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I. INTRODUCTION

The Delhi Sands Flower-Loving Fly ("Fly") is a rare creature. Belonging to the "mydas flies" family, it is one of the few fly species that visit flowers in search of nectar, thereby pollinating native plants. The Fly lives only in the "Delhi series" of soils found in southwestern San Bernardino County and northwestern Riverside County California. The Fly is the only remaining subspecies of its species, the others driven to extinction by habitat destruction. Threatened by unauthorized trash dumping, urban development, and off-road vehicle use, the Delhi Sands Flower-Loving Fly is also in danger of extinction. Currently, only eleven known populations of the Fly exist, all within an eight-mile radius. "The size of the entire population... [i]s estimated in the low hundreds." Ninety-seven percent of their habitat has been destroyed.

The Fly was placed on the endangered species list in 1993. As an endangered species, the Fly was protected under §9(a)(1) of the Endangered Species Act ("ESA") from commercial trade and could not be "taken" without a permit or an exemption from the Fish and Wildlife Service ("FWS"). Environmentalists and others interested in the Fly's survival believed that this action would help protect the Fly and its habitat. However, the proposed building of a county hospital and a Commerce Clause challenge to the application of the ESA "take" provision soon threatened the life of the Delhi Sands Flower-Loving Fly.

II. FACTS AND HOLDING

The National Association of Home Builders of the United States, the Building Industry Legal Defense Fund, the California Building Industry Association, the County of San Bernardino, the City of Fontana, and the City of Colton, California ("plaintiffs") challenged the application of §9(a)(1) of the ESA to the Delhi Sands Flower-Loving Fly. The plaintiffs argued that the application was not within the authorized power delegated to Congress in the Commerce Clause and was, therefore, unconstitutional. The plaintiffs sought an injunction against the application of §9 of the ESA to the construction of the San Bernardino Hospital.

The County of San Bernardino ("County") planned to build a 470 million-dollar earthquake-proof hospital to serve as a teaching facility and a central emergency medical center in case of an earthquake. In July 1992, the hospital board acquired a seventy-six acre site on which to construct this state-of-the-art hospital. This parcel of land,
however, included part of the Fly’s last remaining habitat. The hospital board discovered in November 1992 that the Fly was likely to be listed as endangered, and in May 1993, the board learned from the FWS that the Fly was classified as endangered.

The FWS advised the board that the construction of the proposed hospital would constitute a “taking” of the species under §9 of the ESA. As a result, the board modified its plans by moving the hospital two hundred-fifty feet north, providing an eight acre habitat preserve for the Fly. The plan also created a hundred-foot wide corridor to permit interbreeding between Fly colonies.

In October 1994, the County desired to build a substation to power the hospital on four acres of land which were considered the best remaining habitat for the Fly. They consulted with the FWS about applying for an incidental “taking” of the Fly under §10 of the ESA. The FWS issued such a permit after the County proposed to set off and manage a nearby 7.5 acres for the Fly. In November 1995, the County told the FWS of its plan to reduce the one hundred-foot-wide corridor to eighteen feet in order to redesign an intersection to provide for emergency vehicle access. The FWS informed the County that this seventy to eighty percent reduction of the corridor, which was crucial for interbreeding between Fly colonies, would probably result in a “taking” of the Fly.

After negotiations between the FWS and the County failed, the plaintiffs filed suit in the District Court for the District of Columbia against Bruce Babbitt, the Secretary of the Department of the Interior, and Mollie Beattie, the Director of the FWS. The plaintiffs challenged the application of §9 of the ESA to the Fly and argued that the federal government had no constitutional authority to regulate the use of private land to protect an insect located only in a single state, California. The government moved for summary judgment on the grounds that the application of §9 did not exceed Congress’ Commerce Clause power and was a constitutionally permissible exercise of authority. The Court entered summary judgment for the government.

The plaintiffs appealed to the United States Court of Appeals for the District of Columbia. After reviewing the plaintiffs’ claim, the Court of Appeals affirmed the District Court’s ruling. The Court concluded that §9 of the ESA was applicable to the Fly, an endangered species, and any “taking” of the Fly would be in violation of the ESA. The Court found that the ESA’s application to the Fly was within the powers granted to Congress by the Commerce Clause, as it involved regulating the use of channels of interstate commerce. Further, the Court concluded that application substantially affected interstate commerce by preventing destruction of biodiversity and destructive interstate competition.
III. LEGAL BACKGROUND

The United States Constitution, in Article I, Section 8, grants Congress the power to "regulate commerce with foreign nations, and among the several states, and with Indian tribes." Since the Constitution's inception, courts have struggled to interpret the term "commerce." What constitutes interstate commerce? These are the questions courts try to answer when faced with a challenge to a congressional exercise of power under the Commerce Clause.

