it requires an economic impact analysis during the listing process, Cal. Govt. Code §§ 11346.3 and 11346.5.

interstate commerce); *see also A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See*, *e.g.*, *E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons,* 22 U.S. (9 Wheat.), at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891); *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the States and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the

> States as required by our dual form of government....

156 U.S., at 13; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 301 (1936) (quoting *E.C.* Knight); *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S., at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of . . . of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S., at 203; see also *id*., at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government." 514 U.S., at 555 (quoting *Schechter Poultry*, 295 U.S., at 548).

As should be obvious, the expansion of the Endangered Species Act, 16 U.S.C. § 1531 *et seq*., to the wholly intrastate, non-commercial species at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. The regulation at issue here does not address the interstate shipment of goods—the ESA's. restrictions on the interstate shipment of endangered species, which are a valid exercise of the Commerce Clause power, are not at issue here. *See* 15 U.S.C. § 1538(a)(1)(E) (making it unlawful to transport endangered species in interstate or foreign commerce); *see also* Black Bass Act, ch. 346, 44 Stat. 576 (1926), (repealed by Act of Nov. 16, 1981, Pub. L. No. 97-79, § 9(b)(2), 95 Stat. 1079 (1981)); Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (16 U.S.C. 668 et seq.).

Nor does the regulation at issue here address retail sales of produce that has moved in interstate

commerce. It does not address the preparation of the soil on which that produce is grown. It does not even directly address the irrigation of the land necessary to produce that produce. Rather, it aims at any activity, without regard to its commercial nexus, that might cause "harm" to the habitat of some wholly intrastate smelt that are concededly not articles of commerce, and thereby indirectly regulates a small farm whose activity is several steps removed from the Founders' understanding of "commerce among the states."

Nor can this regulation be sustained as a valid exercise of Congress's powers under the Necessary and Proper Clause. As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.), at 187 (describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819) (describing the Necessary and Proper Clause as merely a means clause); *see also United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power") (*citing Sabri v. United States*, 541 U.S. 600, 605 (2004)). There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here, because as the Ninth Circuit recognized below, the California delta smelt is

simply not an article of commerce, much less of interstate commerce. Pet. App. 4-5 ("The delta smelt . . . is undisputedly endemic to California . . . [and] has no commercial value"). Congress cannot use a Commerce Clause pretext, therefore, to support its exercise of what is essentially a police power. *Id.*, at 423.

Under the original view of the Commerce Clause, therefore, this is an extremely easy case, and the fact that the lower courts are simply refusing to enforce the limits of the Commerce Clause, particularly in an area of such traditional State concern as local land regulation and wildlife protection, warrants this Court's review.

B. Even under the expanded view of the federal power taken in this Court's modern-era precedents, the expansion of the Endangered Species Act at issue here exceeds the outer limits of the power afforded to Congress.

Even when this Court expanded, via the Necessary and Proper Clause, the scope of power originally intended to exist under the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress.

Thus, in *NLRB* v. *Jones & Laughlin Steel Corp.*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate

commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *Morrison*, 529 U.S., at 608). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S., at 554 (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S., at 567; *Morrison,* 529 U.S., at 616 n.6).

These reservations were key to this Court's decisions in *Lopez* and *Morrison*. *See Lopez*, 514 U.S., at 566; *Morrison*, 529 U.S., at 608. As in those cases, the expansion of the Endangered Species Act at issue here does not regulate the channels or the instrumentalities of interstate commerce. Instead, the Court of Appeals based its decision on the claim that federal regulation is permissible if the regulation itself, rather than the activities regulated, is substantially related to interstate commerce. Pet. App. at 26. The Ninth Circuit's bootstrap theory for federal regulation would only encourage rather than thwart an expansive federal government: The more expansive the regulation, the more likely it is to cause the substantial effect on commerce that would render it constitutional under the Ninth Circuit's theory. That cannot possibly be consistent with this Court's repeated admonition that there is an outer limit to the Commerce Clause power. *See Lopez* , 514 U.S., at 567 (rejecting an "inference upon inference" assertion of power that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *Morri-*

son, 529 U.S., at 615.

