IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AMERICAN STEWARDS OF LIBERTY, *et al.*, Plaintiffs, AND JOHN YEARWOOD, *et al.*, Plaintiff-Intervenors; v. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	)	No. 1:15-cv-01174 **AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-INTERVENORS' MOTION FOR SUMMARY JUDGMENT**

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IDENTITY AND INTEREST OF AMICUS CURIAE

Central to the notion of a limited government is the constitutional principle of enumerated powers: those powers not explicitly delegated to the federal government are reserved to the States and the people. These limited powers include Congress's power to make rules regulating interstate commerce, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Legislation that reaches beyond Congress's constitutional authority results in a federal government that is no longer limited and ethical, and erodes individual liberty, the right to own and use property, and the free enterprise system. Accordingly, Mountain States Legal Foundation ("MSLF") has been actively involved in litigation challenging Congress's power under the Commerce Clause. *E.g., People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv.*, No. 14-4151 (10th Cir.) (amicus curiae); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (amicus curiae).

MSLF has also been actively involved in litigation regarding the proper interpretation and application of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*. *E.g*., *Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998) (represented livestock operator charged with the unlawful take of a grizzly bear); *U.S. Fish & Wildlife Serv. v. Lin Drake*, Docket No. Denver 99-1, 2001 WL 1769732 (2001), *aff'd sub nom*. *Lin Drake*, 29 O.H.A. 71 (2004) (represented landowner charged with unlawfully taking Utah prairie dogs). More specifically, MSLF has sought to prevent the ESA from reaching private activities that may result in the take of purely intrastate species. *See, e.g.*, *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) ("*GDF Realty I*"). MSLF seeks to participate as amicus curiae in this case in order to preserve the distinction between "what is

truly national and what is truly local" set forth in *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

STATEMENT OF THE CASE

At issue is the U.S. Fish and Wildlife Service's ("FWS") endangered species listing for the bone cave harvestman ("BCH"). *See* 53 Fed. Reg. 36,029 (Sep. 16, 1988); 58 Fed. Reg. 43,818 (Aug. 18, 1993). The BCH is a cave-dwelling spider found in subterranean limestone caves in Travis and Williamson Counties, Texas. 58 Fed. Reg. at 43,818–19. In 2014, property owners and American Stewards of Liberty filed a petition to delist the BCH on the basis that the original listing was not based on the best available scientific data. *See* Petition to Delist the Bone Cave Harvestman (*Texella reyesi*) (June 2, 2014), *available at* https://ecos.fws.gov/docs/petitions/92100/800.pdf (last accessed Dec. 14, 2016). In 2015, the FWS published notice of its finding that delisting was not warranted. 80 Fed. Reg. 30,990 (June 1, 2015).

Several property owners and American Stewards of Liberty (collectively, "Plaintiffs") filed suit, arguing that, *inter alia*, the continued listing of the BCH violates the ESA because it failed to recognize a listing error, *i.e.*, the original listing's determination that the BCH was located in only a limited number of caves. Dkt. No. 24 at 22.[1] John Yearwood, another property owner, and Williamson County, Texas (collectively, "Plaintiff-Intervenors"), intervened, arguing that the continued listing of the BCH violates the Commerce Clause. Dkt. No. 18 at 13–14. Because there is no dispute of material fact regarding the Commerce Clause issue, Plaintiff-Intervenors moved for summary judgment. Dkt. 42. MSLF files this amicus brief in support of Plaintiff-Intervenors' motion.

[1] All page numbers reference the number assigned by this court's CM/ECF system.

ARGUMENT

I. THERE ARE OUTER LIMITS TO THE FEDERAL GOVERNMENT'S POWER TO REGULATE NONECONOMIC ACTIVITY UNDER THE COMMERCE CLAUSE.

The United States Constitution authorizes Congress "to regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl. 3. In *Lopez*, the Supreme Court set forth the three areas of permissible regulation under the Commerce Clause. The federal government may: (1) "regulate the channels of interstate commerce[;]" (2) "regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce[;]" and (3) regulate economic activities that "substantially affect interstate commerce." 514 U.S. at 558; *see also Gonzales v. Raich*, 545 U.S. 1, 34–36 (2005) ("*Raich*") (Scalia, J., concurring) (discussing in depth the "third [*Lopez*] category" as "different in kind" because "activities that substantially affect interstate commerce are not themselves part of interstate commerce" and, thus, Congress may not regulate "*noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences." (emphasis in original)). These "outer limits" on the federal government's power to regulate necessarily exclude "'the exclusively internal commerce of a State.'" *Lopez*, 514 U.S. at 553, 557 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–95 (1824)).

