No. 10-1551

In the Supreme Court of the United States

STEWART & JASPER ORCHARDS, ET AL., PETITIONERS

v.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Sections 7 and 9 of the Endangered Species Act of 1973, 16 U.S.C. 1536, 1538, as applied through a biological opinion recommending that water diversion projects for agricultural and municipal use be modified to protect a threatened species, are within Congress's power under the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 638 F.3d 1163. The opinion of the district court (Pet. App. D1-D55) is reported at 663 F. Supp. 2d 922.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2011. The petition for a writ of certiorari was filed on June 22, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Finding that many species had already been rendered extinct "as a consequence of economic growth and development," 16 U.S.C. 1531(a)(1), Congress enacted the Endangered Species Act of 1973 (ESA), Pub. L. No.

93-205, 87 Stat. 884, to protect and conserve endangered and threatened species, 16 U.S.C. 1531(b). Section 4 of the Act directs the Secretaries of Commerce and the Interior to list threatened and endangered species, and to designate their critical habitat. See 16 U.S.C. 1533. The Fish and Wildlife Service exercises that statutory authority on behalf of the Secretary of the Interior, see 50 C.F.R. 17.11, 402.01(b), and the National Marine Fisheries Service does so on behalf 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 9 prohibits persons subject to the jurisdiction of the United States from importing, exporting, "tak[ing]," possessing, selling, delivering, carrying, transporting, or shipping any listed species. 16 U.S.C. 1538(a)(1). "'[T]ake' means to 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). Violations can incur civil and criminal penalties. See 16 U.S.C. 1540(a) and (b).

Section 7 of the ESA is directed only to federal agencies and directs them to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. 1536(a)(2). When a proposed federal action "may affect" a listed species in either manner, the agency wishing to undertake it (the action agency) must initially consult with the appropriate expert wildlife agency (here, the Fish and Wildlife Service). 50 C.F.R. 402.14(a). If either agency then determines that the

proposed action is likely to affect a listed species adversely, formal consultation begins, 50 C.F.R. 402.14, culminating in the issuance of a biological opinion that sets forth the expert agency's determination of how the proposed action will affect the listed species, 16 U.S.C. 1536(b)(3).

If the biological opinion concludes that the action is likely to jeopardize the continued existence of the species, the expert agency suggests reasonable and prudent alternatives that the action agency could implement without causing jeopardy. See 16 U.S.C. 1536(b)(3)(A). It also issues an incidental take statement that prescribes terms and conditions governing the action. See 16 U.S.C. 1536(b)(4). If the action agency complies with those terms and conditions, it will be exempt from liability under ESA Section 9 for any take of listed species that occurs incidentally to the action. See 16 U.S.C. 1536(o)(2); *Bennett* v. *Spear*, 520 U.S. 154, 170 (1997).

2. The delta smelt is a small fish endemic to California's San Francisco Bay/Sacramento-San Joaquin Delta Estuary. It is adapted to living in fresh and brackish water, but it is rarely found in estuarine waters having more than ten-to-twelve parts per thousand of salinity (about one-third sea water). 58 Fed. Reg. 12,854 (1993). Although the fish presently lacks known commercial uses, it was harvested as bait in the past. Pet. App. A4-A5. It is collected for scientific purposes, and may be prey for striped bass, a commercially valuable sport fish. 58 Fed. Reg. at 12,860. In 1993, the Fish and Wildlife Service listed the delta smelt as threatened under the ESA, noting that its population had decreased by 90% in the previous 20 years—primarily because of "large freshwater exports from the Sacramento River and San

Joaquin River diversions for agriculture and urban use." *Id.* at 12,854.

3. The U.S. Bureau of Reclamation's Central Valley Project (CVP) and California's State Water Project (SWP) are among the world's largest water diversion operations; they divert for agricultural and municipal uses river water that would otherwise flow out of the Sacramento-San Joaquin Delta (Delta). See Pet. App. A6, D50. In a 2008 biological opinion, the Fish and Wildlife Service concluded that continued CVP/SWP operations would likely jeopardize the delta smelt's continued existence (both through entrainment of fish in pumps and reduction of the amount of suitable Delta habitat). See *id.* at D9. The biological opinion included reasonable and prudent alternatives and an incidental take statement with terms and conditions that would regulate water flows at crucial times of the year. *Id.* at A6, D9.

