No. _______

In the

Supreme Court of the United States

ALABAMA-TOMBIGBEE RIVERS COALITION, an Alabama nonprofit corporation, PARKER TOWING COMPANY, INC., an Alabama corporation, CHARLES A. HAUN, an individual,

Petitioners,

v.

DIRK KEMPTHORNE, Secretary of the United States Department of the Interior, SAM HAMILTON, Regional Director of the United States Fish and Wildlife Service, U.S. FISH AND WILDLIFE SERVICE, an agency of the United States Department of the Interior, STEVE WILLIAMS, Director of Fish and Wildlife Service,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the federal government exceed its power to regulate commerce among the states by regulating under the Endangered Species Act a fish—the Alabama sturgeon—that is found only in one state and is not used for any commercial purpose?

PARTIES TO THE PROCEEDINGS

Petitioners are the Alabama-Tombigbee Rivers Coalition, an Alabama nonprofit corporation; Parker Towing Company, Inc., an Alabama corporation; and Charles A. Haun, an individual. Respondents are Dirk Kempthorne, Secretary of the United States Department of Interior; Sam Hamilton, Regional Director of the United States Fish and Wildlife Service; United States Department of the Interior; United States Fish and Wildlife Service, an agency of the United States Department of the Interior; and Steve Williams, Director of the United States Fish and Wildlife Service.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners Alabama-Tombigbee Rivers Coalition, and Parker Towing Company, Incorporated, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

The Alabama-Tombigbee Rivers Coalition, Parker Towing Company, Inc., and Charles A. Haun, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 477 F.3d 1250 (11th Cir. 2007), and is included in Appendix (App.) A. The Opinion of the District Court is unpublished and is included in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 8, 2007. That court's denial of the Petition for Rehearing *En Banc* was entered on May 3, 2007. App. E. This Court granted an extension of time in which to file this Petition to and including September 14, 2007, on July 17, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The pertinent provision of the United State Constitution provides that Congress has power "to regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The pertinent provisions of the Endangered Species Act are set out at Appendix F.

STATEMENT OF THE CASE

A. Factual Background

1. Regulatory Framework

The Endangered Species Act directs the Secretary of the Interior, through the United States Fish and Wildlife Service, to "list" any species the Secretary determines is endangered or threatened. 16 U.S.C. § 1533(a), App. F1. That determination must be made solely on the "best scientific and commercial data available" after taking into consideration: (1) "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range"; (2) overutilization for commercial, recreational, scientific, or educational purposes"; (3) "disease or predation"; (4) "the inadequacy of existing regulatory mechanisms"; or (5) "other natural or manmade factors affecting [the species'] continued existence." 16 U.S.C. § 1533(a)(1), App. F1.

When a species is listed as endangered or threatened, a species is automatically afforded various protections under the Act. Some of these protections impose duties on federal agencies while others restrict or compel private conduct. Under Section 7 of the Act, federal agencies are required to "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 or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2), App. F5. An agency "action" includes the granting of discretionary permits and licenses. 50 C.F.R. § 402.03.

Therefore, if an agency determines its proposed action may adversely affect a listed species or its critical habitat, the agency must consult with the Fish and Wildlife Service.

16 U.S.C. § 1536(a)(2), App. F5. Consultation may also occur "at the request of, and in cooperation with," a prospective permit or license applicant "if the applicant has reason to believe" that a listed species "may be present in the area affected by his project and that implementation of such action will likely affect such species." *Id.* at § 1536(a)(3). App. F5-F6. Following consultation, the Fish and Wildlife Service will issue an opinion explaining how the proposed action will affect the species or its habitat, and suggest alternatives to avoid jeopardizing the species or adversely modifying its habitat. *Id.* at § 1536(b)(3)(A), App. F7. An "incidental take statement" authorizing the project must be issued if the proposed alternatives will minimize harm to the species. *Id.* § 1536(b)(4), App. F8. The proposed alternatives will generally become conditions of the permit or license.

Section 9 of the Endangered Species Act makes it unlawful for any person (or entity) to "take" a listed species without a federal permit. *Id.* at § 1538(a)(1)(B), App. F9. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). These limitations, as well as other provisions of the Act, apply to nonfederal actors such as Petitioners without regard to whether the regulated species has a connection with or effect on interstate commerce. Section 11 of the Endangered Species Act provides for both civil and criminal penalties for violations of the Act. *See id.* at § 1540.

2. Procedural History

The Alabama sturgeon is a small freshwater fish found only in limited parts of the Alabama River in southern Alabama, downstream to the mouth of the Tombigbee River. 65 Fed. Reg. 26438 (May 5, 2000) (Final Rule). The sturgeon is protected by state law and its conservation has been enhanced by Petitioners' efforts. *Id.* at 26455-26456.