"The Commerce Clause is one of the most prolific sources of national power." Under the Commerce Clause, Congress has broad regulatory authority. Congress can regulate those activities between two or more states and those within one state that substantially affect interstate commerce. Judicial review of an act under the Commerce Clause must be highly deferential to Congress; the court must ask whether there was any reasonable rationale for Congress' conclusion that the activity substantially affected interstate commerce.

From the early 1800s until the early 1900s, courts rarely examined congressional power under the Commerce Clause. Instead, the courts focused on the Commerce Clause as a "limit on state legislation that discriminated against interstate commerce." Through their review, the courts began to categorize certain types of activity as constituting purely intrastate commerce. Such activities, which were beyond the reach of Congress under the Commerce Clause, included production, mining, and manufacturing.

The next great era in Commerce Clause jurisprudence resulted from the Interstate Commerce Act of 1887. In several cases, such as United States v. A.L.A. Schecter Poultry Corp., the Supreme Court held that activities directly affecting interstate commerce were within Congress' power, but those indirectly affecting interstate commerce were not. In Schecter, the Supreme Court abolished a federal government regulation that fixed the hours and wages of employees in an intrastate business because it was only indirectly related to interstate commerce. The Court struck down the regulation due to its concern that "there would be virtually no limit to the federal government for all practical pur-

40. Id.
42. Id.
43. Id. at 554. See Kidd v. Pearson, 128 U.S. 1 (1888) (upholding a state prohibition on manufacturing alcohol because it constituted domestic commerce between "man and man within a State."
44. See Wickard v. Filburn, 317 U.S. 111, 121 (1942) (tracing the development of Commerce Clause jurisprudence); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and not part of it."). In E.C. Knight, the federal government sued under the Sherman Antitrust Act to force a major sugar refiner to divest itself of other recently acquired refiners. E.C. Knight Co., 156 U.S. at 12. The Court held that Congress could not under the Commerce Clause forbid a monopoly in "manufacture." Id. The refinery was a manufacturing operation regardless of whether or not sugar was ever sold in interstate commerce. Id.
45. Lopez, 514 U.S. at 554.
46. 295 U.S. 495 (1935).
47. Id. At issue in Schecter, was the validity of the National Industrial Labor Recovery Act (NIRA), which allowed the President to adopt codes of fair competition for trades and industries, such as minimum wage and maximum hour requirements. Id. In Schecter, Schecter Poultry Corporation was convicted of violating the wage and hour provisions of the New York Metropolitan Area Live Poultry Industry Fair Competition Code. Id. Schecter Poultry Corporation bought poultry within New York City and resold it exclusively to local dealers. Id. The U.S. Supreme Court found the wage policies of an intrastate enterprise were too indirect to allow for congressional control, even if such policies did force interstate competitors to lower prices. Id. The NIRA was held unconstitutional. Id.
poses we should have a completely centralized government."

The defining terms of direct and indirect interstate commerce implemented by the Court in Schecter fell into disregard after the landmark case of NLRA v. Jones & Laughlin Steel Corp. This case viewed congressional authority under the Commerce Clause in terms of degree. The Supreme Court found that Congress could regulate those activities which had such "a close and substantial relation to interstate commerce that their control [was] essential or appropriate to protect that commerce from burdens and obstructions." Under Jones & Laughlin, so long as the regulated activity had a substantial economic effect upon interstate commerce, it was irrelevant whether that activity occurred before, during, or after interstate movement.

Along with Jones & Laughlin, United States v. Darby and Wickard v. Filburn expanded the boundaries of Congress' Commerce Clause power well beyond that of the early years of the Constitution. These Supreme Court cases emphasized the idea that the meaning of the phrase "substantial relation to interstate commerce" was not to be narrowly defined.

Darby involved the manufacture of lumber by Georgia employees who worked for less than the prescribed minimum wage and beyond the maximum hours set by law without overtime pay. The federal government restricted the company's shipment of lumber into interstate commerce, as a penalty for violation of the Fair Labor Standards Act. The Supreme Court upheld the Act as it applied to the company.

The Court stated that Congress' authority over interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end." The legitimate end in Darby was the prevention of substandard labor conditions and suppression of unfair competition.

