No. _____

IN THE

Supreme Court of the United States

CHARLES GILBERT GIBBS, ET AL.,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause authorizes federal restrictions on the ability of individuals to defend themselves and their property from wild wolves, when such actions are wholly intrastate and noncommercial.

INTERESTED PARTIES

Petitioners, plaintiffs below, are Charles Gilbert Gibbs; Richard Lee Mann, III; Hyde County, North Carolina; and Washington County, North Carolina.

The federal respondents, defendants below, are Bruce Babbitt, Secretary of the Interior; United States Fish and Wildlife Service; United States Department of the Interior; and Jamie Clark, Director of the United States Fish and Wildlife Service.

The private respondent is Defenders of Wildlife, which intervened as a defendant in the lower courts.

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Petitioners Charles Gilbert Gibbs, *et al.* respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 214 F.3d 483. The order of the district court (App., *infra*, 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. App., *infra*, 56a-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

The federal regulation at issue, 50 C.F.R. § 17.84(c), is reproduced in the Appendix, *infra*, 70a-74a.

STATEMENT OF THE CASE

Petitioners challenged the constitutionality, under the Commerce Clause, of a federal regulation that generally prohibits individuals from protecting themselves and their property from the depredations of wild wolves, even where such actions are wholly intrastate and noncommercial in nature. The district court granted summary judgment for respondents. The court of appeals, over Judge Luttig's dissent, affirmed.

1. This case involves a regulation promulgated under the Endangered Species Act of 1973 ("ESA"), Pub. L. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1994 & Supp. III 1997)). The regulation at issue generally prohibits human interference with red wolves, a species of wild animal recently reintroduced to North Carolina by the federal government. *See* 50 C.F.R. § 17.84(c).

The ESA authorizes the Secretary of the Interior to designate animal species as "endangered" or "threatened." 16 U.S.C. § 1533. Among other prohibitions, the ESA makes it unlawful for any person to "take" an endangered or threatened species without a permit. 16 U.S.C. § 1538(a)(1)(B). The term "take" is defined as

"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).

The ESA also authorizes the Secretary to release an "'experimental population' . . . of an endangered species or a threatened species" into areas currently unoccupied by that species. 16 U.S.C. § 1539(j)(1)-(2)(A). A reintroduced experimental population is "treated as a threatened species." 16 U.S.C. § 1539(j)(2)(C). That designation allows the Secretary to specify, by rule, the prohibitions of and exceptions to the ESA that apply to the experimental population. *See* 16 U.S.C. § 1533(d).

Pursuant to these provisions of the ESA, and acting under delegated authority from the Secretary of the Interior, the U.S. Fish and Wildlife Service ("FWS") developed a special program to reintroduce the red wolf (*Canis rufus*)—which had been designated an endangered species in 1967, *see* 32 Fed. Reg. 4001 (Feb. 24, 1967)—as an experimental population. An effort was initiated in 1980 to release red wolves in Kentucky and Tennessee, but that plan was eventually withdrawn in 1984 due to public opposition. *See* App., *infra*, 59a-60a n.1. A subsequent effort to release red wolves into the Alligator River National Wildlife Refuge, located in eastern North Carolina, was proposed in 1986 and launched in the fall of 1987. *See id.* at 59a-60a. FWS described the geographic scope of the reintroduction as follows: "The Alligator River National Wildlife Refuge reintroduction site is within the historic range of the species in North Carolina, in Dare and Tyrrell Counties; because of their proximity, Beaufort, Hyde, and Washington Counties are also included in the experimental population designation." 50 C.F.R. § 17.84(c)(9)(i).

In conjunction with the federal government's effort to reintroduce red wolves to North Carolina, FWS promulgated a regulation concerning the experimental population. *See* 50 C.F.R. § 17.84(c). That regulation prohibits, with limited exceptions, the "taking" of red wolves by private persons. *See* 50 C.F.R. § 17.84(c)(2). The ESA authorizes both civil and criminal penalties for violations of its provisions or regulations promulgated thereunder. *See* 16 U.S.C. § 1540(a)-(b).

2. Although the initial site of reintroduction was on federal land, red wolves have wandered onto private property with disturbing ease and frequency. "From available data, as of February 1998 it was estimated that about 41 of the approximately 75 wolves in the wild may now reside on private land." App., *infra*, 5a. The federal government's proven inability to protect private landowners from incursions by red wolves creates an inevitable and dangerous conflict between wolves and humans. *See* App., *infra*, 19a ("Since reintroduction, red wolves have strayed from federal lands onto private lands. Indeed, wolves are known to be 'great wanderers.'") (citation omitted).