The U.S. Fish and Wildlife Service proposed listing the Alabama sturgeon as endangered in 1993. 58 Fed. Reg. 33148 (June 15, 1993). As a result, various businesses in the State of Alabama became concerned about the economic impact of the listing. App. C5-C6. The Petitioner Coalition was therefore formed to evaluate the Service's scientific and legal bases for listing the sturgeon. App. C6. This evaluation revealed that the agency had relied on a study provided by a scientific committee improperly convened. *Id* . The Coalition sued the agency and obtained an injunction preventing the agency from using the study. *See Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103 (11th Cir. 1994). In 1994, the Service withdrew the proposed rule citing "insufficient information to justify listing" the sturgeon. 59 Fed. Reg. 64794 (Dec. 15, 1994).

Before and after the withdrawal of the proposed listing, the Coalition was actively involved in various scientific studies and conservation efforts involving the sturgeon. App. C6. In 1996, the Coalition arranged discussions among the Service, the Army Corps of Engineers, the State of Alabama, and members of the State's congressional delegation that resulted in a Voluntary Conservation Plan that was led by the State and funded by Congress. *Id.* Ultimately, the Coalition was successful at bringing federal and state interests together to convert the Voluntary Conservation Plan into a formal Conservation Agreement to recover the sturgeon. *Id.* This Agreement involved a ten-year, $8 million conservation program. App. C6-C7.

In the midst of these efforts, the Service issued another Proposed Rule in 1999, to list the sturgeon as an endangered species. 64 Fed. Reg. 14676 (Mar. 26, 1999). The Final Rule listing the Alabama sturgeon as endangered was issued in 2000. 65 Fed. Reg. 26438 (May 5, 2000). As a consequence of the listing, the Coalition filed this suit under the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(1), and the judicial

review provision of the Administrative Procedure Act, 5 U.S.C. § 701-706. App. C7. The Coalition sought declaratory judgment and injunctive relief complaining the Final Rule was invalid because the Service: (1) followed an improper process; (2) incorrectly determined that the Alabama sturgeon is a separate species from the Mississippi shovelnose sturgeon; (3) failed to designate critical habitat concurrent with the listing; (4) gave improper notice; and, (5) the listing authority exceeded Congress' power to regulate commerce. *Id.*

On a cross-motion for summary judgment, the government argued the Petitioners lacked Article III standing. *Id.* Although the district court agreed, the Eleventh Circuit did not. On appeal, the circuit court found the listing of the Alabama sturgeon had injured, and would continue to injure, Coalition members because Coalition members "operate their businesses subject to federal licenses and permits" and the associated "activities take place in historical Alabama sturgeon habitat." App. C16. The court found the "listing adds another layer of concrete economic considerations" to the Coalition members' dealings and that each member averred they are "modifying their facilities, altering their operations, or expending resources" in response to the listing and that the ESA consultation requirement is causing them "injury in the form of planning, studies, and delays." *Id.* Thus, the court held the Coalition satisfied the "injury in fact" prong of Article III standing.

As to the traceability prong of Article III standing, the court was equally clear: "Here, the Coalition's injuries are produced by the coercive effect of the ESA as implemented by the FWS or NMFS: federal agencies *and* Coalition members must at least consider whether consultation is necessary for their activities." App. C19. This point was particularly evident, the court pointed out, "in light of the possibility of the Coalition's members running afoul of the '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.*

Finally, the circuit court determined the Coalition satisfied the third prong of Article III standing, redressability, "because delisting the sturgeon will eliminate the additional considerations of which the Coalition complains." App. C20. Having thus concluded that the Coalition had economic standing under the ESA and satisfied the requirements of Article III of the Constitution, the circuit court remanded the case to the district court for a determination on the merits of the case. The district court granted summary judgment in favor of the government on all claims. App. B. This was sustained by the Eleventh Circuit. App. A. Subsequently, the Coalition filed a petition for rehearing *en banc* on the Commerce Clause issue which was denied. App. E.

B. Substantive Proceedings

1. The District Court Decision

With respect to the Commerce Clause challenge to the listing of the Alabama sturgeon, the only issue presented in this petition, the district court acknowledged this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), limiting the commerce power to economic activity, but relied on the opinions of the lower courts interpreting those cases and upholding the Endangered Species Act against similar challenges. App. B8-B12. The district court also was persuaded that this Court's recent decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), authorized federal regulation of activities that "are solely intrastate and non-commercial" as part of a larger regulatory scheme. B12-B14. More specifically, the court held: "The listing of a purely 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." App. B14 (emphasis added).

2. The Eleventh Circuit Decision

The circuit court also dismissed the Commerce Clause challenge based on the premise that the ESA is a "larger regulation of economic activity" and, under *Raich*, the court has "'no power to excise, as trivial, individual instances of the class,'" like the regulation of purely intrastate and noncommercial species. App. A41.