In Wickard, the Supreme Court upheld the amendments to the Agricultural Adjustment Act of 1938 and their application to wheat consumption. The Agricultural Adjustment Act permitted the Secretary of Agriculture to set quotas on wheat growth for every farm in the country, regardless of whether the wheat was intended for interstate or intrastate sale.

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49 Id. at 548. See also Carter v. Carter Coal, 298 U.S. 238 (1936), where the Supreme Court held that the Bituminous Coal Conservation Act of 1935, which set maximum hours and minimum wages for coal mine workers, was unconstitutional. Id. The Court viewed production as different from commerce. Id. Production did not directly affect interstate commerce, even if the coal would all be eventually sold into the market. Id.

50 301 U.S. 1 (1937). Jones & Laughlin involved the constitutionality of the National Labor Relations Act of 1935 (NLRA). Id. The NLRB was attempting to prevent Jones & Laughlin from engaging in unfair labor practices by discriminatorily firing employees involved in union activity. Id. The NLRA as it applied to Jones & Laughlin Steel Corp. was upheld by a majority of the Court as a valid exercise of Congress' Commerce Clause power. Id. Although Jones & Laughlin manufactured steel only in Pennsylvania, the company had mines in two other states, warehouses in four states, operated steamships on the Great Lakes, and sent seventy-five percent of its product out of state. Id. The Court found a labor stoppage of intrastate manufacturing operations in Pennsylvania would have a substantial effect on interstate commerce. Id.

51 Id. at 36. Beginning with this case, the Supreme Court began to show a much greater willingness to defer to legislative decisions. Only in one case since 1937 has the Court found that Congress exceeded its Commerce Clause power. See infra note 83 and accompanying text.

52 Jones & Laughlin, 301 U.S. at 37.

53 Id.

54 312 U.S. 100 (1941).


56 See Darby, 312 U.S. 100; Wickard, 317 U.S. 111.

57 Lopez, 514 U.S. at 555.

58 Darby, 312 U.S. at 111.

59 Id.

60 Id. at 126. The Court held that the Act was definite enough to meet constitutional demands. Id. "One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required." Id.

61 Id. at 118.

62 Id.

63 Wickard, 317 U.S. at 128-29.

64 Id. at 115.

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cess wheat raised was subject to a per-bushel penalty. Filburn owned a small farm and raised wheat solely for consumption on his farm. He challenged the Act as it applied to him, arguing that his was a purely local activity and beyond the scope of federal control. The Court reviewed the demand for wheat in terms of whether the activity, regardless of its nature, exerted a substantial economic effect on interstate commerce. In upholding a federal economic act, Wickard is arguably the Court's most far-reaching decision into intrastate activity.

The expansion of Congress' power came at a time of great industrial change in the United States. Businesses were becoming increasingly more national in character and technological advances in transportation and communication were aiding this expansion. The Supreme Court's decisions allowed Congress to exert more influence over such enterprises, even though they sometimes appeared completely intrastate in nature. One such business was the Heart of Atlanta Motel in Georgia, a 216-room motel that followed a practice of refusing to rent rooms to blacks. The operators of the motel attacked the constitutionality of the public rights accommodations provision of the Civil Rights Act of 1964, arguing that Congress exceeded its Commerce Clause power in applying the Act to their intrastate hotel. The operators contended that they were deprived of their right to choose customers and operate a business as they wished. The Supreme Court in Heart of Atlanta Motel, Inc. v. United States upheld the application as a valid exercise of Congress' Commerce Clause power. The Court found that denying access to rooms interfered significantly with interstate commerce, and the company had actively solicited out-of-state customers through billboards and other forms of advertising.

The Commerce Clause, however, has boundaries. From the 1940s to the present, the Supreme Court has warned Congress to keep its authority within rational bounds. In Maryland v. Wirtz, the Court stated, "the power to regulate commerce, though broad indeed, has limits that the Court has ample power to enforce." A court must be deferential to Congress' authority under the Commerce Clause but may look to see whether the regulation affects activities that are too remote and insubstantial to be considered part of interstate commerce.

