No. 00-844

In the Supreme Court of the United States

CHARLES GILBERT GIBBS, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether restrictions on the taking of endangered red wolves, imposed pursuant to Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1), and implementing regulations, are a permissible exercise of Congress's authority under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 214 F.3d 483. The opinion of the district court (Pet. App. 58a-69a) is reported at 31 F. Supp. 2d 531.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2000. A petition for rehearing was denied on August 25, 2000 (Pet. App. 56a-57a). The petition for a writ of certiorari was filed on November 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish or wildlife determined to be endangered or threatened. Administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service (NMFS) in the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b).

The ESA authorizes the Secretary of the Interior or of Commerce to list domestic or foreign species as endangered or threatened. 16 U.S.C. 1533(a).[1] Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires all federal agencies to avoid actions that are likely to "jeopardize the continued existence of any endangered species" and to consult with either FWS or NMFS on fulfilling these obligations. Section 9(a)(1) of the Act, 16 U.S.C. 1538(a)(1), prohibits takings of endangered species by all persons who do not have a permit or other authorization. Under the ESA, the term "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19); see also 50 C.F.R. 17.3 (definition of "harass"); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (upholding regulation defining "harm" for purposes of "take" prohibition).

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[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).

Under Section 10(j)(2)(A) of the ESA, FWS is authorized to introduce an "experimental population" of a listed species outside the species' current range, if the agency determines that such a release would further the conservation of the species. 16 U.S.C. 1539(j)(2)(A). Congress added Section 10(j) to the ESA in 1982 in response to testimony by fish and wildlife agencies that political opposition had frequently frustrated the reintroduction of species that might create conflicts with human activities. The House Report explained:

> Another shortcoming of the Act is its tendency to discourage voluntary introduction of species in areas of their historical range. State fish and wildlife agencies had probed the feasibility of introducing such experimental populations, but they feared political opposition to reintroducing species unless some assurances were simultaneously extended to prevent the creation of Endangered Species Act problems. In order to mitigate fears expressed by industry that such experimental populations would halt development projects, the Committee defined what an experimental population is and how it shall be treated under the Act.

H.R. Rep. No. 567, 97th Cong., 2d Sess. Pt. 1, at 17 (1982) (1982 House Report). Congress specifically identified the reintroduction of red wolves as the kind of recovery program that it intended to benefit by the enactment of Section 10(j):

> The Committee also expects that, where appropriate, the [experimental population] regulations could allow for the directed taking of experimental populations. For example, the release of experimental populations of predators, such as red wolves, could allow for the taking of these animals if depredations

> occur or if the release of these populations will continue to be frustrated by public opposition.

Id. at 34.

In order to increase FWS's flexibility and discretion in managing reintroduced endangered species, Section 10(j)(2)(C) provides that members of an experimental population are to be treated as "threatened." 16 U.S.C. 1539(j)(2)(C). Treatment of the species as "threatened" rather than "endangered" allows FWS the discretion to determine which of the Section 9(a)(1) prohibitions shall apply. See 16 U.S.C. 1539(j)(2)(C), 1533(d).[2]

As the 1982 House Report explained, Congress assigned to FWS the authority to promulgate regulations governing takings of reintroduced experimental populations in order to

> provide a vehicle for the development of special regulations for each experimental population that will address the particular needs of that population. Each experimental population is to be treated as a threatened species under the Act which grants the Secretary broad flexibility in promulgating regulations to protect such species. These regulations can even allow the taking of threatened animals. The Committee fully expects that there will be instances

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[2] The ESA further requires that before designating any population as "experimental," FWS must make a determination as to whether the population is "essential" to the continued existence of a threatened or endangered species. 16 U.S.C. 1539(j)(2)(B). If FWS finds that the individuals are "nonessential" to the continued existence of the species in question, additional management flexibility is permitted, since nonessential experimental individuals located outside national wildlife refuges or national park lands are exempt from some of the consultation requirements of Section 7 of the ESA, 16 U.S.C. 1536. 16 U.S.C. 1539(j)(2)(C).

> where the regulations allow for the incidental take of experimental populations, such as the inadvertent taking of experimental fish species by those fishing for other species in the same body of water.