Petitioner Richard Lee Mann, III, is a resident of Hyde County, North Carolina, whose small son was threatened by a red wolf. *See* C.A. App. 8. He was subsequently prosecuted under 50 C.F.R. § 17.84(c) for killing a red wolf that he believed was a threat to his cattle. *See* C.A. App. 8. Following a guilty plea, he was fined $2,000 and sentenced to perform community service building "wolfhouses" and feeding red wolves. *See* App., *infra*, 62a. Petitioner Charles Gilbert Gibbs is also a Hyde County resident. He has lost several calves, ap-

parently to red wolf attacks, for which FWS has refused to reimburse him. *See ibid*.

Petitioners Hyde County and Washington County are, as FWS has recognized, proximate to the Alligator River National Wildlife Refuge reintroduction area and therefore are subject to incursion by red wolves. *See* 50 C.F.R. § 17.84(c)(9)(i). In response, the County Commission of Washington County approved a resolution in 1992 opposing the red wolf program. *See* App., *infra*, 62a. The County Commission of Hyde County approved a resolution in 1994 requesting removal of red wolves from private lands within the county. *See ibid.* In addition to these resolutions by the county petitioners, the North Carolina General Assembly passed a law entitled "An Act to Allow the Trapping and Killing of Red Wolves by Owners of Private Land." *Id.* at 7a, 62a-63a (citing 1994 N.C. Sess. Laws Ch. 635). The North Carolina Department of Agriculture has also objected to the red wolf program. *See* App., *infra*, 62a.

3. Petitioners sued the federal agencies and officials responsible for the red wolf reintroduction program, challenging the constitutionality of the red wolf regulation. In particular, petitioners alleged that the prohibition against the "taking" of red wolves on private property exceeded the federal government's authority under the Commerce Clause. *See* App., *infra*, 8a.

a. The district court granted summary judgment for respondents. The court recognized that the sole "nexus between the regulation at issue and interstate commerce is the red wolf." App., *infra*, 66a. The court concluded that red wolves "substantially affect interstate commerce through their tourism value." *Ibid.* That is because, according to the court, "tourists do cross state lines to see

the red wolf." *Id.* at 67a. While the court acknowledged that it was "difficult . . . to fully assess the red wolf's impact on tourism," the court noted that "many persons have traveled from other states to attend red wolf 'howling' events conducted at the Alligator River National Wildlife Refuge in North Carolina." *Id.* at 67a n.9. "Unrestricted taking of red wolves on private land," the court said, "would present a clear threat to this commerce." *Id.* at 67a.

b. The court of appeals, by divided vote, affirmed. The panel members all agreed that the constitutionality of the red wolf regulation had to be evaluated under the standards articulated by this Court in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995). They differed, however, as to the application of those standards in this case.

The majority recognized that, "[t]o fall within Congress's commerce power, this regulation . . . must 'substantially affect interstate commerce.'" App., *infra*, 14a (quoting *Lopez*, 514 U.S. at 559). The majority held that this standard was satisfied because "[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." App., *infra*, 15a-16a. The majority also recognized that the prohibition against taking red wolves must constitute "economic activity." *Id.* at 15a (citing *Morrison*, 120 S. Ct. at 1750). The majority said, without citing any authority or record evidence, that this requirement was met because "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." App., *infra*, 15a. The majority

thus 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 uphold this regulation." *Id.* at 16a.

Judge Luttig dissented. He maintained that the majority's decision could not be reconciled with this Court's decisions in *Lopez* and *Morrison*. *See* App., *infra*, 47a. As Judge Luttig explained, "[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. Moreover, according to Judge Luttig, "even assuming that such is an economic activity, it certainly is not an activity that has a substantial effect on interstate commerce." *Ibid.* Judge Luttig concluded that the majority's analysis was akin to (if not more expansive than) that of the dissenters in *Lopez* and *Morrison* rather than the majorities, and would, if accepted, "consign[] to aberration" this Court's decisions in those cases. *Id.* at 51a.

REASONS FOR GRANTING THE PETITION

This case presents a constitutional question substantially identical to one of the issues currently before the Court in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178 ("*SWANCC*"). Accordingly, the petition should be held pending the Court's disposition of that case. If this Court reaches the constitutional question in *SWANCC*, this case should be remanded to the court of appeals re-

gardless of how the issue is resolved in *SWANCC*. In the event the Court does not reach the constitutional question in *SWANCC*, however, the Commerce Clause question presented by this case warrants plenary review.

I. The Petition Should Be Held Pending The Court's Decision in *SWANCC*

At issue in *SWANCC* is the U.S. Army Corps of Engineers' so-called "migratory bird rule." *See* 51 Fed. Reg. 41,206 (Nov. 13, 1986). This administrative interpretation of the Clean Water Act (33 U.S.C. § 1251 *et seq.*) purports to authorize the exercise of federal jurisdiction over isolated, intrastate waters based solely on the presence of migratory birds. *See* 51 Fed. Reg. at 41,217 (asserting federal jurisdiction over all waters "[w]hich are or would be used as habitat by . . . migratory birds which cross state lines").