In arriving at its conclusion that the ESA "is a general regulatory statute bearing a substantial relation to commerce," unlike the Gun-Free School Zones Act in *Lopez* and the Violence Against Women Act in *Morrison*, the court seized on a single provision in the ESA and observed that the Act prohibits all interstate and foreign commerce in endangered species and the "value of this genetic heritage is, quite literally, incalculable." App. A41-A42. To bolster this conclusion, the Eleventh Circuit cited a substantial market in endangered species and the potential scientific and economic values that could be lost if some species become extinct. App. A42-43.

The court even speculated that the Alabama sturgeon might sufficiently recover for commercial harvesting. App. A46. But, the court explained, the issue "does not turn on the present or potential commercial value of the Alabama sturgeon alone." App. A47. Even if the court "found a commercial nexus completely lacking here," it would not "excise individual applications" of what it characterized as "a concededly valid statutory scheme." *Id.*

In responding to the Coalition's argument that *Raich* and *Wickard v. Filburn*, 317 U.S. 111 (1942), are distinguishable from this case because the ESA is not like the Controlled Substances Act in *Raich* that covered the entire market in drugs, or the Agricultural Adjustment Act in *Wickard* that controlled the entire market in wheat, the circuit court stated it was "not

convinced that the principle that Congress may regulate some intrastate activity as an essential part of a larger permissible regulation is limited to the facts" in those cases. *Id*. Instead, the court concluded:

> This case, like *Raich*, also turns on whether Congress had a rational basis for believing that regulation of an intrastate activity was an essential part of a larger regulation of economic activity. Unlike the statute involved in *Raich*, Congress did not rely on commodity pricing in justifying the Endangered Species Act. Instead, it made a determination that the most effective way to safeguard the commercial benefits of biodiversity was to protect all endangered species, regardless of their geographic range.

App. A48-A49.

REASONS FOR GRANTING THE WRIT

I

Whether the Federal Government Exceeded Its Power to Regulate Commerce among the States by Regulating under the Endangered Species Act a Fish—the Alabama Sturgeon—That Is Found Only in One State and Not Used for Any Commercial Purpose Is an Important Question of Federal Law That Should Be Settled by This Court

This case raises a constitutional challenge to the listing of an intrastate, noncommercial species under the Endangered Species Act which this Court has described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley*

Authority v. Hill, 437 U.S. 153, 180 (1978). Indeed, the ESA is pervasive and requires the protection of listed species, like the Alabama sturgeon, "whatever the cost." *Id*. at 184. The sturgeon is a rare, noncommercial species found only in the State of Alabama. Any person who harms an endangered fish, such as the sturgeon, including adverse habitat modification, without federal authorization, may be subject to heavy civil fines ($25,000 per violation) or severe criminal penalties, including imprisonment. *See* 16 U.S.C. § 1540(a) and (b). According to the Fish and Wildlife Service, approximately half of all species listed as threatened or endangered in the United States have habitat on private land. *See Our Endangered Species Program And How it Works With Landowners*, http://fws.gov/endangered/factsheets/landowners.pdf (Last visited September 7, 2007). Therefore, the constitutional question presented in this case is sure to be repeated.

This is not the first time this Court has been petitioned to decide if the Endangered Species Act, as interpreted by the lower courts, goes too far. But this Court has not yet addressed the question. This Court has denied certiorari in four other cases raising the same important federal question presented here. *See National Association of Home Builders v. Babbitt*, 130 F.3d 1041(D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998) (whether regulation of a local fly under the ESA exceeds the commerce power); *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001), *cert. denied* 534 U.S. 1108 (2002) (whether regulation of local fairy shrimp under the ESA exceeds the commerce power); *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1218 (2004) (whether regulation of local toad under the ESA exceeds the commerce power); and, *GDF Realty Investments Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004), *cert. denied* 545 U.S. 1114 (2005) (whether regulation of local cave species exceeds the commerce power).

As this Court has observed, the environment is "a matter in which it is common to think all persons have an interest." *Bennett v. Spear*, 520 U.S. 154, 165 (1997). Likewise, everyone has an interest in the "rule of law." But as this case demonstrates, the lower federal courts have traded our most fundamental constitutional safeguards for *federal* regulation of local species that have been the traditional province of the States.

Those safeguards require a federal government of limited powers. *See* U.S. Const. Art. I, § 8. The Framers understood this:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.

The Federalist No. 45 at 292-293 (James Madison) (C. Rossitor ed. 1961).

This Court has expressly acknowledged that this division of power is necessary to protect our fundamental liberties:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

But if Congress can pass laws under the commerce power regulating any activity that affects protected species, as the court held it could in this case, there is no human endeavor beyond federal control: "[D]epending on the level of generality, any activity can be looked upon as commercial." *United States v. Lopez*, 514 U.S. at 565.

As the Fifth Circuit has observed:

> Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic activity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, thereby turning that clause into what it most certainly is not, a general police power.

United States v. Ho, 311 F.3d 589, 599 (5th Cir. 2002).