1982 House Report 34.

2. The red wolf, *Canis rufus*, was once abundant throughout the southeastern United States, from the Atlantic coastal States westward to central Texas and Oklahoma and from the Gulf of Mexico northward to Missouri and Illinois. 51 Fed. Reg. 41,791 (1986). The available evidence suggests that the red wolf was "common in the vast pristine bottomland riverine habitats of the southeast, and especially numerous in and adjacent to the extensive 'canebrakes' that occurred in these habitats." *Ibid.* The dramatic reduction in the red wolf's numbers is directly attributable to the human-induced changes to the southeastern landscape caused by such activities as dam construction (which inundated prime habitat), the drainage of wetland areas for agricultural purposes, and the killing of wolves both by private individuals and by state and federal officials. *Ibid.*

The red wolf was listed as an endangered species in 1967, see 32 Fed. Reg. 4001, and is currently considered one of the most endangered mammals in North America, see C.A. App. 266. Until the reintroduction program that is the subject of this case, there had been no red wolves in the wild since the mid-1970s, when FWS was forced to round up the last remaining wild population in a desperate attempt to save the species from extinction. 51 Fed. Reg. 41,791 (1986). That small remnant population faced numerous threats, including disease, parasitism, and genetic inbreeding due to its precariously low numbers. *Ibid.* Immediately upon

rescuing those wolves, FWS began an intensive captive breeding program aimed at conserving the population's genetic vitality. The goal at the time was eventually to reintroduce individual wolves into the wild in an effort to establish new, self-sustaining populations. *Ibid.*

In 1986, FWS identified the 120,000 acre Alligator River National Wildlife Refuge in northeastern North Carolina as ideal habitat for a reintroduction of the red wolf to its historical range. The reintroduction efforts began in 1987 with the release of four pairs of captive wolves into the Refuge. C.A. App. 99, 192. Between 1987 and 1992, a total of 42 wolves were released in the Refuge. *Id.* at 192.

In 1993, the northeastern North Carolina population was expanded through the release of animals in the Pocosin Lakes National Wildlife Refuge. C.A. App. 193.[3] As of 1997, 72 captive-born red wolves had been released in northeastern North Carolina, with at least 135 pups born in the wild. See *id.* at 473-474. As of January 31, 1998, the total red wolf population in that area was estimated to be 77 (± 24%) animals. *Id.* at 489-491. The reintroduction area for that population is defined to include public and private land in Dare, Hyde, Tyrrell, Washington, and Beaufort Counties in North Carolina. 50 C.F.R. 17.84(c)(9)(i). In 1997, it was determined that over the course of the ten-year period

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[3] Beginning in 1991, a second reintroduction effort was initiated in the Great Smoky Mountains National Park, along the boundary between North Carolina and Tennessee. 56 Fed. Reg. 56,325 (1991). In 1998, that reintroduction program was terminated for a number of reasons, including an inadequate prey base within the Park and a concern that the wolves might interbreed with coyotes. Accordingly, the red wolves in the Park have been captured and relocated at several captive-breeding facilities. 63 Fed. Reg. 54,151 (1998).

that red wolves had been restored to northeastern North Carolina, there had been only 27 complaints involving red wolves in the area, of which only seven involved possible red wolf depredation. C.A. App. 474. As a result of FWS's conservation efforts, the total red wolf population increased from 75 captive animals in 1985 to a total 1997 population of between 251 and 334 animals, of which 195 were captive and the remainder wild. *Id.* at 99, 473.

Pursuant to Section 4(d) of the ESA, 16 U.S.C. 1533(d), FWS has promulgated special regulations governing those reintroduced populations. 50 C.F.R. 17.84(c). Under those regulations, the taking of red wolves is permitted on property owned or managed by any local, state, or federal governmental body if "such taking is incidental to lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person's own life or the lives of others." 50 C.F.R. 17.84(c)(4)(ii). The taking of red wolves on private property is permitted if "such taking is not intentional or willful, or is in defense of that person's own life or the lives of others." 50 C.F.R. 17.84(c)(4)(i). Private landowners are also permitted to take red wolves "when the wolves are in the act of killing livestock or pets, *Provided* that freshly wounded or killed livestock or pets are evident." 50 C.F.R. 17.84(c)(4)(iii). A private landowner may also "harass red wolves found on his or her property * * *, *Provided* that all such harassment is by methods that are not lethal or physically injurious to the red wolf." 50 C.F.R. 17.84(c)(4)(iv). Finally, a private landowner may engage in conduct that would otherwise constitute a prohibited taking "after efforts by project personnel to capture such animals have been abandoned, *Provided* that the Service project leader or biologist has ap-

proved such actions in writing." 50 C.F.R. 17.84(c)(4)(v).

3. Petitioners are two counties and two private landowners in eastern North Carolina. They filed suit in federal district court, seeking a declaration that the restrictions on takings of red wolves in eastern North Carolina exceed Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Petitioners also sought an injunction against continued enforcement of those restrictions on non-federal land.