The petitioner in *SWANCC* has presented two questions: Whether the migratory bird rule is a permissible construction of the Clean Water Act, and, if so, whether it is within the federal government's authority to regulate interstate commerce. *See* Pet. Br. in *SWANCC* at 11-13. The latter question is substantially identical to the question in this case.

If this Court in *SWANCC* concludes that the Corps' migratory bird rule is authorized by statute, then it will have to analyze the constitutionality of the rule under the Commerce Clause framework set forth in *Lopez* and reiterated last Term in *Morrison*. In *Lopez*, the Court recognized three strands of Commerce Clause authority: "First, Congress may regulate the use of channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate

commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (citations omitted).

As the decisions below in *SWANCC* and in this case make clear, both cases turn on the scope of federal authority under the third strand identified in *Lopez*, which permits Congress to regulate activities that "substantially affect" commerce. *See SWANCC*, 191 F.3d 845, 849 (7th Cir. 1999) ("The gun control law at issue in *Lopez*, like the migratory bird rule challenged here, could only have been sustained as an exercise of the third variety of regulatory power"); App., *infra*, 12a ("if 50 C.F.R. § 17.84(c) [the red wolf regulation] is within the commerce power, it must be sustained under the third prong of *Lopez*").

Moreover, the application of the "substantial effects" test arises in similar contexts in both *SWANCC* and in this case. In *SWANCC*, the asserted connection to interstate commerce is provided by wild birds; here, the commerce nexus is purportedly provided by wild wolves. In both cases, it is the presence of wild animals on private property that is asserted as the sole basis for the exercise of federal jurisdiction over human activities on that property. Arising as they do from parallel premises, the regulations at issue in both *SWANCC* and this case raise substantially the same constitutional question: Does the mere presence of wild animals substantially affect interstate commerce such that Congress can regu-

late human activities on private property that might impact those animals?

The "substantially affects" strain of Commerce Clause jurisprudence requires the Court to undertake four subsidiary inquiries: (i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the causal link between the regulated activity and interstate commerce is direct or attenuated; (iii) whether the regulation contains an express jurisdictional element; and (iv) whether Congress has made findings regarding the regulated activity's effect on interstate commerce. *See Morrison*, 120 S. Ct. at 1749-51. Each of these inquiries is implicated, in very similar fashion, by both *SWANCC* and this case. Accordingly, this petition should be held pending the Court's resolution of *SWANCC*.

First, the Court has allowed intrastate activities to be considered, *in the aggregate*, as having a substantial effect on interstate commerce only when "the regulated activity was of an apparent commercial character." *Morrison*, 120 S. Ct. at 1750 n.4; *see also Lopez*, 514 U.S. at 561 (Congress may regulate those intrastate activities that "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce"). This is no surprise, since the Commerce Clause, after all, authorizes Congress to regulate only interstate *commerce*, not interstate *activity*.

An important question in both *SWANCC* and this case is whether the regulated human conduct—filling bird-habitat puddles in *SWANCC*, taking wolves in this case—constitutes commercial or noncommercial activity. Neither of the challenged regulations is limited to

commercial activity, and the mere existence of wild animals has not heretofore been considered "economic" in nature. While the Court has suggested that the commerce power extends, unsurprisingly, to *commercial transactions* involving captured animals or their parts (*Andrus* v. *Allard*, 444 U.S. 51, 63 & n.19 (1979)), the Court has never said, much less held, that the Commerce Clause is brought into play due to the simple *presence* of wild animals on private property. The Court's resolution of this issue in the context of birds is likely to be instructive, if not controlling, of the resolution of the same issue in the context of wolves.

Second, the lower courts in both *SWANCC* and this case concluded that human activities that might affect wild animals may constitutionally be regulated because of purported causal links between wild animals and economic activity. In both cases, the courts concluded that human-induced reductions in wildlife might depress interest in interstate tourism or negatively impact the supply of a commercial resource in some manner. *See SWANCC*, 191 F.3d at 850 (upholding migratory bird rule on ground that, "throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds") (quoting *Hoffman Homes, Inc.* v. *EPA*, 999 F.2d 256, 261 (7th Cir. 1993)); App., *infra*, 15a-16a ("with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts"). Yet both *SWANCC* (involving a proposed landfill on private property) and the present case (also involving private land) push the tourism argument to its outermost reaches—to say the least.