When the federal government lists a species, like the Alabama sturgeon in this case, it assumes functional control over the species' habitat. If the listing authority is not directed at regulating interstate commerce, it would result in a significant impingement on the states' traditional and primary power over land and water use. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173-174 (2001). *See also GDF Realty*, 362 F.3d at 292 (Jones, J.) (dissenting from the denial of rehearing *en banc*.)

When this Court determined in *Tennessee Valley Authority v. Hill, supra,* that enforcement of the ESA must occur "whatever the cost," it set up an inevitable constitutional conflict. The Fish and Wildlife Service reports that over 1,300 species of plants and animals are currently listed across the nation. *See* http://ecos.fws.gov/tess_public/boxscore.do (Last visited on September 7, 2007). As evidenced by this case, and others like it, federal officials assert plenary authority over land and water resources all across the country where listed species exist.

Some legal scholars have noted the need for this court to address the scope of the commerce power under the ESA. In his article, *The Commerce Clause Appropriately Defined Within a Universe Without Distinction: The Federal Endangered Species Act's Unconstitutional Application to Intrastate Species*, 25 T. Jefferson L. Rev. 649 (2003), Justin G. Reden, the author considers whether the application of the ESA to intrastate, noncommercial species satisfies this Court's Commerce Clause test as set forth in *Lopez* and *Morrison*. He concludes it does not.

> There is no rational basis upon which Congress could conclude that such intrastate species have sufficient ties to interstate commerce to justify regulation under the Commerce Clause within the permissible scope defined by modern Supreme Court jurisprudence.

Id. at 650.

As expressed by Reden,

> Congress has constitutionally transformed the Commerce Clause into a tool used to slowly and impermissibly unsettle the balance of power between the States and the federal government, placing almost unfettered jurisdictional power in the hands of the federal government.

Id.

As a result, the author calls for judicial review:

> Where federal legislation, such as the ESA, unconstitutionally arrogates to the federal government powers properly belonging to the individual States, the judicial branch must intervene

> and enforce the notions of federalism the founding fathers envisioned.

Id.

Many circuit court judges also are calling for judicial intervention in the enforcement of the ESA. In the dissent to the denial of rehearing *en banc* in *GDF Realty* Judge Edith Jones authored a five-page opinion joined by Judges Jolly, Smith, DeMoss, Clement, and Pickering, that castigated the panel decision for authorizing unlimited congressional authority to regulate intrastate activities and pointed out the "obvious dissonance between the panel opinion and *Lopez*, *Morrison* and the Constitution." *GDF Realty*, 362 F.3d at 291-292. That dissonance, the dissent argued, "is that the Commerce Clause regulates commerce, not ecosystems." *Id*. at 292. Finally, the dissent noted that the federal circuits had recognized that otherwise constitutional enactments may be invalid in some applications and called for further appellate review in the case because "many applications of the ESA may be constitutional, but this one [the regulation of intrastate, noncommercial cave species] simply goes too far." *Id*. at 293.

The need for this Court to address the constitutional question raised here also is evident in the fact that among the circuit courts that have addressed the constitutionality of the ESA, the courts could not agree on the rationale that would support the ESA under the Commerce Clause. In his capacity as a circuit judge, Chief Justice Roberts called for further review to address a direct conflict that exists between the D.C. Circuit in *Rancho Viejo* and the Fifth Circuit in *GDF Realty*. *See Rancho Viejo, LLC v. Norton*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc). Judge Roberts urged further review to determine the proper constitutional basis for species regulation under the ESA. *Id*.

II

The Eleventh Circuit Has Decided an Important Federal Question in a Way That Conflicts with the Decisions of This Court

A. Under *Lopez*, Intrastate Activity May Be Regulated for Its Substantial Effects on Interstate Commerce Only If the Regulated Activity Is Economic in Nature

Alfonso Lopez, Jr., was indicted for violating the Gun-Free School Zones Act of 1990. *Lopez* 514 U.S. at 551. That Act made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A). In 1992, Lopez, a 12th-grade student, arrived at school with a concealed .38 caliber handgun and five bullets. *Lopez*, 514 U.S. at 551. He was arrested and ultimately charged with a federal crime under section 922(q) of the Act. *Id*.

Lopez sought to dismiss the indictment as beyond the commerce power of Congress. *Id.* But the district court upheld the Act holding that section 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce." *Id.* at 551-552. On appeal, however, the Fifth Circuit reversed and held that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause," and this Court affirmed. *Id.* at 552.

Starting with first principles, this Court observed that the "Constitution creates a Federal Government of enumerated powers." *Id.* This principle was "adopted by the Framers to ensure protection of our fundamental liberties" by maintaining the balance of power between the States and the Federal Government so as to reduce the risk of abuse from either side. *Id.* As for the enumerated power delegated to Congress, "'to regulate commerce with foreign Nations, and among the several

States, and with the Indian Tribes,' Art. I, § 8, cl. 3," this Court emphasized the inherent limitations found in the very language of the clause. *Lopez*, 514 U.S. at 552-553.

