

•Stewart & Jasper Orchards v. Salazar

Brief Of Amici Curiae Center For Constitutional Jurisprudence And The CATO Institute In Support Of Petitioners

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The federal government is currently engaged in a misguided attempt to use a noneconomic statute — the Endangered Species Act — to regulate under its Commerce Clause authority a noneconomic activity, the potential "take" of the noncommercial, wholly intrastate delta smelt. Acting under this purported authority, the U.S. Fish and Wildlife Service issued an opinion in 2008 that requires a reduction of critical water deliveries in California for the alleged benefit of the threatened delta smelt species. The delta smelt-based water cutbacks have resulted in substantial hardship to farmers and other water users in Southern California and the San Joaquin Valley. In 2009, the Pacific Legal Foundation filed a lawsuit contending that regulation of the delta smelt is not a valid exercise of the Commerce Clause. The district court and the Ninth Circuit Court of Appeals disagreed. Cato joined Chapman University's Center for Constitutional Jurisprudence and former attorney general Edwin Meese in filing a brief that supports PLF's request for Supreme Court review. We argue that the Court should take this case in order to delineate the constitutional distinction between federal and state power and protect the states' exclusive police power to regulate and advance the health, safety, and welfare of the people. Specifically, our brief argues: (1) that the federal government's regulation of a wholly intrastate, noncommercial species exceeds Congress's powers under the Commerce Clause; (2) the expansive application of the ESA to the delta smelt, because it is noncommercial species that doesn't travel across state lines, intrudes on the core police powers reserved to the states; and (3) that the Supreme Court should repudiate the aggregation principle of Wickard v. Filburn. Striking down the expanded interpretation of the ESA at issue here is not enough. If left untouched, the Ninth Circuit decision opens the door to unlimited and abusive assertions of power by an assortment of federal agencies. The Court needs to reinforce and rebuild the limits of the Commerce Clause and to reign in a federal government that continues to believe that the Constitution sets no bounds on its power.

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