4. Petitioners, who are agricultural water users, and several other sets of plaintiffs filed suits in federal district court challenging the 2008 biological opinion on various grounds. Among other arguments, petitioners alleged that application of Sections 7 and 9 of the ESA through the 2008 biological opinion was beyond Congress's power under the Commerce Clause. Pet. App. D2.

a. The district court ruled on petitioners' constitutional claims before addressing the remaining ones, granting summary judgment for the government and entered a partial final judgment under Fed. R. Civ. P. 54(b). Pet. App. C2-C5; D55. The district court held that petitioners lacked standing to challenge ESA Section 9 because they had pointed to no imminent imposition of liability on the Bureau of Reclamation (to say nothing of petitioners themselves) under that statutory

provision, a shortcoming that also rendered any such challenge unripe. See *id.* at D10-D16. Despite noting that petitioners had deliberately declined to advance their challenge to ESA Section 7 on summary judgment for strategic reasons, *id.* at D11 n.4, D16, the district court ruled on the merits of such a challenge as well. Relying extensively on the Eleventh Circuit's decision in *Alabama-Tombigbee Rivers Coalition* v. *Kempthorne*, 477 F.3d 1250 (2007), cert. denied, 552 U.S. 1097 (2008) (*Tombigbee*), the district court held that the ESA is a comprehensive regulatory scheme that bears a substantial relation to commerce and that it is therefore a valid exercise by Congress of its Commerce Clause power. See Pet. App. D31-D54.

b. The court of appeals affirmed. That court found it had Article III jurisdiction to consider an as-applied challenge to ESA Section 9 (in addition to Section 7), stating that the potential threat of Section 9 liability would have a coercive effect on the Bureau of Reclamation's decision whether to adhere to the reasonable and prudent alternatives and the incidental take statement in the 2008 biological opinion. See Pet. App. A8-A18.

Turning to the merits, the court of appeals noted that this Court's decision in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), had reiterated that "Congress has the power to regulate purely intrastate activity as long as the activity is being regulated under a general regulatory scheme that bears a substantial relationship to interstate Commerce." Pet. App. A21. It noted that every court of appeals to have considered the issue had upheld the ESA as a valid exercise of the Commerce Clause power. *Id.* at A22. The court of appeals focused in particular on the Eleventh Circuit's post-*Raich* analysis in *Tombigbee*, a case "involving almost identical circumstances," *i.e.*, an

intrastate fish species of no current commercial value. *Ibid.* In that case, the Eleventh Circuit "had little difficulty concluding that 'the [ESA] is a general regulatory statute bearing a substantial relation to commerce,'" *id.* at A23 (quoting *Tombigbee*, 477 F.3d at 1273). The court of appeals briefly summarized the reasons (discussed at length in the four other circuits' decisions rejecting Commerce Clause challenges to the ESA) "why the protection of threatened or endangered species implicates economic concerns," *ibid.*, including possible future interstate commerce, travel for tourism or scientific research, and the potential value of species' genetic material to commercial ventures, including agriculture, see *id.* at A23-A25.

5. The decisions at issue here form just part of a complex consolidated case involving a variety of challenges brought by a number of plaintiffs (including petitioners) to the Bureau of Reclamation's response to the biological opinion involving the delta smelt. In 2009, the district court handling that consolidated case granted summary judgment to plaintiffs on their claim that the Secretary of the Interior and the Bureau of Reclamation had violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, by not performing a NEPA analysis "prior to provisionally adopting and implementing" the 2008 biological opinion and its reasonable and prudent alternatives. *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 686 F. Supp. 2d 1026, 1051 (E.D. Cal.). In 2010, the court concluded that plaintiffs had established a likelihood of success on their claim that a component of the biological opinion's reasonable and prudent alternatives was arbitrary and capricious because its "precise flow prescriptions imposed on coordinated project operations are not supported

by the best available science and are not explained as the law requires." *Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1071 (E.D. Cal.).

Later in 2010, the district court concluded that "despite the harm visited on California water users," the Fish & Wildlife Service "has failed to provide lawful explanations for the apparent over-appropriation of project water supplies for species protection." *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 760 F. Supp. 2d 855, 968 (E.D. Cal.). The court concluded that the 2008 biological opinion and its reasonable and prudent alternatives "are arbitrary, capricious, and unlawful, and are remanded to [the Fish & Wildlife Service] for further consideration in accordance with this decision and the requirements of law." *Id.* at 970. Finally, on August 31, 2011, the district court enjoined the Bureau of Reclamation from implementing a component of the reasonable and prudent alternatives. *Consolidated Delta Smelt Cases*, No. 1:09-CV-00407 OWW DLB, 2011 WL 3875512, at *62 (E.D. Cal.).