When this Court first defined the commerce power in *Gibbons v. Ogden*, 22 U.S. 1 (1824), it recognized that

> [c]omprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

Lopez, 514 U.S. at 553 (citing *Gibbons*).

Another inherent limitation to the commerce power, recognized by this Court, was that the commerce power is the power to regulate or to "prescribe the rule by which commerce [itself] is to be governed." *Id.* In *Lopez*, this Court observed that even its expansive precedents in *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), *United States v. Darby,* 312 U.S. 100 (1941), and *Wickard*, 317 U.S. 111, affirmed that the commerce power is "subject to outer limits." *Id.* at 557.

What are those limits? This Court admonished that the commerce power is constrained by our dual system of federal and state government and may not be stretched to encompass "indirect and remote" effects on interstate commerce so as to extinguish "the distinction between what is national and what is local and create a completely centralized government." *Id.* (citing *Jones & Laughlin Steel*).

This Court also took pains to characterize *Wickard* as the Court's "most far reaching example of Commerce Clause authority over intrastate activity." *Id.* at 560. But, this Court emphasized that at least that case involved actual *economic*

activity and that the Agricultural Adjustment Act upheld by this Court was a market scheme designed for the purpose of regulating national competition *in commerce* which was directly affected by home-grown wheat. *Id.* This Court concluded that it had always observed the constitutional structure, even in those cases where the congressional enactment was upheld based on "substantial effects," and that this Court's inquiry in such cases was always "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id*. at 557.

After laying the foundation of a limited commerce power, this Court had no difficulty finding that the Gun-Free School Zones Act had exceeded Congress' Commerce Clause authority and was constitutionally invalid.

This Court readily determined that *Lopez* was a "substantial effects" case. For that determination, this Court looked at the object of section 922(q) and observed that the language of the Act, like the ESA in this case, did not purport to regulate the use of channels of interstate commerce or prohibit the interstate transportation of a commodity through the channels of commerce. *Id.* at 559. Likewise, because the statutory provision prohibited mere possession of a gun in a school zone, it could not be justified as a regulation to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Id.* at 561. If section 922(q) was to be upheld, it would have to be under the third category of Commerce Clause enactments—"as a regulation of an activity that substantially affects interstate commerce." *Id.* at 559.

First, this Court looked at the text of the statute and found that, unlike the act in *Wickard*, section 922(q) *by its own terms* had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. This obvious conclusion was compelled by the express language of the Act which made the mere possession of a firearm in a school zone a crime.

This Court also found that the regulated act, the possession of a gun, was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez* at 561. In fact, the Act was a criminal statute that did not involve a commercial or economic regulatory scheme at all. *Id.* Section 922(q) could not be sustained, therefore, under this Court's cases, like *Wickard*, that allowed congressional regulation of activities "that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce." *Id.* (emphasis added). Significantly, this Court came to this conclusion even though the prohibited activity, possession of a gun, involved a commercial item.

After rejecting the aggregation approach to sustaining the regulation of an intrastate activity that is *not* economic in nature, this Court sought next to determine whether section 922(q) contained a "jurisdictional element" that would ensure on a case-by-case basis that the possession of a firearm substantially affects interstate commerce. *Id.* For that determination, this Court turned again to the language of the Act and found that it did not provide an express requirement that would "limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562. Because no substantial effect was "visible to the naked eye," in the text of the Act itself, this Court also looked to the legislative history to locate any express congressional findings that demonstrated Congress' belief that the possession of a gun in a school zone substantially affected interstate commerce. *Id.* at 562-563. But this Court found none.

Nevertheless, the government argued that Congress could rationally have concluded that section 922(q) did substantially affect interstate commerce because possession of a gun in a school zone may result in violent crime and violent crime

interferes with the national economy by increasing the cost of insurance and deterring people from traveling to unsafe areas. *Id.* at 563-564. The government also argued that guns in school undermine the learning environment, producing less productive citizens, which hurts the national economy. *Id.* at 564. To underscore the limitations on the commerce power, this Court addressed the implications of those arguments.

The government acknowledged under its "costs of crime" argument that Congress could regulate any activity that might lead to violent crime no matter how remote the connection to interstate commerce. *Id.* Likewise, this Court found that under the government's "national productivity" argument, Congress could regulate anything related to individual economic productivity. *Id.* If these arguments were accepted, this Court concluded it would be "hard pressed" to find any individual activity that Congress could not regulate under the commerce power. *Id.* "Depending on the level of generality," this Court observed, "any activity can be looked upon as commercial." *Id.* at 565.

This was the fallacy in the government's arguments; they provided no logical stopping point to congressional authority and converted the commerce power into a general police power like that enjoyed by the states. *Id.* at 567. Although some of this Court's earlier cases leaned in that direction and suggested a possible expansion of the commerce power, this Court set aside section 922(q) as an invalid Commerce Clause enactment and declined in *Lopez* to go any further. *Id.* "To do so," this Court stated, "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-568 (citing *Gibbons* and *Jones & Laughlin Steel*).

