No. 07-364

In the Supreme Court of the United States

ALABAMA-TOMBIGBEE RIVERS COALITION, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the listing of the Alabama sturgeon as an endangered species pursuant to Section 4 of the Endangered Species Act of 1973, 16 U.S.C. 1533 (2000 & Supp. V 2005), was a permissible exercise of federal authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A49) is reported at 477 F.3d 1250. A prior opinion of the court of appeals (Pet. App. C1-C21) is reported at 338 F.3d 1244. The opinion of the district court (Pet. App. B1-B25) is unreported. A prior opinion of the district court (Pet. App. D1-D35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2007. A petition for rehearing was denied on May 3, 2007 (Pet App. E1-E2). On July 17, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including Septem-

ber 14, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 5, 2000, the Fish and Wildlife Service (FWS) listed the Alabama sturgeon as an "endangered species" pursuant to Section 4 of the Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1533 (2000 & Supp. V 2005). Pet. App. A3. Petitioners brought various challenges to the listing decision, alleging, inter alia, that the listing of the species exceeded the federal government's authority under the Commerce Clause and was therefore unconstitutional. *Id.* at A38. The district court dismissed the suit for lack of standing, *id.* at D1-D35, but the court of appeals reversed and remanded for further proceedings, *id.* at C1-C21. On remand, the district court granted the government's motion for summary judgment with respect to the claim at issue in this Court. *Id.* at B1-B25. The court of appeals affirmed. *Id.* at A1-A49.

1. Congress enacted the ESA to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). Section 4 of the ESA directs the Secretaries of Commerce and the Interior to list threatened and endangered species and to designate their critical habitats. See 16 U.S.C. 1533 (2000 & Supp. V 2005).[1] The FWS implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. See 50

[1] An "endangered species" is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A "threatened species" is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

C.F.R. 17.11, 402.01(b). The National Marine Fisheries Service (NMFS) administers the Act with respect to species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.101(a), 223.102.

After a species has been listed as endangered or threatened, the ESA imposes various restrictions on governmental and private conduct that might affect the species. Section 7(a)(1) of the Act provides that "[t]he Secretary [of Commerce or the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter," and that "[a]ll other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes 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); see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2526 (2007).

Section 9(a)(1)(B) of the ESA, which applies to private as well as governmental actors, generally 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). The ESA defines the term "take" to mean "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 50 C.F.R. 17.3; *Babbitt* v. *Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 696-708 (1995) (uphold-

ing regulatory definition of "harm"). FWS and NMFS may authorize "incidental takes" of listed species under certain circumstances, see 16 U.S.C. 1536(b)(4)(C)(i)-(iv); 16 U.S.C. 1539(a)(2)(B)(i)-(v), and any take of a listed species consistent with such authorization does not violate Section 9, see 16 U.S.C. 1539(a)(1)(B).

2. The Alabama sturgeon is a freshwater fish that grows to about 31 inches in length and two to four pounds in weight. See 65 Fed. Reg. 26,438 (2000). Its range formerly included approximately 1000 miles of the Mobile River system in Alabama, and the fish was once so common that it was captured commercially. *Id.* at 26,439. By the year 2000, however, the Alabama sturgeon was known to inhabit only about 15% of its earlier range, and it was known to survive only in a 134-mile portion of the Alabama River channel. *Id.* at 26,441. The marked decline in population and range of the Alabama sturgeon is due primarily to over-fishing, development of the rivers of the Mobile River Basin for navigation and power production, and water-quality degradation. *Id.* at 26,438, 26,441. On May 5, 2000, the FWS listed the Alabama sturgeon as an endangered species. *Id.* at 26,438; see Pet. App. A3.

3. Petitioners filed suit in federal district court, asserting a variety of statutory and constitutional challenges to the FWS's listing of the Alabama sturgeon. See Pet. App. B2-B3 (summarizing petitioners' claims). Petitioners contended, inter alia, that the listing decision "was not within the powers granted to Congress by the Constitution under the Commerce Clause." *Id.* at B2. The district court dismissed the suit for lack of standing. *Id.* at D1-D35.