The district court granted the government's motion for summary judgment. Pet. App. 58a-69a. The court held that the protection of red wolves has a sufficient connection to interstate commerce to permit congressional regulation under the Commerce Clause. *Id.* at 63a-69a. The court explained:

> [The government] ha[s] demonstrated that tourists do cross state lines to see the red wolf, and that these tourists have an impact on commerce. [The government] ha[s] further demonstrated that red wolves are to be found in several States, and that some of the red wolves of Eastern North Carolina either have crossed state lines or may cross state lines in the future. All of these actions have economic consequences, as tourists, academics, and scientists follow the red wolves. Unrestricted taking of red wolves on private land would present a clear threat to this commerce.

Id. at 67a (footnotes omitted).

4. The court of appeals affirmed. Pet. App. 1a-55a. The court of appeals analyzed the case under the framework articulated by this Court in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000). The court held that the

challenged restrictions on the taking of red wolves are a constitutional exercise of Congress's power to regulate activities that "substantially affect interstate commerce." Pet. App. 14a (quoting *Lopez*, 514 U.S. at 559).

The court explained that "[t]he taking of red wolves implicates a variety of commercial activities and is closely connected to several interstate markets." Pet. App. 14a. It observed, as an initial matter, that "[t]he protection of commercial and economic assets is a primary reason for taking the wolves," since "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." *Id.* at 15a. The court found other connections to interstate commerce as well, explaining that "with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." *Id.* at 15a-16a. The court concluded that "[w]hile the taking of one red wolf on private land may not be 'substantial,' the takings of red wolves in the aggregate have a sufficient impact on interstate commerce" to satisfy constitutional requirements. *Id.* at 16a.

The court of appeals also found the challenged provisions to be consistent with traditional conceptions of the appropriate division between federal and state authority. The court explained that "[g]iven the history of federal regulation over wildlife and related environmental concerns, it is hard to imagine how this anti-taking regulation trespasses impermissibly upon traditional state functions—either control over wildlife or local land use." Pet. App. 33a. The court concluded that "[i]n contrast to gender-motivated violence or guns in school yards [at issue in *Morrison* and *Lopez*], the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation. The

federal government has been involved in a variety of conservation efforts since the beginning of this century." *Id.* at 33a-34a.

Judge Luttig dissented. Pet. App. 46a-55a. Relying principally on this Court's decisions in *Lopez* and *Morrison*, Judge Luttig concluded that the challenged restrictions on red wolf takings exceed Congress's power under the Commerce Clause. Judge Luttig explained that in his view, "[t]he killing of even all 41 of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court in *Lopez* and in *Morrison* to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all." *Id.* at 50a.

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. As petitioners acknowledge (Pet. 20), the courts of appeals have uniformly sustained the constitutionality of the prohibition on takings of listed species established by Section 9 of the ESA, 16 U.S.C. 1538. See Pet. App. 1a-46a (upholding restrictions on takings of red wolves); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding application of ESA Section 9 to the Delhi Sands Flower-Loving Fly), cert. denied, 524 U.S. 937 (1998). See also *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1997) (upholding the constitutionality of the Bald Eagle Protection Act); *Building Indus. Ass'n of Superior Cal.* v. *Babbitt*, 979 F. Supp. 893 (D.D.C. 1997) (upholding application of ESA Section 9 to fairy shrimp regu-

lation), appeal pending, No. 00-5143 (D.C. Cir.); *Palila* v. *Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979) (upholding the application of ESA Section 9 to Hawaiian bird species), aff'd, 639 F.2d 495 (9th Cir. 1981). Indeed, to our knowledge no court—either before or after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995)—has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause.[4]

2. The court of appeals correctly held that the challenged restrictions on takings of endangered red wolves have a sufficient connection to interstate commerce to support congressional regulation under the Commerce Clause.

a. Petitioners suggest (Pet. 14) that the challenged restrictions on red wolf takings are the product solely of "administrative regulations." That is incorrect. Section 9(a)(1) of the ESA, 16 U.S.C. 1538(a)(1), broadly prohibits takings of endangered species. Although FWS has promulgated regulations focusing specifically on the reintroduced red wolf population at issue here, the effect of those regulations is to *authorize* takings of red wolves in some circumstances where the ESA would otherwise proscribe such conduct. See Pet. App. 30a ("Without these special regulations, all red wolves would be subject to the absolute taking prohibition of

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[4] In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), decided shortly after *Lopez*, this Court held that the Secretary of the Interior had reasonably construed the term "harm," as used in the ESA's definition of "take," to include habitat modification that would kill or injure members of a listed species. No member of the Court suggested that the ESA, so construed, might exceed Congress's power under the Commerce Clause.