One of the most recent examinations of the limits on the exercise of commerce.
congressional power under the Commerce Clause was the landmark case of United States v. Lopez. 83

In Lopez, the defendant, a twelfth grade student, carried a gun to school and was convicted of possessing a firearm in a school zone in violation of the Gun-Free School Zones Act of 1990. 84 The Court struck down the Act, upon finding that the possession of a firearm in a school zone did not substantially affect interstate commerce. 85 The Court noted that in striking down the statute, it was declining to further extend Congress' Commerce Clause power. 86

To limit such power, the Court in Lopez enunciated three categories of activity which Congress was permitted to regulate under the Commerce Clause. 87 First, Congress may regulate the use of channels of interstate commerce. 88 Second, Congress has the power to regulate and protect instrumentalities of interstate commerce, or persons and things in interstate commerce, even if the threat comes from intrastate activities. 89 Third, Congress can regulate those activities having a substantial relation to interstate commerce. 90 In explaining the third category, the Court stated, "where economic activity substantially affects interstate commerce, legislation regulating that activity should be judicially sustained," even if the activity may be purely local. 91

Under this third category of substantial relation, the Court offered three areas of inquiry. 92 First, does the regulation control a commercial activity, or an activity necessary to the regulation of some commercial activity? 93 Second, does the statute include "a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce?" 94 Third, does the rationale offered to support the constitutionality of the statute have a logical stopping point, as to not be so broad as to regulate all types of human activity? 95

In National Ass'n of Home Builders, the United States Court of Appeals for the District of Columbia used the three categories set out in Lopez to determine whether the ESA "take" provision, as it applied to the Delhi Sands Flower-Loving Fly, was a constitutional exercise of congressional power under the Commerce Clause. 96

IV. INSTANT DECISION
A. The Court's Opinion
In National Ass'n of Home Builders, the United States Court of Appeals for the District of Columbia upheld the application of §9(a)(1) of the ESA to the Delhi Sands Flower-Loving Fly. 97 The Court held that the prohibition against "taking" the endangered species was within Congress' power under the Commerce Clause to regulate the use of channels of interstate commerce, and the regulation substantially affected interstate commerce, as it

83 514 U.S. 549 (1995). Note, Lopez was the only case since 1937 to strike down an application of a congressional act under the theory that it was an unconstitutional exercise of Commerce Clause power.
84 Lopez, 514 U.S. at 549. The Gun-Free School Zones Act forbids "any individual knowingly to possess a firearm at a place that [he] knows...is a school zone." 18 U.S.C. §922(q)(1)(A).
85 Lopez, 514 U.S. at 631.
86 Id. The Court did not alter its pre-Lopez decisions concerning the Commerce Clause. Justice Kennedy stated, "the legal system as a whole has an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." Id. at 569.
87 Id. at 558. See United States v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (quoting Camerini v. United States, 242 U.S. 470, 491 (1917), "[t]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.").
88 Lopez, 514 U.S. at 558. See Shreveport Rate Cases, 234 U.S. 342 (1914); Southern R. Co. v. United States, 222 U.S. 20 (1911).
90 Lopez, 514 U.S. at 558.
91 Id. at 560.
92 Id. at 559-65. See United States v. Wall, 92 F.3d 1444, 1455-56 (6th Cir. 1996); National Ass'n of Home Builders, 130 F.3d at 1064 (Dissenting opinion lists the three categories of commerce Congress can regulate).
93 Lopez, 514 U.S. at 559-65.
94 National Ass'n of Home Builders, 130 F.3d at 1064.
95 Id.
96 Id. at 1045.
97 Id.
prevented the destruction of biodiversity and the destruction of interstate competition.\textsuperscript{98}

The plaintiffs argued that the federal government had no authority to regulate the use of non-federal lands in order to protect a species which is only located in one state.\textsuperscript{99} They contended that the Constitution of the United States gave the federal government no grant of power to regulate wildlife on non-federal lands.\textsuperscript{100}

The plaintiffs relied heavily on United States v. Lopez for the proposition that the government’s application of the ESA to the Fly was unconstitutional.\textsuperscript{101} The Court used Lopez as the starting point for its examination of the relationship between the ESA and the Commerce Clause.\textsuperscript{102} Whether the ESA’s regulation of the Fly was within Congress’ authority to regulate the “use of channels of interstate commerce” and/or within “those activities that substantially affect interstate commerce” were the two questions the Court attempted to resolve by referring to Lopez.\textsuperscript{103} The Court found that Congress was authorized under the Commerce Clause to apply §9(a)(1) of the ESA to the Fly, as it was a proper exercise over the channels of interstate commerce.\textsuperscript{104} The Court noted that while the term “use of channels of interstate commerce” was usually thought to refer only to the transportation of persons or goods, it should not be so narrowly defined.\textsuperscript{105} Instead, the term provided a justification for the application of §9(a)(1) to the Fly.\textsuperscript{106}