The court of appeals reversed and remanded for further proceedings. Pet. App. C1-C21. In holding that pe-

titioners had standing to sue, the court of appeals noted that the members of petitioner Alabama-Tombigbee Rivers Coalition "operate their businesses subject to federal licenses and permits," and that "portions of the members' licensed or permitted activities take place in historical Alabama sturgeon habitat." *Id.* at C16. The court found it "reasonable to infer from the Coalition's evidence that its members have settled expectations with respect to the viability of their businesses," and it stated that "[t]he listing [of the Alabama sturgeon] adds another layer of concrete economic considerations that may be in tension with the members' pre-listing assumptions." *Ibid.* The court emphasized in particular "the possibility of the Coalition's members running afoul of the [ESA's] 'take' prohibition if they or acting agencies fail to consider the Alabama sturgeon at all with respect to their activities in its historical habitat." *Id.* at C19.

On remand, the district court granted the government's motion for summary judgment on petitioners' challenges to the listing of the Alabama sturgeon. Pet. App. B1-B25.[2] In rejecting petitioners' contention that the listing exceeded Congress's Commerce Clause authority, the district court explained that three courts of appeals had sustained the ESA's application to "intrastate, noncommercial species." *Id.* at B13; see *id.* at B8-B14. The court concluded that "[t]he listing of a purely

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[2] The district court agreed with petitioners that the FWS had breached its obligation under 16 U.S.C. 1533(a)(3)(A) (Supp. V 2005) to designate critical habitat for the Alabama sturgeon. See Pet. App. B23-B25. The court directed the FWS "to publish a proposed critical habitat determination for the Alabama Sturgeon no later than six months following the issuance of the [court's] order and a final determination no later than one year following the issuance of the order." *Id.* at B25. That aspect of the district court's decision is not before this Court.

intrastate, noncommercial species under the ESA does not violate the Commerce Clause because 'the "incalculable" value of the genetic heritage that might be lost absent regulation' would undoubtedly harm interstate commerce in a permanent and irreparable way." *Id.* at B14 (quoting *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 639 (5th Cir. 2003), cert. denied, 545 U.S. 1114 (2005) (*GDF Realty*)).

4. The court of appeals affirmed. Pet. App. A1-A49. In rejecting petitioners' contention that the listing of the Alabama sturgeon exceeded Congress's power under the Commerce Clause, see *id.* at A38-A49, the court agreed with the holdings of three other circuits that the ESA "is a general regulatory statute bearing a substantial relation to commerce," *id.* at A41. The court explained that, in the aggregate, protection of listed species has a variety of substantial economic effects, *id.* at A41-A43, and that "[t]he decision to list a species as endangered or threatened is a necessary precondition to the protection afforded species under the Act," *id.* at A44.

The court of appeals also rejected petitioners' contention that, because the Alabama sturgeon is "a purely intrastate species" with no "demonstrated commercial value," the ESA is unconstitutional as applied to the particular listing decision at issue here. Pet. App. A44; see *id.* at A44-A49. The court explained that even species located within a single State may be found to have significant economic value or unanticipated importance to the larger ecosystem. See *id.* at A44-A46. The court also noted that the Alabama sturgeon "was once harvested commercially," and that the ESA's protections "may one day allow the replenishment of its numbers and eventual, controlled, commercial exploitation of the

fish." *Id.* at A46. The court concluded that here, as in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), "Congress had a rational basis for believing that regulation of an intrastate activity was an essential part of a larger regulation of economic activity." Pet. App. A49.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The exercise of federal power that petitioners challenge in this case is not the regulation of private conduct *per se*, but rather the FWS's decision to *list* the Alabama sturgeon as an endangered species. See, *e.g.*, Pet. 5, 22, 23, 24, 25, 29. Similarly in the court of appeals, petitioners contended "that the Final Rule [listing the Alabama sturgeon] should be vacated because Congress has exceeded the power granted to it under the Commerce Clause." Pet. App. A38. Petitioners' constitutional challenge to the listing decision lacks merit.