Because the theory proffered by the government and upheld by the Ninth Circuit to support the expansive reach of the Endangered Species Act at issue in this case has no bounds, it contravenes even the expanded view of the Commerce Clause that has been in place since the New Deal. It amounts to a pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.

The importance of vertical federalism, and the critical and exclusive role that the States play in exercising the police power, has repeatedly been reaffirmed by this Court, most recently in *Bond v. United States*, a unanimous decision that recognized the importance of federalism to the preservation both of "the integrity, dignity, and residual sovereignty of the States" and of "the liberty of the individual." 131 S. Ct. 2355, 2364 (2011). Quite simply, as Justice Kennedy noted for the Court in *Bond*, "impermissible interference with state sovereignty is not within the enumerated powers of the National Government." *Id.*, at 2366.

This Court has not yet addressed that unassailable foundational principle in the context of the expansive application of the Endangered Species Act to wholly intrastate, non-commercial species. Shortly after *Lopez* was decided, for example, certiorari was denied in the *Home Builders* case involving the Delhi Sands Flower-Loving Fly (a non-commercial species located only in California), perhaps because the fact that the two judges forming the panel majority disagreed on the rationale for their holding indicated that further percolation of the issue would be help-

ful. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997) (Henderson, J., concurring) ("I agree with Judge Wald's conclusion . . . [but] I cannot . . . agree entirely with either of her grounds for reaching the result"), *cert. denied*, 524 U.S. 937 (1998). Certiorari was also denied in another case from the same Circuit, addressing the Arroyo Toad (also a non-commercial species located in California) despite strong dissents from the denial of rehearing en banc by Judge David Sentelle and then-Judge John Roberts respectively noting the panel's "divergence from contemporary Supreme Court Commerce Clause jurisprudence" with an approach that "seems inconsistent with the Supreme Court's holdings" in *Lopez* and *Morrison*. *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1158, 1160 (D.C. Cir. 2003), *denying reh'g in* 323 F.3d 1062, *cert. denied*, 540 U.S. 1218 (2004).

Certiorari was similarly denied in a Fifth Circuit case involving Texas cave bugs, despite an equally strong opinion from Judge Edith Jones, joined by Judges Grady Jolly, Jerry Smith, Harold DeMoss, Edith Brown Clement, and Charles Pickering, dissenting from the Fifth Circuit's denial of rehearing en banc in that case, in which Judge Jones noted that the "panel's 'interdependent web' analysis of the Endangered Species Act" was "no more than the 'but-for-causal chain' approach twice rejected . . . in *Lopez* and *Morrison*" and, indeed, "gives . . . subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in M*orrison*." *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 287, 292 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc), *denying reh'g in* 326 F.3d 622 (2003), *cert. denied*, 545 U.S. 1114

(2005).

Most recently, certiorari was denied in a case out of the Eleventh Circuit involving the Alabama sturgeon, another wholly interstate, non-commercial species. *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008). *Cf. Gibbs v. Babbitt*, 214 F.3d 483, 506-07 (4th Cir. 2000) (Luttig, J., dissenting) (noting that the Fourth Circuit's decision upholding the Endangered Species Act in the somewhat analogous context of the "take" of red wolves on private property for protection rather than commercial purposes was "not even arguably sustainable under *Lopez* [and] *Morrison*"), *cert. denied*, 531 U.S. 1145 (2001).

Granted, the expansive application of the Endangered Species Act to wholly intrastate, non-commercial species was upheld in each of these cases, but they did so with conflicting rationales. In his opinion dissenting from the denial of the petition for rehearing *en banc* in *Rancho Viejo*, for example, Judge Sentelle noted that the reasoning upon which the D.C. Circuit grounded its ruling was "conspicuously in conflict" with the reasoning of the Fifth Circuit in *GDF Realty*. *See Rancho Viejo*, 334 F.3d, at 1159 (Sentelle, J., dissenting from denial of petition for rehearing *en banc*). The Ninth Circuit's decision below adds yet another dimension to the theory split, focusing not on whether the entity challenging the regulation is itself an economic actor, as the D.C. Circuit did in *NAHB*, or the circle-of-life interrelatedness of all species, as the Fifth Circuit did in *GDF Realty,* but on whether the regulation itself causes a substantial effect on commerce.