The Court found that the ban against “taking” endangered species allowed the government to control the transport of endangered species in interstate commerce, as well as, “keep the channels of interstate commerce from immoral and injurious uses.”\textsuperscript{107} The application of §9(a)(1) to the Fly performed such functions by allowing Congress to use its authority to help save an endangered species, which was threatened by the construction of a hospital.\textsuperscript{108} The construction presumably entailed the use of materials and people from outside the state.\textsuperscript{109} Such a facility would also likely attract employees, patients, and students from outside the state.\textsuperscript{110}

The Court next reasoned that the “take” provision of the ESA could be seen as a constitutionally permissible exercise of authority in relation to the Fly by viewing it as an activity that substantially affected interstate commerce.\textsuperscript{111} The Court noted that an activity can affect commerce even if it is noncommercial in nature.\textsuperscript{112} The Court studied the legislative history of the ESA provision in order to determine if it fell within this category of regulation.\textsuperscript{113}

The legislative history of the ESA “take” provision distinguished this case from the Gun-Free School Zones Act in Lopez, as the Committee Reports on the ESA revealed findings that such a provision substantially affected interstate commerce.\textsuperscript{114} The legislative history in the Gun-Free School Zones Act was silent as to any such relationship.\textsuperscript{115} The ESA’s committee reports discussed the impor-
tance of preserving genetic diversity and the potential future commerce related to such diversity. The legislature sought to promote the “continuing availability of a wide variety of species to interstate commerce.”

Legislative history alone, however, was not enough to justify the statute’s application. The Court stated that in evaluating the constitutionality of an act’s application a court must determine if there was a “rational basis for Congress’ conclusion that a regulated activity substantially affects interstate commerce.” The Court examined two reasons why Congress could rationally conclude that the application of Section 9 of the ESA substantially affected interstate commerce. First, the provision protected against the destruction of biodiversity, and second, the provision controlled adverse effects of interstate competition.

The destruction of biodiversity would threaten current and future interstate commerce that relied upon such diversity in day-to-day business. The Court noted that 521 of 1082 endangered species are located in only one state, and the elimination of even a few of those species would have a traumatic effect on interstate commerce. In terms of economics, plant and animal species are valuable commodities as sources of medicine and genes. When a species vanishes, its value may never have been discovered, and its possible benefit to the economy is lost. The Court found that destruction of biodiversity was an action that substantially affected interstate commerce and was within Congress’ power to regulate.

Congress’ finding that the “taking” of the Fly and other endangered species would substantially affect interstate commerce could also be based on the premise that it was the product of destructive interstate competition. According to the Court, Congress had the power to regulate interstate competition that would threaten endangered species, such as the Fly. The Court based its conclusion on three Supreme Court cases that dealt with destructive interstate competition in the areas of the environment, labor relations, and agriculture.

The ESA provision at issue regulated the “taking” of the endangered species

116 National Ass'n of Home Builders, 130 F.3d at 1051.
117 Id. at 1050. The committee reports noted the incalculable importance such diverse species could have to future discoveries in the fields of science, medicine, and agriculture. For example, a species on the verge of extinction could hold the possibility of a cure for cancer. S.REP. NO.91-526, at 3 (1969).
118 National Ass'n of Home Builders, 130 F.3d at 1051.
119 Id. The Court observed, “[i]t the court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.” Id. (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981)).
120 Id. at 1052.
121 Id.
122 Id. (Biodiversity is defined as “the presence of a large number of species of animals and plants.”)
123 Id.
124 Id. The Court stated that fifty percent of the most prescribed medicines are derived from wild plant and animal species. Id. In 1983, the value of these medicines alone was approximately fifteen billion dollars a year. Genetic material from wild plants and animals is also inbred into domestic animals and crops to improve productivity and value. Id. Beyond these values, the species may be important as a tourist attraction, a scientific study, or as an evolutionary link to the past. Id. at 1053.
125 Id. at 1053-54. The federal court cases that have considered such Commerce Clause challenges since Lopez have held that the extinction of animals substantially affects interstate commerce. See United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996); United States v. Lundquist, 932 F. Supp. 1237 (D. Or. 1996); United States v. Romano, 929 F. Supp. 502 (D. Mass. 1996).
126 National Ass'n of Home Builders, 130 F.3d at 1054.
127 Id.
128 Id. at 1055.
129 Id. at 1055-57. Hodel v. Virginia, 452 U.S. 264 (1981), considered the constitutionality of the Surface Mining Control and Reclamation Act of 1977. The Court held that “the power conferred by the Commerce Clause is broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.” Hodel v. Virginia, 452 U.S. at 282. Similar rationales were set forth in United States v. Darby, 312 U.S. 100 (1941) (upheld wage and hour regulations for Georgia employees working in intrastate lumber production in order to protect against substandard working conditions) and in Hodel v. Indiana, 452 U.S. 314 (1981) (held that “prime farmland” provisions of the Surface Mining Act did not violate constitutional powers, as they ensured that coal would not be produced at the expense of public safety, agriculture, or the environment).
130 National Ass'n of Home Builders, 130 F.3d at 1056.
in the process of building a hospital, power plant, and an intersection that would probably serve a variety of individuals in more than just the state of California. Congress passed the statute “in part to prevent states from gaining a competitive advantage by enacting lower regulatory standards than other states.” The Court concluded that the ESA substantially affected interstate commerce by preventing destructive interstate competition, as it required uniform regulation in all states to protect threatened species.