B. Morrison Affirmed That the "Substantial Effects" Standard Applies to Intrastate Activity Only If the Activity Is Economic in Nature

Morrison is instructive because of what it says about this Court's decision in *Lopez*. In 1994, Christy Brzonkala enrolled at Virginia Polytechnic Institute. *Morrison*, 529 U.S. at 602. Shortly afterward, Brzonkala alleged she was raped by two fellow students, Morrison and Crawford. *Id.* When the Institute failed to punish the students, Brzonkala filed a suit in federal court against Morrison and Crawford under 42 U.S.C. § 13981 of the Violence Against Women Act of 1994. That Act provided a federal civil remedy for victims of gender-motivated violence and stated that "persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). But the district court dismissed the suit because it determined that section 13981 was an invalid Commerce Clause enactment. The *en banc* Court of Appeals and this Court both affirmed.

Returning to "first principles," this Court reaffirmed that all laws passed by Congress must find authority in the Constitution and that the powers of Congress are limited. *Morrison*, 529 U.S. at 607. As this Court emphasized, "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *Id*. at 608.

Because section 13981 focused "on gender-motivated violence wherever it occurs" and was not directed at the instrumentalities of interstate commerce or interstate markets, or things or persons in interstate commerce, this Court determined the Act fell within the third category of Commerce Clause enactments and could only be sustained as a regulation of activity that "substantially affects" interstate commerce. *Id.* at 609. To conduct its analysis, this Court concluded that *Lopez* provided the appropriate framework. *Id.*

According to this Court, four factors contributed to the decision in *Lopez*. The first factor was that the statute, by its terms, had nothing to do with commerce or an economic enterprise; that is, the Act did not purport to regulate an economic activity. *Id.* at 610. The second factor was that the Act contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 611-612. This factor was important to establish that the Act was in "pursuance of Congress' regulation of interstate commerce." *Id*. at 612. The third factor was that neither the statute "nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce" of the regulated activity. *Id.* at 612. And, the fourth factor was that the connection between the regulated activity and a substantial effect on interstate commerce was remote. *Id.*

With this framework underlying this Court's Commerce Clause analysis, resolution of the *Morrison* case was clear. *Id.* at 613. First, this Court held, as it must, that the statute, by its terms, had nothing to do with commerce: "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* As a result, gender-motivated crimes are not the type of *economic* activity that, through repetition elsewhere, would substantially affect interstate commerce. *Id.* at 610-611. Not even *Wickard*'s economic aggregation principle was availing. *Id.* at 611 n.4.

This was critical to the outcome of the case. As the majority observed, the noneconomic, criminal nature of the prohibited activity in *Lopez* was central to its decision in that case. *Id.* at 610. But this Court did not stop there. To further illustrate the importance of this factor, this Court stated, as a matter of historical fact, that it had upheld federal regulation of intrastate activity based on its "substantial effects" on interstate

commerce *only* when the regulated activity was economic in nature. *See id.* at 611, 613.

Next, this Court held that the Violence Against Women Act did not contain an express "jurisdictional element" establishing that Congress was attempting to regulate interstate commerce. *Id.* at 613. Rather than limit its reach to a discrete set of gender-motivated violent crimes that had an explicit connection with or effect on interstate commerce, section 13981 was drawn too broadly and included purely intrastate violent crime. *Id.* The language of the Act did not support the conclusion, therefore, that section 13981 was adequately tied to interstate commerce. *Id.*

Unlike the situation in *Lopez*, however, this Court did find that the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce. *Id.* at 614. Among others, those effects included deterring victims from traveling interstate or engaging in interstate business. *Id.* at 615. Diminishing national productivity, increased medical costs, and a decrease in the supply and demand of interstate goods also were cited. *Id.* But because the regulated activity was not economic in nature, this Court did not believe that these findings were sufficient to uphold the Act under the Commerce Clause. *Id.* "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at 614. That determination, the majority held, is for the courts to decide. *Id.*

Finally, because Congress followed the but-for causal chain from the original violent act to every remote effect upon interstate commerce, this Court decided that Congress' findings were faulty and relied on a "method of reasoning" that obliterates the distinction between what is national and what is local and which this Court had already rejected in *Lopez*. *Id.* at 615. Simply put, this Court was unwilling to allow Congress to regulate noneconomic activity, such as gender-motivated acts

of violence, based only on that activity's attenuated effects on interstate commerce. *Id.* at 617. Therefore, this Court held that Congress did not have authority under the Commerce Clause to enact section 13981 of the Violence Against Women Act. *Id.* at 619.