The federal government has appealed the district court's final judgment embodying its merits determinations, see Pet. App. E1-E6, and its opening brief is due on October 26, 2011. See No. 11-16623 (9th Cir. July 5, 2011). The government also recently filed a notice of appeal with respect to the district court's August 31 injunction decision. See No. 11-17144 (9th Cir. Sept. 8, 2011).

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. Moreover, the government action challenged in this case is independently authorized

by other constitutional bases of congressional authority. Finally, plaintiffs in this litigation are pursuing a number of non-constitutional grounds for relief, making review of petitioners' constitutional claims by this Court unwarranted.

1. As an initial matter, application of the ESA in this case fails rests on several settled sources of congressional authority in addition to the one relied upon by the court below.

First, the exercise of federal power that petitioners challenge in this case is not the direct regulation of their own conduct, but rather adherence by one federal agency (the Bureau of Reclamation) to a biological opinion issued by another federal agency (the Fish and Wildlife Service). See Pet. 8-9; see also Pet. App. D13 ("Section 7 [of the ESA] operates as an independent requirement that agencies thoroughly examine the potential consequences of their actions for listed species."). Congress has ample constitutional authority, quite aside from the Commerce Clause, 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."); 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.").

Second, this case involves federal regulation of the navigable waters of the United States. "It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173 (1979); see *United States* v. *Lopez*, 514 U.S. 549, 558 (1995) (identi-

fying, 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"). Application of the ESA in this case falls well within Congress's authority to regulate the Nation's water, separate and apart from any substantial effect on interstate commerce.

Third, petitioners are commercial operators engaged in interstate commerce. The complaint in this case alleged that petitioners "grow[] and sell hundreds of thousands of pounds of [nuts] each year to customers throughout California and the world," that they "depend[] on a sufficient and reliable water supply in order to produce [their] permanent crops," and that "[i]mplementation and enforcement of the [biological opinion] * * * will * * * result in reductions to the quantity of water available for [petitioners], thereby making it significantly more costly to continue to operate at full capacity." Compl. paras. 7, 8. Although this case does not present any question regarding direct regulation of petitioners, see p. 8, *supra*, even if it did, that regulation would plainly be within Congress's commerce authority because petitioners are commercial operators. See *United States* v. *Morrison*, 529 U.S. 598, 611 (2000) (explaining that in both *Lopez* and *Morrison* itself "neither the actors nor their conduct ha[d] a commercial character") (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

Petitioners cannot prevail by contending that the statute 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, 1066-1080 (2003) (*Rancho Viejo*), cert. denied, 540 U.S. 1218 (2004), the D.C. Circuit applied that principle in rejecting an as-applied challenge 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 plaintiff developer's contention that the provision would be unconstitutional as applied to non-commercial conduct. *Id.* at 1077-1078.

2. Even apart from those defects in petitioners' challenge, this case would not merit review. All five courts of appeals to have considered the question have concluded that the ESA may be constitutionally applied to intrastate species with no current commercial value. See Pet. App. A19-A26; *Alabama-Tombigbee Rivers Coal.* v. *Kempthorne*, 477 F.3d 1250, 1271-1277 (11th Cir. 2007), cert. denied, 552 U.S. 1097 (2008); *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 627-641 (5th Cir. 2003) (*GDF Realty*), cert. denied, 545 U.S. 1114 (2005); *Rancho Viejo*, 323 F.3d at 1066-1080; *Gibbs* v. *Babbitt*, 214 F.3d 483, 490-506 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001); see also *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1045-1057 (D.C. Cir. 1997) (opinion of Wald, J.), cert. denied, 524 U.S. 937 (1998); *id.* at 1057-1060 (Henderson, J., concurring). This Court has denied review of every one of those decisions, and there has been no change in circumstances that would warrant a different outcome here.