After reviewing case law and legislative history, the Court of Appeals for the District of Columbia concluded that Congress had the constitutional authority under the Commerce Clause to apply the ESA “take” provision to the Delhi Sands Flower-Loving Fly. The Court affirmed the district court’s ruling upholding the government’s motion for summary judgment. The Court held that Congress had both the power to regulate the channels of interstate commerce and the ability to determine if the “taking” of the Fly substantially affected interstate commerce, as it could lead to the destruction of biodiversity and create unfair interstate competition.

B. Henderson’s Concurrence
While concurring in the result reached by the Court, Judge Henderson disagreed with the Court’s conclusion that protecting an endangered species had a substantial effect on interstate commerce by virtue of its potential medical or economical value. Henderson concluded that any possible value was too uncertain to factor into a decision to uphold congressional power. She also dismissed the contention that the application of §9 of the ESA was a regulation over the use of interstate commerce channels. Judge Henderson instead upheld the application on grounds that the loss of biodiversity itself has a substantial effect on the ecosystem and as a result, interstate commerce. She rationalized that everything in the environment was interconnected and the loss of one species, even an intrastate one, would substantially affect interstate commerce. This alone was enough to validate Congress’ Commerce Clause authority as the construction of a hospital, which played a vital role in interstate commerce, would result in endangering both the Fly and its habitat.

C. Sentelle’s Dissent
Judge Sentelle’s dissent focused on the notion that Congress does not have the power under the Commerce Clause to regulate the application of §9 of the ESA to the Fly, as such an application involves neither commerce nor interstate activity. The dissent contended that the Commerce Clause should not be a catchall provision. Sentelle argued that the clause must have a specific meaning, and the application of §9 to the Fly did not fall within any possible meaning. The dissent rejected the Court’s conclusion that the application was one that regulated the use of channels of interstate commerce. Sentelle agreed with the concurrence that the Fly was an intrastate creature and was not connected to movement outside of the state. The dissent also contended that “[t]he fact that activities like the

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130 National Ass’n of Home Builders, 130 F.3d at 1056.
131 Id.
132 Id.
133 Id. at 1057.
134 Id.
135 Id.
136 Id. at 1058.
137 Id.
138 Id. at 1059.
139 Id. “The interstate effect of a taking is particularly obvious here given the nature of the taking the County proposes. In enacting the ESA, Congress expressed an intent to protect not only endangered species but also the habitats that they, and we, occupy.” Id.
140 Id.
141 Id. at 1060-67.
142 Id. at 1061. According to Sentelle, the Court limited such wide application in Lopez, as it provided for three categories of regulation. See supra notes 87-95 and accompanying text.
143 National Ass’n of Home Builders, 130 F.3d at 1061.
144 Id. at 1063.
145 Id.
construction of a hospital might involve articles that have traveled across state lines cannot justify federal regulation of the incidental local effects of every local activity in which those articles are to be employed.146

In the dissent, Sentelle disagreed with both the concurrence and the court’s opinion that the application of §9 could be a valid exercise of congressional power, as it substantially affected interstate commerce.147 The dissent dismissed both the biodiversity and ecosystem arguments for upholding the application of the statute.148

First, the dissent determined that the ESA regulation did not control a commercial activity.149 "Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense."150 Second, Sentelle stated that nothing in §9 of the ESA required that the regulated activity affect interstate commerce. Thus, it fell outside of the powers granted by the Commerce Clause.151

Third, the dissent found that the meaning given to the Commerce Clause in the opinion and in the concurrence provided no identifiable boundaries for Congress. This gave the legislature unlimited power to regulate purely intrastate activity by simply stating that the activity may in some remote way affect interstate commerce.152

The dissent concluded that the attempt to regulate the taking of the Fly must fail, as there is absolutely no interstate commerce involved in the application of §9 of the ESA to the Fly.153 There must be a stopping point in order for the words of the Constitution to have meaning.154

V. COMMENT

In National Ass’n of Home Builders, the Court of Appeals for the District of Columbia concluded that Congress had the constitutional authority under the Commerce Clause to apply the ESA’s “take” provision to the Fly.155 The Court’s substantial-relation-to-interstate-commerce test was probably the most poignant line of reasoning for upholding the application, as it examined both the legislative history of the ESA and prior Commerce Clause case law.