Quite similar theories of causation were rejected by the Court in *Lopez* and *Morrison* on the ground that they involved excessively attenuated chains of causation to link the regulated activity with its effects on interstate commerce. *See Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). Both *SWANCC* and this case test the limits of *Lopez* and *Morrison*, inviting the Court to distinguish the impact of human activity on animals and their habitats (asserted in both *SWANCC* and this case) from the impact of human activity on people and their neighborhoods (held insufficient in *Lopez* and *Morrison*) on interstate tourism or travel. These cases also invite the Court to contrast the commercial interest in human resources, already rejected as insufficient in *Lopez* and *Morrison*, from the commercial interest in wildlife resources asserted by the government in *SWANCC* and this case.

Lopez and *Morrison* identified causal chains that were simply too attenuated and too speculative to constitute a substantial effect on interstate commerce. The causal chains in both *SWANCC* and this case bear striking resemblance to those already held insufficient. *See Cargill, Inc.* v. *United States*, 516 U.S. 955, 957-58 (1995) (Thomas, J., dissenting from denial of certiorari) (stating that "[t]he basis asserted to create federal jurisdiction over petitioner's land [pursuant to the migratory bird rule] seems to me to be even more far-fetched than that offered, and rejected, in *Lopez*"); App., *infra*, 50a (Luttig, J., dissenting) ("The number of inferences (not

even to mention the amount of speculation) necessary to discern in this activity a substantial effect on interstate commerce is exponentially greater than the number necessary in *Lopez* . . . or in *Morrison*"); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 Tex. Rev. L. & Pol. 365, 419 (1998) ("If this elaborate chain of contingencies does not stretch the limits of reason, it is hard to imagine a chain that would"). The Court's resolution of the attenuation question with respect to the birds in *SWANCC* will control, or at least directly impact, the resolution of the same question as to the wolves in this case.

Third, neither the migratory bird rule nor the red wolf regulation contains any express jurisdictional element. Thus, both *SWANCC* and this case raise the question whether the determination that wildlife preservation constitutes a valid national concern is, alone, sufficient to permit federal regulation of wholly intrastate, noncommercial activity. *See* U.S. Br. in *SWANCC* at 37 ("[b]ecause migratory birds are a shared resource of the several States, their protection has traditionally been regarded as a task most appropriately performed by the national government"); *compare* App., *infra*, 45a (noting that "the national interest in the development of natural resources" must be considered in determining the scope of federal power under Commerce Clause) *with id.* at 47a-48a (Luttig, J., dissenting) ("the simple (and frankly, considerably less incitant) question of law for us to decide is" not whether there is a national interest in conserving natural resources, but rather "whether . . . this one particular Fish and Wildlife regulation exceeds Congress' power under the Commerce Clause"). The

Court's determination whether bird protection of itself is a constitutionally sufficient rationale in *SWANCC* will directly bear on the sufficiency of the government's interest in wolf reintroduction at issue in this case.

Fourth, both the migratory bird rule and the red wolf regulation are administrative regulations, not statutes as in *Lopez* and *Morrison*. As a result there are no congressional findings regarding the regulated activity's ostensible effect on commerce. *See Lopez*, 514 U.S. at 562 ("as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce"). Moreover, neither the Corps in announcing the migratory bird rule nor FWS in promulgating the red wolf regulation attempted to establish any link between these federal proscriptions and interstate commerce. Therefore, there are no legislative or administrative findings in either *SWANCC* or this case to which this Court might look, much less defer.

In any event, while "[d]ue respect for the decisions of a coordinate branch of Government demands that [this Court] invalidate a *congressional enactment* only upon a plain showing that Congress has exceeded its constitutional bounds" (*Morrison*, 120 S. Ct. at 1748 (emphasis added)), the Court does not give the same deference to constitutional interpretations made by bureaucrats in the Executive Branch. *See*, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 922 (1995). That is particularly true here, where the interstate commerce rationale for the regulation has been articulated only by the government's lawyers in the context of this litigation. *See Martin* v. *OSHRC*, 499 U.S. 144, 156 (1991). The dis-

trict court in this case, however, concluded that the fact that the asserted federal authority was premised on a regulation rather than a federal statute was of no consequence to the Commerce Clause analysis. *See* App., *infra*, 64a ("this Court can analyze 50 C.F.R. § 17.84 in the same way it would had that regulation been passed by both Houses of Congress and signed by the President, as opposed to promulgated through the exercise of delegated rulemaking authority"). The Court's consideration in *SWANCC* whether there is any constitutional significance to the distinction between congressional enactments and administrative interpretations will be dispositive of the same problem in this case.