Petitioners contend that certiorari is warranted because the court of appeals' reasoning here conflicts with

the Fifth Circuit's statement that the "ESA is an economic regulatory scheme," *GDF Realty*, 326 F.3d at 640; see Pet. 30. But both the court below and the Fifth Circuit *rejected* constitutional challenges to the ESA, so there is no conflict between them. This Court "reviews judgments, not statements in opinions," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted), and there is no reason for this Court to review mere differences in wording or analysis leading to the same result. In any event, the reasoning of the two courts is not inconsistent. The court of appeals in this case did not conclude that the ESA was *not* an "economic regulatory scheme"; it simply pointed out that this Court "has never required that a statute be a 'comprehensive *economic* regulatory scheme,' * * * in order to pass muster under the Commerce Clause." Pet. App. A25. Nor did the Fifth Circuit suggest that its description of the ESA as an "economic regulatory scheme" was necessary to its holding that it was constitutional.

Similarly, petitioners' contention that there are other "dispute[s]" among the courts of appeals in this area, Pet. 31; see Pet. 31-36, is immaterial. There is no dispute on the only question that matters, *i.e.*, the constitutionality of the ESA's regulation of species such as the one at issue here. Petitioners' claim would have failed in every court of appeals that has addressed that question.

3. a. The court of appeals correctly concluded that the ESA as applied in this case was within Congress's Commerce Clause power. Relying heavily on the reasoning of the other courts of appeals that have rejected claims like petitioners', the court of appeals properly held that the ESA is a comprehensive regulatory scheme that bears a substantial relation to interstate commerce.

See Pet. App. A22-A26. A variety of circumstances support that conclusion.

First, there is a substantial worldwide market in the trade of illegally-caught animals. The United Nations has estimated the value of illegal trade (prohibited by ESA Section 9) in protected species to generate between $5 billion and $8 billion annually worldwide, with Americans spending an estimated $200 million annually on illegally-caught animals. *Tombigbee*, 477 F.3d at 1273; cf. *Gonzales* v. *Raich*, 545 U.S. 1, 3 (2005) (relying on the "established, and lucrative, [illegal] interstate market" in marijuana).

Even with respect to species that are not presently traded or exploited commercially, the ESA's protections may "permit the regeneration of [covered] species to a level where controlled exploitation of that species can be resumed," leading to "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." S. Rep. No. 526, 91st Cong., 1st Sess. 3 (1969); see also H.R. Rep. No. 412, 93d Cong., 1st Sess. 6 (1973) (House Report) (noting that species' value "should encourage [countries] to maintain healthy and viable stocks of these animals as a resource"); *Gibbs*, 214 F.3d at 495 (discussing recovery of American alligator as an example). The prospect of future commercial value is a valid basis for exercise of Congress's power under the Commerce Clause. See *Preseault* v. *ICC*, 494 U.S. 1, 17-19 (1990) (holding Congress has power to convert decommissioned railroad tracks into trails—instead of returning them to property

owners—because of the possibility that they could be used as tracks again in the future).[*]

Additionally, Congress noted that the "genetic variations" of protected species "are potential resources" with a value that is "quite literally, incalculable." *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 178 (1978) (quoting House Report 4-5) (emphasis omitted). In 1972, Congress also observed that "one of the critical chemicals in the regulation of ovulation in humans was found in a common plant," and hypothesized that as-yet-unknown genetic structures of other species could provide "potential cures for cancer or other scourges." House Report 5; see, *e.g.*, *Tombigbee*, 477 F.3d at 1274 (citing example of rosy periwinkle, which was driven nearly to extinction before scientists discovered that it contained substances now used to treat cancer). Indeed, many of the most commonly-prescribed medicines "are derived from plant and animal species." *Id.* at 1273.

Preservation of genetic biodiversity is also of immeasurable value to agriculture and aquaculture: introduction of genetic material from wild species can enhance the productivity and commercial value of cultivated species, as well as protect them against disease and pests. *National Ass'n of Home Builders*, 130 F.3d at 1052-1053 (opinion of Wald, J.). Ultimately, "[e]ach time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes." *Id.* at 1053. The delta smelt itself is the subject

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[*] Although the delta smelt currently lacks commercial value, it was previously harvested in a bait fishery. Pet. App. A4-A5.

of continuing scientific research. See, *e.g.*, 75 Fed. Reg. 17,667, 17,669 (2010).