Those who criticize expanding the definition of interstate commerce often take the position argued by Judge Sentelle in dissent in National Ass’n of Home Builders.156 They contend that interstate commerce cannot be a catchall provision, as it would render the provision in the Constitution meaningless.157 Interstate commerce must be clearly defined in order to avoid interfering with the powers of the states to regulate purely intrastate commerce.158

The Commerce Clause gives no guidance in determining whether or not an activity should be defined as interstate commerce. The clause itself simply states Congress has the power “to regulate commerce with foreign nations, and among the several states, and with Indian tribes.”159 This has left courts with

146 Id.
147 Id.
148 Id. at 1063-67.
149 Id. at 1064.
150 Id.
151 Id. at 1064-65.
152 Id. at 1065-67.
153 Id. at 1067.
154 Id.
155 Id. at 1057.
156 Id. at 1060-67. "The proposition that the federal government can, under the Interstate Commerce Clause, regulate an activity which is neither interstate nor commerce, reminds me of the old chestnut: If we had some ham, we could fix some ham and eggs, if we had some eggs." Id. at 1061. Other critics have also argued that the Commerce Clause has lost all meaning due to the expansive definition given to it by courts. For example, Judge Kozinski in his Introduction to Volume 19, 19 HARV. J.L. & PUB. POL. 1, 5 (1995), argued that the clause should probably be called the “hey-you-can-do-whatever-you-feel-like-clause.”
157 National Ass’n of Home Builders, 130 F.3d at 1061. Sentelle’s dissent likened National Ass’n of Home Builders to Wickard v. Filburn, 317 U.S. 11 (1942), a Supreme Court case upholding congressional power to regulate the consumption of home-grown wheat. Id. Sentelle contended the courts have construed the Commerce Clause too liberally to give any recognizable meaning to the word interstate or commerce. Id.
158 Id. at 1060. Sentelle questions in his dissent, “What business, one might ask, does the federal government have disrupting these activities of the unit of local government, which range from the purely local to the generally local in nature?” Id
159 U.S. CONST., art. I, §8, cl. 3.
the challenging task of trying to determine whether Congress has the power to regulate certain activities.\footnote{A court must be deferential to congressional findings regarding interstate commerce, upholding a regulation if there is any rational basis. See Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264, 276 (1981).}

In determining whether the ESA's application to the Fly is within Congress' Commerce Clause power, one should look to the congressional intent behind the ESA "take" provision and the purpose that the provision serves in protecting the Fly. Through an examination of these aspects, the dissent's argument, as well as those of other critics, can be rebutted. While in some instances the Commerce Clause has been extended too far into completely intrastate activities, the ESA's application to the Fly, an endangered species, is not one of those cases.

Through the legislative findings of the ESA, the substantial relation the "take" provision has to interstate commerce becomes clear. These findings discuss the importance of genetic diversity and the potential future commerce related to such diversity. The Senate Report states, "[f]rom a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed."\footnote{See S. REP. NO. 91-526, at 3 (1969).} The Report, more importantly, emphasizes the importance of the gene pool and its preservation, as the gene material might be invaluable for future discoveries in numerous fields, such as medicine or agriculture.\footnote{S. REP. NO. 91-526, at 5 (1969).} Similarly, the House Report emphasized the importance of endangered species by noting that they are potential keys to a variety of puzzles that cannot yet be solved, such as cancer.\footnote{H.R. REP. NO. 93-412, at 4-5 (1973).} What is quite disturbing about the dissent in National Ass'n of Home Builders is the fact that Sentelle quickly dismissed these arguments.\footnote{"[A]s a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind...is also irrevocably lost." Id.} He argued that:

because of some undetermined and indeed indeterminable possibility that the fly might produce something at some undefined and undetermined future time which might have some indeterminable medical value, which in turn might affect interstate commerce at that imagined future point, Congress can today regulate anything which might advance the pace at which the endangered species becomes extinct.\footnote{"As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their--and our own--genetic heritage." Id.}