C. The Listing of the Alabama Sturgeon, an Intrastate, Noncommercial Fish, Does Not Involve the Regulation of Economic Activity and Fails the *Lopez* and *Morrison* Standard for "Substantial Affects"

The Endangered Species Act authorizes federal regulation of threatened and endangered species. *See* 16 U.S.C. § 1533. As with the challenged provisions in *Lopez* and *Morrison,* the listing process is not directed at the use of channels or instrumentalities of interstate commerce or interstate markets, or things or persons in interstate commerce. *See Morrison*, 529 U.S. at 609. Thus, if the listing of the Alabama sturgeon is to be sustained, it will have to be as a regulation of activity that "substantially affects" interstate commerce. *Id.* Therefore, *Lopez* and *Morrison* provide the appropriate analytical framework for determining the listing's constitutional validity. *Id.*

As noted above, under that framework this Court looks at four factors: (1) Is the challenged federal action in furtherance of commerce or an economic enterprise; that is, does the action purport to regulate an economic activity? *Id.* at 610. (2) Is the federal action supported by an express "jurisdictional element" which might limit its reach to a discrete set of activities that "additionally have an explicit connection with or effect on interstate commerce?" *Id.* at 611-612. (3) Is the federal action backed by express "findings regarding the effects upon interstate commerce" of the regulated activity? *Id.* at 612. And, (4) is the connection between the regulated activity and a substantial effect on interstate commerce attenuated? *Id.*

The purpose of this overall inquiry is to determine "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 557.

1. The Listing of the Alabama Sturgeon Has Nothing to Do with Economic Activity

Although the Eleventh Circuit acknowledged this Court's *Lopez* and *Morrison* decisions, it did not follow those decisions. Had it done so, it would have concluded that the listing of the Alabama sturgeon had nothing to do with economic activity and cannot be sustained under the "substantial effects" test established in those decisions. Under that test, the first step is to determine whether the federal action has anything to do with economic activity. Here, the Coalition challenges the listing of the Alabama sturgeon. The government concedes that the sturgeon is not a commercial fish and the species does not affect interstate commerce. *See* App. B8 n.4. But, more importantly, nothing in the listing process requires the species to have any connection with any commerce whatsoever. The listing of the Alabama sturgeon has by its own terms nothing to do with commerce or any sort of economic endeavor. In *Lopez*, this was decisive: § 922(q) *by its own terms* had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561.

Additionally, the listing of the Alabama sturgeon is "not an essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *See* Lopez, 514 U.S. at 561 (emphasis added). To the contrary, the ESA is a conservation statute that, like the statutes in *Lopez* and *Morrison*, does not involve a commercial or economic regulatory scheme at all. The regulation of the Alabama sturgeon cannot be sustained, therefore, under this Court's cases, like *Wickard*, that allow congressional regulation of activities "that arise out of or are

connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *See id.*

2. The Listing Includes No Express "Jurisdictional Element" That Would Limit It to Species That Have an Explicit Connection with Interstate Commerce

In its enforcement of the ESA, the Service lists all threatened or endangered species without regard to their effect on interstate commerce. This includes commercially harvested species that travel interstate, like certain salmon populations, as well as a rare species of fish, like the Alabama sturgeon, that is found only within a single state and has no economic value or commercial use.

Although the government could have limited its listings to commercial species, it did not do so. Instead it chose to cast its regulation "over a wider, and more purely intrastate" species —the Alabama sturgeon—that has no explicit connection with interstate commerce, like the failed actions in *Lopez* and *Morrison. See Morrison*, 529 U.S. at 613.

Indeed, the ESA requires that a listing determination rest *solely* on the biological status of the species and *does not allow* a consideration of the effects a species may have on interstate commerce. *See* 16 U.S.C. § 1533(a)-(b). Therefore, the listing of the Alabama sturgeon did not include any sort of jurisdictional element that would ensure the species substantially affects interstate commerce and that the government was acting "in pursuance of Congress' power to regulate interstate commerce." *See Morrison*, 529 U.S. at 613. *See also* 65 Fed. Reg. 26449-26450.

3. The Listing of the Alabama Sturgeon Is Not Supported by Express Findings Regarding the Effects of Intrastate, Noncommercial Species

Under *Lopez* and *Morrison*, a court may look to the Act and the congressional record for express findings that demonstrate Congress was legislating pursuant to its Commerce Clause authority. *Morrison*, 529 U.S. at 615. But under the ESA, Congress has made no express findings regarding the effects of intrastate, noncommercial species on interstate commerce generally. And, of course, the government admits there are no interstate commerce effects associated with the Alabama sturgeon specifically. The final rule itself contains no findings that show a relationship between the listing of the Alabama sturgeon and any interstate commercial activity.

That should end the inquiry because nothing in the record provides convincing support for the Eleventh Circuit's conclusion that Congress intended, or needed, to regulate interstate commerce by listing intrastate, noncommercial species. However, the court below makes much of general comments in the legislative history that Congress was concerned in the ESA with the "'incalculable' value of the genetic heritage that might be lost absent" federal regulation of threatened and endangered species. App. A1-A42.