section 9(a), placing a much greater burden on the property owner."); 51 Fed. Reg. 41,792 (1986) (explaining that designation of the red wolves as an experimental population "enables the [FWS] to adopt a special rule which is less restrictive than the mandatory prohibitions covering endangered species"). Although petitioners have consistently characterized their suit as a challenge to the "red wolf regulation," that administrative rule does not subject them to any disability beyond those imposed by the Act itself. Petitioners' constitutional claim therefore necessarily depends on the proposition that Congress lacks power to enact the basic prohibition on takings of endangered species contained in Section 9(a)(1) of the ESA.

b. As the court of appeals correctly held, "[t]he taking of red wolves implicates a variety of commercial activities," Pet. App. 14a, and "the effect of the takings on these varied activities in combination qualifies as a substantial one," *id.* at 17a. First, the taking of red wolves is typically undertaken to protect commercial and economic assets, and the record in this case demonstrates that petitioners' primary concern has been the perceived threat posed by wolves to livestock. See C.A. App. 8 (complaint); *id.* at 422 (Hyde County resolution noting concerns regarding livestock); *id.* at 424 (similar Hyde County resolution); Pet. C.A. Br. 11 (noting concerns about "inadequate protection of humans and livestock"). The court of appeals therefore correctly found that "[t]he protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." Pet. App. 15a.

Second, the existing red wolf population is the subject of observation and study, both by tourists and by scientific researchers, that entail substantial interstate travel and commercial activity. The record in this case shows that tourists travel to North Carolina from throughout the country for "howling events" at the refuge. Pet. App. 17a; C.A. App. 793-839 ("howling" information and visitor logs); *id.* at 840 (list of red wolf program volunteers 1986-1998). As the court of appeals noted, a study by a Cornell University professor indicated that the red wolf program could result in a significant regional economic impact. Pet. App. 17a; see C.A. App. 633 (economic study). The court also explained that the "red wolf reintroduction program has already generated numerous scientific studies." Pet. App. 20a.

Third, the protection of existing red wolves preserves the possibility of a restored commerce in fur pelts. See Pet. App. 20a. The goal of the ESA is not simply to keep endangered species on the razor's edge between survival and extinction, but to assist in recovering the species to the point that it no longer requires extraordinary protection. See, *e.g.*, 16 U.S.C. 1533(f) (recovery plans); see generally Jason M. Patlis, *Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 Pub. Land & Resources L. Rev. 55, 56 (1996) (ESA "seeks not only to arrest the decline of those species on the brink of extinction, but to bring about their recovery so that they can assume their natural role in the ecosystem"). Although the ESA proscribes certain forms of interstate commerce (*e.g.*, the harvesting and sale of pelts) in an endangered species for so long as the species remains listed, the Act's protective measures may nevertheless serve, in the long term, to facilitate future

commerce in the species after recovery efforts are complete.[5] See *Palila*, 471 F. Supp. at 995 (explaining that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species"); cf. *Bramble*, 103 F.3d at 1481 (upholding the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, as a valid exercise of Commerce Clause authority, and observing that "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity," including "future commerce in eagles or their parts").

Finally, petitioners' demand for specific proof of the red wolf's near-term commercial importance ignores two central (and related) premises of the ESA: that individual species are part of an interdependent web, and that the significance of a particular species cannot always be easily determined at a given point in time. Section 9(a)(1)(B) of the ESA regulates takings of all species that have met the strict criteria for listing by FWS or NMFS as endangered or threatened. 16 U.S.C. 1538(a)(1)(B). "In the aggregate, * * * we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *National Ass'n of Home Builders*, 130 F.3d at 1053-1054 (opinion of Wald, J.). A focus on the aggregate commercial significance of all listed species is particularly appropriate in light of

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[5] As the court of appeals observed (Pet. App. 21a), the American alligator was once listed as an endangered species but has now recovered to the point at which a robust market in alligator hides exists. The potential for a restored commerce in red wolves is also plausible. Grey wolves in Minnesota are likely to be delisted soon; when that occurs, management will be returned to the State, which may choose to permit the hunting of its wolves. See *id.* at 40a.

(1) the difficulty of identifying *ex ante* the commercial potential of a particular species, and (2) the fact that extirpation of a species eliminates for all time the possibility of future commercial uses.

In resolving questions concerning the proper construction of the ESA, this Court has recognized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978). The Court in *TVA* v. *Hill* relied on the Act's legislative history, which emphasized the "*incalculable*" value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 4-5 (1973) (1973 House Report)). Precisely because extinction of an endangered species may have irremediable consequences that cannot readily be foreseen, the few remaining members of the species are appropriately regarded as a valuable national resource. As the court of appeals observed, "[i]t would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power." Pet. App. 28a.