Indeed, the lower courts appear to be floundering in search of an argument that would allow them to uphold the expansive applications of the Endangered Species Act at issue in these cases consistently with this Court's Commerce Clause jurisprudence. With the Courts of Appeal from the D.C., Fifth, Eleventh, and now the Ninth Circuits having addressed the issue, with the Fourth Circuit having addressed the issue in an analogous context, and with thorough dissenting opinions from then-Judges Roberts and Luttig, Judge Sentelle, and Judge Jones joined by nearly half of the Fifth Circuit's en banc bench, all challenging the holdings' consistency with this Court's Commerce Clause jurisprudence, there has probably been more than enough percolation on this significant issue for certiorari to be fully warranted at this time.

II. The Expansive Application of the Endangered Species Act to Wholly Intrastate, Non-Commercial Species Intrudes on Core Police Powers Reserved to the States.

The facts of this case also cause us to recall that the protection of the health, safety, and welfare of the people—the traditional definition of the police power—is a power reserved to the States. *See*, *e.g.*, *South Covington & C. St. R. Co. v. City of Covington*, 235 U.S. 537, 546 (1915). As importantly, the exercise of that power often requires a careful balancing of competing concerns, a balancing that is best left to the people and governments who will most directly bear the consequences of the decision. *See*, *e.g.*, *Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago*, 107 U.S. 678 (1883) (noting that the police power "can generally be exercised more wisely by the

states than by a distant authority").

Here, the preservation of some non-commercial minnow-size fish is pitted against the water needs of California, the agriculture of the State's central valley that relies on that water, the livelihoods of countless individual engaged in those agricultural efforts, and even other ecosystems effected by the overzealous application of federal law.

California law already lists the delta smelt as endangered, but it quite sensibly recognizes the competing concerns of agriculture and other areas impacted by species regulation. *See supra* note 2; *compare Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting [ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*"). Indeed, the California law demonstrates that the states are fully capable of protecting their own wholly intrastate species when, on balance with other legitimate concerns in the state, they deem it necessary. Given this Court's recent solicitude for the sovereignty of the States, *see*, *e.g.*, *Bond v. United States*, 131 S. Ct. 2355 (2011); *Medellin v. Texas,* 552 U.S. 491 (2008); *Alden* v. *Maine*, 527 U.S. 706 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999); *Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), it would be odd indeed if Congress could intrude upon the powers reserved to the States, and hence on state sovereignty, in the much more substantial way presented by the expansion of the Endangered Species Act at issue here.

That does not mean that without comprehensive and expansive federal regulation, a State, through the exercise of its police powers, could immunize actions that have a detrimental effect in other states. As this Court recognized in *Raich,* the regulation of species in which there is an interstate commercial trade would still be valid. *Gonzales v. Raich*, 545 U.S. 1, 26 (2005) (citing the Eagle Protection Act, 16 U.S.C. § 668). For potential spillover effects from hypothetically lax regulation of wholly intrastate species, traditional tort and nuisance law remains available. *See, e.g.*, *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840 (4th Cir. 1999), *aff'd sub nom, United States* v. *Morrison*, 529 U.S. 598 (2000); *Missouri* v. *Illinois*, 180 U.S. 208 (1901).

Even for species that migrate between two or more States, the States remain free to enter into agreements to regulate species takes to their mutual benefit. *See*, *e.g.*, *Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1893) (describing an agreement to drain a malarial district on the border between two States as an example of an interstate agreement that could "in no respect concern the United States"). And on the chance that such an agreement might be made to the detriment of other states, the Congressional consent requirement of the Compacts Clause of Article I, Section 10 provides a sufficient check. U.S. Const. Art. I, Sec. 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power"); *see also West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. . . . [I]t is also a means of safeguarding the

national interest").