Finally, Congress was aware "that many of these animals perform vital biological services to maintain a 'balance of nature' within their environments." S. Rep. No. 307, 93d Cong., 1st Sess. 2 (1973); see also *Hill*, 437 U.S. at 178-179 ("Congress was concerned 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."); House Report at 6 (discussing recent awareness of "the critical nature of the interrelationships of plants and animals between themselves and with their environment"). The delta smelt, for example, feeds upon zooplankton and a variety of other species, and is in turn potential prey for striped bass. 58 Fed. Reg. at 12,854, 12,860 (1993). The Fish and Wildlife Service expected designation of the delta smelt's critical habitat "to positively affect all components of the food web," including commercial and recreational salmon fisheries, which would also have economic benefits. 59 Fed. Reg. 65,256, 65,263 (1994); cf. *Tombigbee*, 477 F.3d at 1274 ("A species' simple presence in its natural habitat may stimulate commerce by encouraging fishing, hunting, and tourism.").

b. Contrary to the petition's arguments, the court of appeals' analysis was in no way inconsistent with *Raich*. That decision reaffirmed that "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558 (1995)). The Court explained that the proper inquiry is whether Congress had a rational basis for concluding that exclusion of a "narrower 'class of activities'" (*i.e.*, intrastate, non-

commercial activity) from the "larger regulatory scheme," *id.* at 26, "would undermine the orderly enforcement of the entire regulatory scheme," *id.* at 28. Applying those principles, the Court upheld the Controlled Substances Act's regulation of intrastate cultivation and possession of home-grown medical marijuana, finding "that Congress had a rational basis for believing that, when viewed in the aggregate, * * * leaving home-consumed marijuana outside federal control would * * * affect price and market conditions." *Id.* at 19.

Raich reaffirmed Congress's power to enact a broad regulatory statute that bears a substantial relation to interstate commerce, but petitioners attempt to interpret it as having dramatically circumscribed Congress's commerce power. That is incorrect. *Raich* relied heavily on *Wickard* v. *Filburn*, 317 U.S. 111 (1942), noting that the earlier case had upheld the regulation of wheat grown for a farmer's homegrown consumption even though it "was not treated by the Court as part of his commercial farming operation." 545 U.S. at 20; see *id.* at 17 ("As we stated in *Wickard*, 'even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.'") (quoting 317 U.S. at 125).

Raich also relied on *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), in which the Court declined to adopt a narrow view of substantial effects like petitioners advance. See *Raich*, 545 U.S. at 22 (citing *Hodel*, 452 U.S. at 276-280). *Hodel* rejected a Commerce Clause challenge to the Surface Mining Control and Reclamation Act of 1977, which requires protection and remediation of lands that are mined for coal. 452 U.S. at 268-269. The Court found a rational basis for

believing that protection of such lands could have a substantial effect on interstate commerce insofar as coal-mining could hinder their future utility in a variety of ways, including through adverse effects on water quality and natural beauty. See *id.* at 276-280. It rejected the argument—analogous to that advanced in the petition here—that the inquiry into substantial effects must be undertaken from the perspective of "whether land *as such* is subject to regulation under the Commerce Clause, *i.e.* whether land can be regarded as 'in commerce.'" *Id.* at 275; see also *Perez* v. *United States*, 402 U.S. 146, 155-156 (1971) (finding rational basis to believe intrastate loansharking could substantially affect interstate commerce, including by allowing organized crime interests to gain control of legitimate businesses through inducements to their owners to commit criminal acts), cited with approval in *Raich*, 545 U.S. at 22.

c. 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 delta smelt, because "regulation of intrastate, noncommercial species like the delta smelt exceeds Congress' Commerce Clause authority." Pet. 15. That contention is foreclosed by *Raich*:

> [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.

Congress had sound reasons for declining to limit the ESA's coverage in the manner that petitioners advocate. It was aware of several types of economic value to be derived from imperiled species, including the possibility of future value. See pp. 12-14, *supra*. Excluding species with no current commercial uses from the ESA's protections would thus substantially undercut Congress's regulatory goals. Indeed, when it enacted the ESA, "Congress was concerned with 'the *unknown* uses that endangered species might have.'" *Tombigbee*, 477 F.3d at 1274 (quoting *Hill*, 437 U.S. at 178-179). "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 1275.

4. Plaintiffs in the consolidated delta smelt litigation continue to press a variety of non-constitutional objections to the steps the Bureau of Reclamation has taken to protect the delta smelt in light of the biological opinion at issue in this case. See pp. 6-7, *supra*. Indeed, plaintiffs have prevailed on a number of those claims in the district court. See *ibid.* Although some of those matters are now on appeal in the Ninth Circuit, there remains the possibility that plaintiffs in these cases will

ultimately receive substantial relief, irrespective of the Commerce Clause question presented here. That provides yet another reason why the Court's consideration of petitioners' constitutional claim is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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