II. This Case Should Be Remanded To The Court Of Appeals Regardless Of How The Court Resolves The Constitutional Question In *SWANCC*

In light of the many similarities between the constitutional questions raised in both *SWANCC* and this case, it cannot seriously be doubted that a constitutional ruling in *SWANCC* will necessarily have a dramatic impact on the validity of the Fourth Circuit's decision—as the government itself has already recognized. The government has cited the court of appeals' decision in this case as support for upholding the migratory bird rule in *SWANCC*. Its brief in *SWANCC* suggests that, if the taking of wolves substantially affects commerce, so does the destruction of migratory bird habitat. *See* U.S. Br. in *SWANCC* at 37-38 n.29 (discussing the decision below). The converse equally holds: if destruction of migratory bird habitat does *not* substantially affect commerce, neither does the taking of wolves. *See* Holman, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause*

Attack?, 15 Va. Envtl. L.J. 139, 139 (1995) ("*Lopez* poses a considerable threat to portions of the Endangered Species Act (ESA) and the Clean Water Act (CWA), because these two federal environmental laws, as applied, lack a strong connection to interstate commerce").

1. In the event this Court reverses on the constitutional question in *SWANCC*, certiorari should be granted in this case, the decision below should be vacated, and the case should be remanded to the court of appeals for further consideration. If the migratory bird rule is held unconstitutional in *SWANCC*, grave doubts, to say the least, will be cast on the red wolf regulation challenged here. The court of appeals should be given the opportunity to reconsider its decision in light of the Court's decision in *SWANCC*.

2. Even if this Court were to affirm on the constitutional question in *SWANCC*, the Court should remand this case to the court of appeals.

SWANCC is the first case before this Court in which a federal regulation of wholly intrastate, noncommercial activities affecting wild animals has been directly challenged under the Commerce Clause. Yet there are several differences between this case and *SWANCC* which render the challenged regulation in the present case even further outside the scope of federal commerce power than that challenged in *SWANCC*.

First, the government claims in *SWANCC* that "[t]he proposed activity for which petitioner sought a federal permit—the filling of ponds in order to construct a municipal landfill—is plainly of a commercial nature." U.S. Br. in *SWANCC* at 43. Irrespective of the merits of

this argument (which appears identical to one rejected in *Lopez*, 514 U.S. at 561), it cannot save the regulation challenged in this case.

The red wolf regulation is not a regulation of commerce even under the distinction urged by the government in *SWANCC*. Just as in *Lopez*, *see* 514 U.S. at 567, there is "no reason to believe" that the activity prohibited by the red wolf regulation will be in any way "typical[ly]" commercial. U.S. Br. in *SWANCC* at 47 n.38. In practice just as in its plain text, the red wolf regulation applies to private residential properties and commercial ones with equal force and regularity. Indeed, FWS has recognized the threat posed by red wolves to human safety and private property, making the concerns affected by the red wolf regulation particularly noncommercial, and thus substantially more similar to *Morrison* and *Lopez* than *SWANCC*. *See* 63 Fed. Reg. 54151, 54152 (Oct. 8, 1998) (terminating red wolf release program in the Great Smoky Mountains National Park, noting that the red wolf is "a behaviorally unsuitable animal" which "represents a demonstrable . . . threat to human safety"); 60 Fed. Reg. 18940, 18943 (Apr. 13, 1995) ("Wolves that come in close proximity to private residences may cause property damage by killing pets or removing and/or physically defacing small property items. In addition, private individuals may not want the animals on their property because they fear them or consider them a nuisance.").

Thus, even if the Court determines that the regulation in *SWANCC*, though lacking a jurisdictional "interstate commerce" element, is sufficiently related to commercial conduct to avoid the reach of *Lopez*, remand will be necessary to determine whether *this* case falls within the

ambit of *Lopez*, as clarified by the Court's decision in *SWANCC*.

Second, in *SWANCC* the government urges that the interstate *travel* of migratory birds alone is sufficient to trigger the federal commerce power, even without any showing of impact on interstate *commerce*. *See* U.S. Br. in *SWANCC* at 39 ("[Migratory birds] can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein.") (quoting *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920)); *id.* at 40 ("Like water flowing in an interstate river, migratory birds constitute a natural resource . . . that has no permanent locus in a single State . . . [and thus] are appropriately regarded as a shared resource of the several States").

Justice Thomas has previously rejected such reasoning. *See Cargill*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari) (rejecting argument that "the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds"). But even were the Court to accept this novel interstate travel theory of the commerce power in *SWANCC*, such reasoning would not justify regulation of red wolves in the case at bar. There is no evidence that the red wolf looks to more than one State at a time for habitat. Indeed, FWS's regulation implementing the red wolf experimental program confirms that the geographical scope of the red wolf release is limited to a handful of counties in North Carolina, where they have adopted their "home ranges." *See* App., *infra*, 72a; *see also Nat'l Ass'n of Home*

Builders v. *Babbitt*, 130 F.3d 1041, 1058 (D.C. Cir. 1997) (Henderson, J., concurring) (rejecting similar argument); *id.* at 1063 (Sentelle, J., dissenting) (same).