In short, there is as little need for federal regulation here as there is constitutional authority. That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of California provides no constitutional title for them to do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are almost exclusively borne by the people of California. Our Constitution leaves such decisions to the States for good reason. The bootstrap reasoning of the federal government and the Court of Appeals below should not be allowed to alter that fundamental constitutional structure.

III. This Court Should Grant the Writ of Certiorari in order to repudiate the aggregation principle of *Wickard* v. *Filburn*, thereby removing from Congress and the regulatory agencies the remotely colorable claim to unconstitutional assertions of power that it provides.

More fundamentally, the decision by the Court of Appeals below demonstrates just how pernicious the substantial effects test discussed in *Lopez* really is. Standing alone, the substantial effects test essentially converts the Necessary and Proper Clause from a means clause to an ends clause, and therefore renders it constitutionally suspect. *See Lopez*, 514 U.S., at 584-85 (Thomas, J., concurring); *M'Culloch*, 17 U.S. (4 Wheat.), at 423; *Carter Coal*, 298 U.S., at 317 (Hughes, C.J., separate opinion). But when combined with the aggregation principle from *Wickard* v. *Filburn*, 317 U.S. 111, 127-28 (1942), there is absolutely nothing over which clever lawyers and bu-

reaucrats in federal regulatory agencies cannot stake some claim of regulatory power, as this case and the similar cases from the D.C., Fifth, and Eleventh Circuits amply demonstrate.

Striking down the expanded interpretation of the Endangered Species Act at issue here is not enough. *Lopez* has been on the books for more than fifteen years, yet federal agencies have persisted in asserting jurisdiction where, under any reasonable reading of *Lopez*, they have none. The potential for unlimited and abusive assertions of power is the reason that many constitutional scholars over the past half century—both those who favor and those who oppose the resulting expansion in federal powers—have criticized *Wickard* as extra-constitutional. *See, e.g.,* R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN 148-51 (1987); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 56-57 (1990) (explaining that *Wickard* "abandoned" aspects of the Constitution that defined and limited national power); R. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 139 (1992) (contending that *Wickard* was a "manifestly erroneous" decision that left "no conceivable stopping point for the federal commerce power"); L. Graglia, *United States v. Lopez: Judicial Review Under The Commerce Clause*, 74 TEX. L. REV. 719, 745 (1996) (referring to *Wickard* as a "notorious" decision); C. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253 & n.18 (1996) (describing *Wickard* as a "repudiation" of the original Constitution that gave the national government "something close to general police powers"); B. Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 322, 324 (1992) (describing *Wickard* as a

"wrenching break with the constitutional past," ringing the "death-knell for traditional notions of limited national government"); *cf*. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. 1, p. 831 n.29 (3d ed. 2000) (describing hypothetical "sham" legislation that could result from the combination of the substantial effects test and the aggregation principle); G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 191 (13th ed. 1997) (suggesting that *Wickard* "in effect abandon[ed] all judicial concern with federalism-related limits on congressional power"). The expansion of federal power that has followed on the *Wickard* decision and the concomitant retraction of liberty, not just in this arena but in numerous others, suggest that the time is long overdue for a reversal of that decision. *See Lopez*, 514 U.S., at 585 (Thomas, J., concurring). Although the decision below cannot be sustained even under *Wickard,* it demonstrates just have far the expansive enterprise launched by *Wickard* has gone. Nothing short of a full repudiation of that decision will suffice to rebuild the limits of the Commerce Clause and to reign in a federal government that continues to believe that the Constitution sets no bounds on its power.

CONCLUSION

Certiorari is necessary here to address fundamental elements of this Court's Commerce Clause analysis, in the specific context of whether Congress has the authority to regulate wholly intrastate, noncommercial species, substituting its police power judgments for those of the States. Accordingly, this Court should grant the petition and issue a writ of certiorari.

Respectfully submitted,

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DATED: July 25, 2011