The problem with this is twofold. First, at most, such broad statements indicate only Congress' assessment that protecting species is important. They do not in any way constitute a "finding," let alone an "express finding," that intrastate, noncommercial species, like the Alabama sturgeon, will have substantial effects on interstate commerce. And second, although legislative statements may reveal that Congress was concerned with interstate commerce, even express findings regarding the effects of the regulated activity on interstate commerce cannot be taken at face value. This Court was clear on that point in *Morrison*. Only the courts can

decide whether particular activities "affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them." *Morrison*, 529 U.S. at 614. The question is judicial, not legislative. *Id.* A question this Court should answer.

4. The Connection Between the Alabama Sturgeon and Interstate Commerce Is Attenuated

This Court's inquiry into whether the connection between the regulated activity and interstate commerce is attenuated is really a question of whether the theory supporting the connection provides a meaningful limit on federal regulatory authority. *See Morrison*, 529 U.S. at 615. Put another way, this Court wants to know if the regulation has a logical stopping point. If the government can use its authority to obliterate the Constitution's distinction between what is national and what is local, the courts must intervene and invalidate the regulation.

In *Lopez*, the government argued that violent crime substantially affects commerce and that violence in schools affects the productivity of the nation's citizens which, in turn, substantially affects commerce. But this Court found that argument went too far:

> Under the theories that the Government presents . . ., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Lopez, 514 U.S. at 564.

Likewise, in *Morrison*, the government argued that Congress can regulate gender-motivated crime because violent

crime as a whole substantially affects interstate commerce. But this Court rejected that argument for the same reasons cited in *Lopez*. *See Morrison*, 529 U.S. at 615. If Congress can regulate violent crime because it has some ultimate effect on interstate commerce, Congress could similarly regulate any human endeavor because of its ultimate effect on commerce: "[D]epending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565.

Likewise, if the federal government can regulate a wholly intrastate, noncommercial species, and its habitat, like the Alabama sturgeon, because biodiversity (the genetic heritage) somehow affects interstate commerce, as the Eleventh Circuit held in this case, there is no activity that the government could not regulate. In this symbiotic world, virtually all physical endeavor has an effect on the biosphere which could affect biodiversity and, ultimately, through a chain of but-for causation, interstate commerce. Thus, by this line of reasoning which this Court expressly rejected in *Lopez*, the federal government could regulate (indeed even control) whole areas of historical state authority such as local land use, local water use, or even individual consumption and obliterate the distinction between what is national and what is local.

5. This Court's *Raich* Decision Did Not Change the "Substantial Effects" Test Established in *Lopez* and *Morrison*

The Eleventh Circuit in this case relied on a misinterpretation of this Court's recent decision in *Raich* for its conclusion that the listing of the Alabama sturgeon does not exceed Congress' commerce power. According to the court below, "When Congress can and has regulated a class of activities, we 'have no power to excise, as trivial, individual instances of the class.'" App. A41 (citing *Raich*, 545 U.S. at 23). Were this the law, this Court would not have invalidated the Gun-Free School Zones Act in *Lopez* or the Violence

Against Women Act in *Morrison*. This is a mischaracterization of the current state of the law and this Court's *Raich* decision.

In *Raich*, this Court considered whether the use and distribution of home-grown marijuana could be prohibited by the federal government under the Controlled Substances Act. In addressing that question, this Court did not overrule *Lopez* or *Morrison*. Those cases are still controlling. *Raich*, like *Wickard*, constituted a special circumstance not applicable here.

Just as the Agricultural Adjustment Act in *Wickard* regulated the entire national market in wheat, the Controlled Substances Act in *Raich* regulated the entire national market in drugs. And, as with the home-grown wheat in *Wickard*, the use of locally grown marijuana in *Raich* involved an actual market commodity. In *Raich* this Court cited *Wickard* for the proposition that Congress can regulate intrastate activity involving a fungible commodity if failure to regulate that class of activity would undermine "regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 2. Additionally, this Court observed:

> The similarities between [*Raich*] and *Wickard* are striking. In both cases, the regulation is squarely within Congress' commerce power *because* production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

Id. (emphasis added)

Of course, the ESA is not a regulation of a national market nor does the regulation of an intrastate, noncommercial species, like the Alabama sturgeon, involve a market commodity. Therefore, *Raich* is not controlling in this case as the Eleventh Circuit held.

CONCLUSION

The government listed the Alabama sturgeon as an endangered species after determining the sturgeon did not have *any* effect, let alone a substantial effect, on interstate commerce. This exercise of federal power conflicts with this Court's Commerce Clause cases which demonstrate that this Court has upheld federal regulation of intrastate activity, based upon the activity's substantial effects on interstate commerce, only when the activity has been economic in nature. Nevertheless, in putative reliance on this Court's recent decision in *Raich*, the Eleventh Circuit in this case adopted a boundless interpretation of the commerce power that extends federal regulation to a rare species of fish—the Alabama sturgeon—that is found in only one state and has no commercial use. Review of this case by this Court is therefore necessary to determine the scope of the commerce power.

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Respectfully submitted,

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