Third, in upholding the migratory bird rule, the lower court in *SWANCC* relied on the government's determination that the rule was essential to protecting migratory bird species from the destruction of their habitat. *See SWANCC*, 191 F.3d at 850 ("the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce"). The anti-taking rule challenged in this case, by contrast, involves just one experimental red wolf population. Under the ESA, the Secretary must make a determination that such populations are not essential to the continuation of the species before embarking on a reintroduction program. *See* 16 U.S.C. § 1539(j)(2)(B); App., *infra*, 4a; *id.* at 60a n.2. Should the Court determine in *SWANCC* that the continued existence of wildlife species as a whole substantially affects commerce, remand to the court of appeals is necessary to determine whether the preservation of particular members of the species, deemed nonessential to the continuation of the species as a whole, also substantially affects commerce.

Fourth, the migratory birds in *SWANCC* inhabited or visited the petitioner's property at the time it was purchased. The red wolves in this case, by contrast, were introduced into petitioners' vicinity *by the federal government*. The government's suggestion that it can release wild (and dangerous) animals into areas adjacent to private land, and simultaneously assert federal jurisdiction to prohibit private landowners from interfering

with those animals, is nothing other than a bootstrap argument.

For these reasons, a decision on the constitutional question raised in *SWANCC* will provide further guidance to the court of appeals with respect to the red wolf program, necessitating remand *regardless* of how the Court actually rules on the constitutionality of the migratory bird rule.

III. In The Event The Court Does Not Reach The Constitutional Question In *SWANCC*, It Should Grant Certiorari In This Case

The petitioner in *SWANCC* has challenged not only the constitutionality of the Corps' migratory bird rule, but also the reasonableness of that rule as a construction of the Clean Water Act. It is therefore possible that the Court will reverse on the statutory issue without reaching the constitutional issue. If the Court does not reach the Commerce Clause question in *SWANCC*, this case presents an ideal vehicle for the resolution of that question.

1. Several courts of appeals have sustained the constitutionality of regulations promulgated under the ESA in the wake of *Lopez*. *See* App., *infra*, 1a-46a (upholding red wolf regulation); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding Delhi Sands Flower-Loving Fly regulation). *See also Palila* v. *Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (upholding Palila bird regulation before *Lopez*); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the Eagle Protection Act); *Building Indus. Assoc. of Superior Cal.* v. *Babbitt*, 979 F.

Supp. 893 (D.D.C. 1997) (upholding fairy shrimp regulation).

Those decisions, however, have drawn considerable criticism. Indeed, *every* court of appeals decision to have upheld an ESA regulation after *Lopez* has drawn a dissent (and in the D.C. Circuit, a critical separate concurrence as well). *See* App., *infra*, 46a (Luttig, J., dissenting); *Home Builders*, 130 F.3d at 1057 (Henderson, J., concurring); *id.* at 1060 (Sentelle, J., dissenting). These splintered decisions show that the lower courts are badly torn on the scope of federal power to regulate noncommercial activities affecting wildlife. This conflict warrants this Court's immediate attention.

In this case, the court below based its ruling upholding the red wolf regulation on several different theories of "substantial effects." The various theories came under severe criticism from Judge Luttig, however. In his dissent, Judge Luttig stated that the majority's decision relied on the kind of attenuated causation theories previously rejected in *Lopez* and *Morrison*, and in so doing "consigned" those decisions "to aberration." App., *infra*, 51a (Luttig, J., dissenting). He then criticized the majority's attempt to avoid *Lopez* and *Morrison* by claiming a strong national interest in wildlife preservation, stating: "The affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge." *Id.* at 55a (Luttig, J., dissenting).

Similarly, the D.C. Circuit upheld an ESA regulation protecting the Delhi Sands Flower-Loving Fly, but drew a scholarly dissent from Judge Sentelle. Moreover, the two judges who voted to uphold the regulation could not

even agree on a rationale for connecting the regulated activity with interstate commerce. Judge Wald concluded that the regulation protected biodiversity, and that biodiversity is an important commercial interest. *See Home Builders*, 130 F.3d at 1053 ("Each 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."). This theory was rejected by Judge Henderson, however. *See id.* at 1058 (Henderson, J., concurring) ("it is . . . impossible to ascertain that there will be any [] impact [on commerce] at all" from biodiversity). Judge Henderson instead upheld the regulation on the ground that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce." *Ibid.* (Henderson, J., concurring). Writing in dissent, Judge Sentelle found the biodiversity and the "biodiversity affecting ecosystems" rationales indistinguishable, and rejected both as inconsistent with *Lopez*. *See id.* at 1065 (Sentelle, J., dissenting) ("neither Congress nor the litigants, nor for that matter Judge Wald, has pointed to any commercial activity being regulated, any commercial competition being unfairly challenged, or any other sort of commerce being destroyed by the taking of the fly").