3. Petitioners contend (Pet. 27-28) that the challenged restrictions on red wolf takings are not a valid exercise of federal authority because the "[r]egulation of wild animals * * * remains a matter of state concern that is outside the powers conferred on Congress." That claim is without merit.

"Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises

one of its enumerated constitutional powers." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (quoted at Pet. App. 31a); see *Missouri* v. *Holland*, 252 U.S. 416 (1920) (sustaining Migratory Bird Treaty Act against challenges that it exceeded Congress's treaty-making powers and infringed on powers reserved to the States under the Tenth Amendment); *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 281-282 (1977) (Congress has power under the Commerce Clause to regulate the taking of fish from state waters, thus preempting conflicting state laws). Thus, unlike the federal statutes struck down by this Court in *Lopez* and *Morrison*, the ESA's take prohibition does not "plow[] thoroughly new ground" or "represent[] a sharp break with the long-standing pattern" of federal regulation. *Lopez*, 514 U.S. at 563 (citation omitted). Rather, "[i]n contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation." Pet. App. 33a-34a; see *id.* at 33a-35a (discussing history of federal wildlife conservation efforts).

4. The court of appeals correctly recognized that protection of endangered species from takings on private land is essential to the achievement of the ESA's objectives. The court explained:

> If the federal government cannot regulate the taking of an endangered or threatened species on private land, its conservation and preservation efforts would be limited to only federal lands. A ruling to this effect would place in peril the entire federal regulatory scheme for wildlife and natural resource conservation.

Pet App. 42a. According to the General Accounting Office, in 1993 there were 781 species listed under the ESA, nearly three-quarters of which had more than 60% of their habitat on non-federal land. *Id.* at 38a; C.A. App. 1370. As the court of appeals explained, predecessors to the ESA enacted in 1966 and 1969 "initially targeted conservation efforts only on federal lands, but they met with limited success." Pet. App. 19a; see 1973 House Report 5 ("Clearly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our own civilization."); *Sweet Home*, 515 U.S. at 698. Because the ESA was prompted in part by the demonstrated "need to extend takings regulation beyond the limited confines of federal land," Pet. App. 19a, there is no basis for petitioners' suggestion (Pet. 28-29) that the Act's objectives could be achieved solely through exercises of Congress's spending power and its authority over federal property.

5. This Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178 (Jan. 9, 2001), does not cast doubt on the court of appeals' decision in this case. The Court in *Solid Waste Agency* concluded that the assertion of federal regulatory jurisdiction over ponds not connected to any navigable-in-fact water body, based on the use of the ponds as habitat by migratory birds, would raise significant constitutional concerns. See slip op. 12-13. The Court ultimately issued no constitutional holding, however, finding instead that the Army Corps of Engineers' assertion of regulatory jurisdiction over the ponds in question was unauthorized by the Clean Water Act. *Id.* at 13-14.

In any event, the constitutional concerns identified by the Court in *Solid Waste Agency* are inapplicable here. The Court in that case found that the Army Corps' regulatory approach raised potential constitutional difficulties because it would "readjust the federal-state balance" and "result in a significant impingement of the States' traditional and primary power over land and water use." Slip op. 13. The ESA, however, does not readjust the federal-state balance, because as explained above (see pp. 15-16, *supra*), the protection of wildlife has historically been the subject of federal regulation as well. Moreover, the red wolf take restrictions at issue in this case cannot meaningfully be characterized as land-use regulation. They impose no broad constraints on the acceptable uses of particular tracts, but instead prohibit (with certain exceptions) the intentional taking of members of an animal species of particular national concern.[6] Nothing in *Solid Waste Agency* suggests that the establishment of that prohibition is beyond Congress's authority.

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[6] As we explain above (see note 4, *supra*), FWS regulations construing the basic ESA take prohibition extend that ban to habitat modification that actually kills or injures a member of a listed species. Thus, under some circumstances, the ESA take prohibition may apply to conduct that is not intended to harm any member of a listed species but in fact has that consequence. The regulation governing the red wolf reintroduction program provides, however, that "[a]ny person may take red wolves found on private land in the" defined reintroduction areas, so long as "such taking is not intentional or willful." 50 C.F.R. 17.84(c)(4)(i); cf. pp. 11-12, *supra* (explaining that the effect of the red wolf regulation is to authorize some conduct that Section 9(a)(1) of the ESA would otherwise prohibit).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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