Under the ESA, listing of a species as endangered or threatened triggers an array of legal protections. In addition to the "take" prohibition contained in Section 9, 16 U.S.C. 1538, listing of a new species implicates the duty of federal agencies to carry out appropriate conservation programs, see 16 U.S.C. 1536(a)(1), and to "insure" that agency actions are "not likely to jeopardize the continued existence of" the newly-listed species, see 16 U.S.C. 1536(a)(2). Quite apart from its powers under the Commerce Clause, Congress has ample constitutional authority to direct Executive Branch agencies to conduct their *own* activities in ways that are protective of listed species. See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 1

(Congress has power to spend money to "provide for the * * * general Welfare of the United States."); *id.* Art. IV, § 3, Cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). The remedy that petitioners seek—vacatur of the FWS's decision to list the Alabama sturgeon as an endangered species—would frustrate Congress's effort to ensure that the government's own conduct is adequately protective of species meeting the statutory listing criteria.

As we explain below (see pp. 9-16, *infra*), the ESA's restrictions on private conduct are constitutional on their face and as applied to the activities in which petitioners and their members propose to engage. But even if petitioners could demonstrate that particular ESA provisions are unconstitutional as applied to their own conduct, there would be no basis for setting aside the FWS's decision to list the Alabama sturgeon as endangered. The specific agency action that petitioners challenge is therefore constitutional under any plausible conception of Congress's powers. That fact is an independently sufficient basis for this Court to deny the petition for a writ of certiorari.[3]

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[3] In opposing petitioners' motion for summary judgment in the district court, the government contended that petitioners' challenge to the listing decision was misdirected because, independent of its Commerce Clause authority to regulate private conduct that may harm listed species, Congress has power to regulate the federal government's own operations. In support of that contention, the government cited, inter alia, Article I, Section 8, Clause 14 of the United States Constitution, which authorizes Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." The government subsequently withdrew that argument. But even though the argument at pp. 7-8, *supra*, was not preserved in the courts below, it provides an

2. Even if petitioners had directed their challenge at the ESA's application to their own conduct, their claim would not warrant this Court's review. Petitioners do not describe the conduct in which they and their members wish to engage. The record in this case makes clear, however, that federal regulation of petitioners' own activities is well within Congress's authority.

The complaint in this case alleged that petitioner Alabama-Tombigbee Rivers Coalition and its members

> have direct and substantial interests in the listing of the Alabama sturgeon because, among other reasons, one or more of them (i) own and operate dams on Alabama rivers and rely on and require, in conjunction with such ownership and operations, the ability to regulate the stream flow of those rivers; (ii) navigate the Alabama waterways, as part of their business operations, and rely on and require the continuing ability of the United States [Army] Corps of Engineers to dredge and maintain navigable channels in such rivers; (iii) discharge effluent to Alabama rivers and, therefore, rely on and require the continuing ability of the Environmental Protection Agency and the Alabama Department of Environmental Management to continue to issue discharge permits; and (iv) withdraw water from Alabama rivers as an integral component of their industries and rely on and require the continuing ability to do so.

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independent ground for affirmance of the Eleventh Circuit's judgment. In addition, petitioner's focus throughout this litigation on the FWS's listing decision makes this case an unsuitable vehicle for addressing the constitutionality of Section 9 of the ESA, 16 U.S.C. 1538, which directly addresses private conduct.

Compl. para. 5. Petitioners' affidavits in support of their claim of standing likewise emphasized the potential impact of the challenged listing decision on their commercial activities. See Pet. App. C7-C10. In holding that petitioners had standing to sue, the court of appeals explained that "Coalition members operate their businesses subject to federal licenses and permits"; that "portions of the members' licensed or permitted activities take place in historical Alabama sturgeon habitat"; and that the listing of the Alabama sturgeon "adds another layer of concrete economic considerations that may be in tension with the members' pre-listing assumptions." *Id.* at C16.

Thus, if petitioners had challenged the application of the ESA's "take" prohibition to their own conduct, the commercial character of their activities would have rendered their suit readily distinguishable from *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), and would have compelled rejection of their constitutional claim. Compare *Morrison*, 529 U.S. at 611 (explaining that, in those two cases, "neither the actors nor their conduct ha[d] a commercial character") (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)). The susceptibility of petitioners' conduct to federal regulation is particularly clear because the activities in question are conducted on, and directly affect, navigable waters within the United States. See *Lopez*, 514 U.S. at 558 (identifying, as one of the "three broad categories of activity that Congress may regulate under its commerce power," the "use of the channels of interstate commerce"). In holding that petitioners had standing to sue, the court of appeals observed that "Coalition members operate their businesses subject to federal licenses and permits."