Similar conflicts with respect to federal authority to regulate wildlife have arisen in the context of the Clean Water Act. The lower court in *SWANCC* concluded that the migratory bird rule bore a substantial relation to interstate commerce. *See* 191 F.3d at 849-51. That decision conflicted with *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997), creating a split in authority that this

Court may have granted certiorari in *SWANCC* to resolve.

As Justice Thomas explained in his dissent from the denial of certiorari in *Cargill, Inc.* v. *United States*, the argument that modifications of migratory bird habitat substantially affect interstate commerce is "even more farfetched than that offered, and rejected, in *Lopez*." 516 U.S. at 958. *See also Hoffman Homes*, 999 F.2d at 263 (Manion, J., concurring) ("The commerce power . . . is . . . not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink"); *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396 (9th Cir. 1995) ("The migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason"). These objections have the same force with respect to the red wolf regulation challenged in this case as with the migratory bird rule—as the government has already recognized. *See* U.S. Br. in *SWANCC* at 37-38 & n.29.

Given these serious disagreements in the lower courts, it is no surprise that the constitutionality of regulations promulgated under the ESA has drawn considerable scholarly attention. Indeed, numerous commentators have recognized that the constitutionality of certain endangered species programs, such as the red wolf regulation in this case, is doubtful in light of *Lopez* and *Morrison*. *See, e.g.,* Nagle, *The Commerce Clause Meets The Delhi Sands Flowers-Loving Fly*, 97 Mich. L. Rev. 174 (1998); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 Tex. Rev. L. & Pol. 365, 419 (1998); Warner, *The Po-*

tential Impact of United States v. Lopez *On Environmental Regulation*, 7 Duke Envtl L. & Policy Forum 321 (1997); Sherry, *The Barking Dog*, 46 Case W. Res. L. Rev. 877, 881 (1996) (describing the destruction of endangered species habitat by private landowners as "an activity only speculatively related to interstate commerce"); Holman, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 197 (1995).

The continuing uncertainty pervading the courts of appeals respecting the limits of the federal commerce power as regards wild animals cannot be tolerated, as this Court may already have concluded when it granted certiorari in *SWANCC*. Therefore, should the controversy in *SWANCC* be decided on statutory grounds alone, this case presents an ideal opportunity for the Court finally to resolve this important question of federal power.

2. Indeed, in light of the reasoning adopted by the court below, this case is particularly deserving of the Court's attention. The nexus between the red wolf regulation and interstate commerce is so attenuated that the lower court majority felt compelled to concoct a hypothetical commercial market in red wolf pelts in an effort to justify the exercise of the commerce power. Both the majority and FWS concede, however, that no such markets currently exist. *See* App., *infra*, 20a-21a ("[a]lthough . . . red wolves were sold for their pelts primarily in the nineteenth century, this temporal difference is beside the point"); C.A. App. 303 (September 1993 FWS environmental assessment report concluding that "[t]he red wolf is not expected to enter into com-

mercial production or to compete with any species that are harvested for commercial use," nor is it "expected to become a game species or to compete with presently taken game species").

This exercise in speculation exceeds what even the lower court in *SWANCC* was willing to do. This Court has never recognized that the mere possibility of a market appearing at some unknown time in the future is enough to satisfy the requirement of *substantial* effects on commerce today. To the contrary, as Judge Luttig correctly noted, the hypothetical market theory requires just the kind of speculation and blind inference this Court repudiated in *Lopez* and *Morrison*: "we are confronted here with an administrative agency regulation of an activity that . . . has had no economic character for well over a century now. [This is] [a]n activity that has no foreseeable economic character at all, except upon the baldest (though admittedly most humorous) of speculation that the red wolf pelt trade will once again emerge." App., *infra*, 53a (Luttig, J., dissenting). To state the matter simply, what might be in commerce some day is *not* in commerce today. An activity's effect on commerce at some unknown future date—indeed, a day that may *never* come—is too remote to survive scrutiny under *Lopez* and *Morrison*.