What the dissent fails to comprehend, unlike the majority, is that what is being considered is not only the extinction of a single species, but the aggregate effect on commerce through the loss of biodiversity.\footnote{"[T]he commerce clause power...is broad enough to extend [federal] jurisdiction to local waters which may provide habitat to birds and endangered species." See also Andrus v. Allard, 444 U.S. 51 (1979) (noting Commerce Clause power reaches migratory wildlife.)} The impact on interstate commerce as a result of the extinction of the Fly may be hard to predict, but this is not the point. The premise is that the loss of endangered species, as a whole, has a substantial effect on interstate commerce.\footnote{"foreclosing any possibility of several types of commercial activity."} Prior to Lopez, courts also consistently concluded that Congress' efforts to protect endangered species were constitutional under the Commerce Clause.\footnote{103 F.3d 1475 (9th Cir. 1996).}
The application of the adequate concern and conservation. The United States have been rendered extinct as a consequence of economic growth and development untempered variety of species through the acts of a single state, as the effect will likely be felt in more than one state. 1

In examining the dissent, it seems that the purpose of the Act was to safeguard the nation's endangered species. If California destroys the Fly or its habitat, the destruction affects the citizens of the United States as a whole. Congress, through the ESA, must be able to regulate the “taking” of endangered species in order to protect everyone's rights. Through such regulation, Congress prevents destructive interstate competition, which has a substantial relation to interstate commerce. The ESA “take” provision, which affects society and its commerce power in all fifty states, needs to be uniformly regulated.

Taken to the extreme, the dissent’s position in National Ass’n of Home Builders could lead to the destruction of numerous endangered species. Could the habitat of the endangered California condor be destroyed to build an office complex? Could a state construct a highway through the home of the endangered woodland caribou? Many people would be outraged at such thoughts; however, this is exactly what California had planned for the Fly. If the congressional regulation was declared invalid, the Fly would have been left unprotected and likely driven to extinction. The application of the ESA “take” provision to the Fly protects the endangered species, one of many species vital to biodiversity and consequently, interstate commerce. Congress must have such power through the Commerce Clause to safeguard endangered wildlife.

VI. CONCLUSION

The decision in National Association of Home Builders v. Babbitt will be extremely important in the coming years as the human population grows and urban development encroaches further and further upon lands that were previously inhabited only by wildlife and plant species. Congress’ ability under the Commerce Clause to apply the ESA “take” provision to endangered and threatened animals, such as the Fly, will be crucial in preserving uniform federal regulation of such species, thereby protecting biodiversity and their future, as well as our own.

172 119 CONG. REC. 30, 157 (1973). The Senate’s Declaration of Policy states: “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.” Id.

173 Judge Sentelle in his dissent in National Ass’n of Home Builders takes an almost sarcastic tone in examining the application of the ESA to the Fly. He states:

the statute forbidding the taking of endangered species can be used, provided it passes constitutional muster, to prevent counties and their citizens from building hospitals or from driving to those hospitals by routes in which the bugs smashed upon their windshields might turn out to include the Dehli Sands Flower-Loving Fly. National Ass’n of Home Builders, 130 F.3d. at 1061.

In examining the dissent, it seems that the Fly is viewed as a major barrier to progress, in that the County needs the hospital and a Fly is impeding progress. Id. at 1060. This progress-stops-at-nothing attitude seems to pervade Sentelle’s whole argument. Although the Fly may seem worthless to some individuals, some of the most important products in commerce have been produced from animals and plants, which were at one time seemingly worthless. For example, mold, which led to the discovery of antibiotics, was once only valued for the flavoring it provided to cheese. See id. at 1054.

174 119 CONG. REC. 25, 694 (1973). The House’s Declaration of Findings, Purpose, and Policy stated:

[the Congress finds and declares that one of the unfortunate consequences of growth and development in the United States and elsewhere has been the extermination of some species or subspecies of fish, wildlife, and plants; that serious losses in species of wild animals with educational, historical, recreational, and scientific value have occurred and are occurring...; that a key to more effective protection and management of native fish and wildlife that are endangered or threatened is to encourage and assist the States in developing programs for such fish and wildlife; and that the conservation, protection, restoration, or propagation of such species will inure to the benefit of all citizens. Id.

175 Id.

176 National Ass’n of Home Builders, 130 F.3d at 1054.

177 Id. at 1054-57. Destructive interstate competition includes the destruction of the availability of a variety of species through the acts of a single state, as the effect will likely be felt in more than one state.