Pet. App. C16. The fact that petitioners' operations are subject to other, uncontested federal permitting regimes reinforces the conclusion that those operations are not beyond the reach of federal control.

Petitioners could not avoid the ESA's application to their own conduct by arguing that the statutory prohibition on "takes" of Alabama sturgeon would be unconstitutional as applied to hypothetical non-commercial activities. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). In *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004) (*Rancho Viejo*), the court of appeals applied that principle to the ESA, holding that Section 9 of the Act was constitutional as applied to a commercial development project that caused "takes" of listed species, while declining to address the developer's contention that the provision would be unconstitutional as applied to non-commercial conduct. *Id*. at 1077-1078; cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (holding that 18 U.S.C. 666(a)(1)(B) is constitutional as applied to a bribery offense that threatens the integrity of the relevant federal program, and affirming the defendant's conviction on that basis, without addressing the constitutionality of other potential applications of the statute).[4]

[4] The ESA contains an express congressional finding 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.

Consideration of petitioners' own conduct is especially appropriate because petitioners have not sought facial invalidation of the "take" prohibition or of any other ESA provision, but have instead limited their challenge to the listing of a single species. Petitioners emphasize that the Alabama sturgeon "is found in only one state and has no commercial use." Pet. 29. In light of petitioners' decision to frame their suit as an as-applied challenge, it is particularly appropriate for this Court to take into account the nature of petitioners' own activities, which are commercial in character and occur on navigable waters within the United States. See *Rancho Viejo*, 323 F.3d at 1077 (explaining that the plaintiff developer's effort to limit the court's inquiry to a single listed species allegedly lacking in commercial value, without reference to the commercial nature of the developer's own activities, was "simply the plaintiff's attempt to have its cake and eat it too").[5]

1531(a)(1). And, as an empirical matter, it appears to be undisputed that "the majority of takes would result from economic activity." *GDF Realty*, 326 F.3d at 639; see *Rancho Viejo*, 323 F.3d at 1078 (endorsing the government's representation that "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities"). Facial invalidation of the "take" prohibition based on its potential applicability to non-commercial conduct would be particularly inappropriate in light of the consistently commercial nature of the activities to which the provision has actually been applied. Compare *United States* v. *Raines*, 362 U.S. 17, 23 (1960) (suggesting that facial invalidation may be appropriate where a statute is "unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover").

[5] Even if the as-applied inquiry appropriately focused on the Alabama sturgeon itself, rather than on the human activities that the FWS's listing decision may impact, petitioners' constitutional challenge

3. For the foregoing reasons, petitioners are wrong in arguing that the ESA's application to the Alabama sturgeon involves purely non-commercial conduct. Even if that characterization were correct, however, petitioners' constitutional challenge would lack merit.

a. As the court of appeals explained, the international market in illegally taken wildlife is estimated at between $5 billion and $8 billion annually. Pet. App. A41-A42. The court of appeals also noted the FWS's estimate that Americans pay $200 million annually for illegally taken domestic wildlife and $1 billion annually for wildlife taken abroad. *Id.* at A42. Consistent with the rulings of other courts of appeals, the Eleventh Circuit correctly concluded that the ESA "is a general regulatory statute bearing a substantial relation to commerce." *Id.* at A41; 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

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would lack merit. The Alabama sturgeon was formerly harvested for commercial purposes, see 65 Fed. Reg. at 26,439 (explaining that "the 1898 commercial catch [of Alabama sturgeon] consisted of approximately 20,000 fish"), and the ESA's protections "may one day allow the replenishment of its numbers and eventual, controlled, commercial exploitation of the fish," Pet. App. A46. See S. Rep. No. 526, 91st Cong., 1st Sess. 3 (1969) (explaining that the protection of an endangered species "may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed," so that "businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels"); pp. 15-16, *infra*. In addition, the habitat of the Alabama sturgeon is located entirely within navigable waters. See 65 Fed. Reg. at 26,441 (stating that "the species is known to survive only in the Alabama River channel below Millers Ferry Lock and Dam"). Those facts make the Alabama sturgeon a particularly unlikely candidate for a species that is beyond the reach of federal protection.

effect"); *Gibbs* v. *Babbitt*, 214 F.3d 483, 496 (4th Cir. 2000) ("Given the existing economic and commercial activity involving * * * wildlife generally, Congress could find that conservation of endangered species and economic growth are mutually reinforcing."), cert. denied, 531 U.S. 1145 (2001).