Moreover, the "hypothetical market" theory cannot stand in the face of the Court's unanimous decision last Term to construe the federal arson statute, in order to avoid constitutional problems, not to apply to private, owner-occupied residences, even though such residences might *someday* become rental properties. *Compare Jones* v. *United States*, 120 S. Ct. 1904 (2000) (refusing to apply federal arson statute to owner-occupied private

residence), *with Russell* v. *United States*, 471 U.S. 858 (1985) (applying federal arson statute to rental property). In doing so the Court necessarily rejected the government's assertion that the federal arson statute applies "even if the particular property victimized by crime is not at the time of the criminal act devoted to commercial activity, or itself on the market for rent or sale." U.S. Br. in *Jones* at 35-36.

3. The Court explained just last Term that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754; *see also Lopez*, 514 U.S. at 566, 567-68. The red wolf regulation, by asserting federal authority over the ability of North Carolinians to trap or otherwise "take" wild animals, unnecessarily intrudes into an area of purely local concern. In fact, the federal regulation purports to override a North Carolina state statute that specifically authorizes the taking of red wolves in certain circumstances. *See* App., *infra*, 8a-9a.

States have long asserted plenary authority over the wild animals within their borders. As the Court has explained, this is an incidence of sovereignty that has been exercised at least since Roman times. *Geer* v. *Connecticut*, 161 U.S. 519, 523-28 (1896); *see also Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 287-88 (1977) (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). This authority is exercised in a variety of ways, including the establishment of hunting seasons, the various schemes of fishing and other licenses required, limits on the size and number of animals that can be caught,

and the like. *See, e.g.*, *Baldwin* v. *Montana Fish & Game Commission*, 436 U.S. 371 (1978).

The federal government's authority to regulate with respect to wild animals, by contrast, is limited to its enumerated powers. The federal government's property power, for example, authorizes it to proscribe harming wild animals on federal land. *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976). Similarly, the spending power authorizes the federal government to acquire, by purchase or easement, private land that may be used as animal habitat. *North Dakota* v. *United States*, 460 U.S. 300 (1983). The treaty power has been held to authorize the federal government to protect animals that are the subject of international concern. *Missouri* v. *Holland*, 252 U.S. 416 (1920). And the commerce power authorizes certain federal activity, such as regulating animals within the territorial waters (*i.e.*, the "channels" of commerce). *Seacoast Products*, 431 U.S. 265.

The commerce power, however, has *never* been held to authorize federal regulation of wild animals *qua* wild animals. In fact, precisely that argument was advanced by the Solicitor General in *Missouri* v. *Holland*, but was *rejected* by this Court. *Compare* 252 U.S. at 423 (argument for the United States) *with id.* at 433-34 (opinion of the Court). That is because such regulation is, and always has been, the province of the several States; and the Tenth Amendment and fundamental principles of comity dictate that the federal-state balance not be altered in this regard. The federal government has no more rightful place prohibiting the taking of red wolves in North Carolina, where such activity is expressly authorized by state law, than it has regulating the deer-hunting season in Virginia or the ability to fish in

Alaska's intrastate waters. Regulation of wild animals, including human interactions with animals on private property, remains a matter of state concern that is outside the powers conferred on Congress. As a result, the red wolf regulation cannot be sustained as a valid exercise of federal authority. *See Morrison*, 120 S. Ct. at 1748; *Lopez*, 514 U.S. at 567-68.

4. This case is not an attack on the entire scheme of federal environmental regulation. Indeed, the red wolf regulation is not even essential to the continuation of the species *Canis rufus*, or any other. *See* 16 U.S.C. § 1539(j)(2)(B). Judge Luttig correctly explained the narrowness of the issues in this case:

> While it could be lost in a reading of the majority opinion, we do not address here Congress' power over either the channels or instrumentalities of interstate commerce. We do not address activity that is interstate in character. We do not address in this case a statute or a regulation with an express interstate commerce jurisdictional requirement, which would all but ensure constitutional validity. We do not have before us an activity that has obvious economic character and impact, such as is typically the case with non-wildlife natural resources, and even with other wildlife resources. We are not even presented with an activity as to which a plausible case of future economic character and impact can be made.
>
> To the contrary, we are confronted here with an administrative agency regulation of an activity that implicates but a handful of animals, if even that, in one small region of one state. An activity

> that not only has no current economic character, but one that concededly has had no economic character for well over a century now. . . . And, importantly, an activity that Congress could plainly regulate under its spending power and under its power over federal lands, regardless.

App., *infra*, 52a-53a.

Even after *Lopez* and *Morrison*, there is significant disagreement over the extent to which the Commerce Clause confers authority upon the federal government to regulate wholly intrastate, noncommercial activities that may impact wildlife. Prompt resolution of this important and recurring issue is necessary to give lower courts much-needed guidance.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178, and then remanded to the court of appeals for further consideration in light of the Court's resolution of the Commerce Clause issue in that case. In the event the Court does not reach the constitutional question in *SWANCC*, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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