As the court of appeals explained, moreover, the potential economic significance of endangered species extends well beyond commercial traffic in wildlife. See Pet. App. A42-A44. The court observed that "[n]ine of the ten most commonly used prescription drugs in the United States are derived from natural plant products," *id.* at A42; that "[g]enetic diversity is also important to improving agriculture and aquaculture," *ibid.*; and that "[a] species' simple presence in its natural habitat may stimulate commerce by encouraging fishing, hunting, and tourism," *id.* at A43. In the aggregate, protection of listed species therefore can be expected to produce substantial economic benefits.

b. Petitioners do not contest the overall economic significance of the protections that the ESA provides to listed species generally. Rather, they contend that the Act is unconstitutional as applied to the Alabama sturgeon because that fish is "found in only one state and has no commercial use." Pet. 29. This Court's analysis in *Raich* is equally apposite here:

> [Petitioners] ask [the Court] to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that where 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.

545 U.S. at 23 (citations, brackets, and internal quotation marks omitted). Under *Raich*, the ESA's application to intrastate species having no current commercial use must be sustained if Congress had a "rational basis" (*id.* at 22) for concluding that the exclusion of such species from the Act's protections would significantly impair Congress's ability to achieve its commerce-related objectives.

As the court of appeals explained, see Pet. App. A44-A49, Congress had sound reasons for declining to limit the ESA's coverage in the manner that petitioners advocate. Some listed species (including the Alabama sturgeon) were once commercially exploited, and the protections of the Act may regenerate such species to the point that commercial uses again become feasible. See *id.* at A46; note 5, *supra*; *Gibbs*, 214 F.3d at 496 (explaining that protection of the endangered red wolf could lead to a restoration of the trade in red wolf pelts if the species' numbers increased); *United States* v. *Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996) (upholding the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, and explaining that "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity").[6] Ex-

[6] As this Court has recognized, Congress may act to protect assets that were previously used in interstate commerce, but presently are not, on the theory that such protection may facilitate future commercial activity. In *Preseault* v. *ICC*, 494 U.S. 1 (1990), this Court upheld the National Trails System Act, 16 U.S.C. 1241 *et seq.*, which provided for conversion of unused railroad lines to trails in order to preserve the right-of-ways for possible reconversion to railroad purposes, as a valid exercise of Commerce Clause authority. The Court explained that Con-

cluding species with no *current* commercial uses from the ESA's protections would substantially frustrate that endeavor. When it enacted the ESA, moreover, "Congress was concerned with 'the *unknown* uses that endangered species might have.'" Pet. App. A44 (emphasis added) (quoting *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978)). "Because Congress could not anticipate which species might have undiscovered scientific and economic value, it made sense to protect all those species that are endangered." *Id.* at A45.

4. The courts of appeals that have considered the question have uniformly sustained the constitutionality of the "take" prohibition contained in Section 9 of the ESA. See *GDF Realty*, 326 F.3d at 627-641; *Rancho Viejo*, 323 F.3d at 1066-1080; *Gibbs*, 214 F.3d at 490-506.[7] As petitioners acknowledge (Pet. 9), this Court has repeatedly denied review of those holdings. Because the courts of appeals have uniformly rejected Commerce Clause attacks on the ESA, because petitioners' constitutional challenge to the *listing* of the Ala-

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gress could rationally conclude "that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable." *Preseault,* 494 U.S. at 19.

[7] Although petitioners do not contend that any court has invalidated Section 9 or any other ESA provision, either on its face or as applied, they note that the Fifth Circuit in *GDF Realty* and the District of Columbia Circuit in *Rancho Viejo* relied on different rationales in sustaining the ESA against constitutional attack. Pet. 13. This Court, however, "reviews judgments, not statements in opinions." *E.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see also *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827). The Court denied petitions for certiorari in both *GDF Realty* and *Rancho Viejo*, and there is no reason for a different result here.

bama sturgeon is insubstantial (see pp. 7-8, *supra*), and because petitioners' own conduct is commercial in character and occurs on navigable waters (see pp. 9-11, *supra*), review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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