In *Lopez*, the Supreme Court took care to emphasize the importance of Commerce Clause limits to upholding our dual system of federal and state government. If stretched too far to include "indirect and remote" effects on interstate commerce, "'the distinction between what is national and what is local'" would be extinguished and would "'create a completely centralized government.'" *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)). The Court also explained that a regulation cannot be justified by too tenuous a

connection to economic activity because, "depending on the level of generality, any activity can be looked upon as commercial." *Id.* at 565. Based on those strictures, the federal statute at issue in *Lopez*, which barred possession of a gun in a school zone, was held to be outside the scope of Congress's Commerce Clause power. *Id.* at 552. Even though the defendant in *Lopez* had purchased the gun, and even though firearms generally are bought and sold in interstate commerce, the Court focused on the specific activity regulated by the statute—possession of a gun in a school zone—and found that activity to be noneconomic. *Id.* at 561–62.

Five years after *Lopez*, the Supreme Court reaffirmed the Commerce Clause's limits on federal power in *United States v. Morrison*, 529 U.S. 598 (2000). The Court clarified that federal regulation under the third *Lopez* category—economic activities that substantially affect interstate commerce—was permissible based on four factors. First, the regulated activity at issue must be economic in nature. *Id.* at 610. Second, the statute at issue must contain an "'express jurisdictional element which might limit its reach to a discrete set of [prohibited activities] that additionally have an explicit connection with or effect on interstate commerce.'" *Id.* at 611–12 (quoting *Lopez*, 514 U.S. at 562). Third, the statute or its legislative history should "contain express congressional findings regarding the effects upon interstate commerce" of the regulated activity. *Id*. at 612. Finally, the connection between the regulated activity and a substantial effect on interstate commerce must not be attenuated. *Id.* Considering all these factors, the Court in *Morrison* held that the statute at issue—the Violence Against Women Act—did not have a substantial effect on interstate commerce, even though there were *some* congressional findings that gender-motivated violence affects interstate commerce. *Id.* at 614–15. On balance, the statute's connection to interstate commerce was simply too attenuated. The Court found it determinative that there was no stopping point to the government's rationale: "[I]f Congress may

regulate gender-motivated violence, it would be able to regulate murder or any type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part." *Id.* at 616.

The Court's precedents maintain a distinction between what is national and what is local because the Constitution, and consequently the Commerce Clause, mapped out a government that separates power between state and federal governments, providing a "double security to the rights of the people." The Federalist No. 51, at 320 (James Madison) (C. Rossiter ed., 2003) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments …. The different governments will control each other, at the same time that each will be controlled by itself."); *Lopez*, 514 U.S. at 552 ("Th[e] constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

The separation between what is national and what is local can only be maintained by distinguishing between regulation of economic and noneconomic activities. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur …."). Similarly, allowing courts "to pile inference upon inference" in finding that noneconomic, intrastate activities effect interstate commerce "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort

retained by the States." *Id*. at 567 (majority op.); *see also United States v. Patton*, 451 F.3d 615, 628 (10th Cir. 2006) ("[A]ny use of anything might have an effect on interstate commerce, in the same sense in which a butterfly flapping its wings in China might bring about a change of weather in New York."). Such obliteration of Congress's "enumerated powers" is inconsistent with the Framers' view that the Commerce Clause placed real limits on Congress's power. The government may not play connect-the-dots to demonstrate an effect on interstate commerce, or to exercise any other enumerated power. *See* Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), *in* 10 *The Writings of Thomas Jefferson* 165 (Albert Ellery Bergh ed., 1903) ("Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built?'"). The economic/noneconomic distinction provides an essential limit to an enumerated power, thereby preserving our federalist system of government.

Therefore, the Commerce Clause must be interpreted to provide "judicially enforceable outer limits[.]" *Lopez*, 514 U.S. at 557, 566; *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2589 ("[O]ur cases have 'always recognized that the power to regulate commerce, though broad indeed, has limits.'" (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968))). Regarding the ESA specifically, Congress is empowered "to regulate commerce, not ecosystems." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting) (internal quotations omitted); *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv.*, 57 F. Supp. 3d 1337, 1344 (D. Utah 2014) ("If Congress could use the Commerce Clause to regulate anything that *might* affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power under the

Commerce Clause." (emphasis in original)), *appeal pending*, No. 14-4151 (10th Cir. Nov. 26, 2014). It is this framework that must be applied to the FWS's regulation preventing the take of the BCH.

II. TAKE OF THE BCH IS NOT AN ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

The Fifth Circuit has held, and the FWS has previously conceded, that regulation of the take of BCH under the ESA is not a regulation of the channels of interstate commerce, nor is it a regulation of the instrumentalities or persons/things in interstate commerce. *GDF Realty I*, 326 F.3d at 628. Thus, only the third *Lopez* category is at issue—whether the take of the BCH has a substantial effect on interstate commerce. In those cases where the Court "has sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611. Thus, the proper focus of a Commerce Clause inquiry is the activity regulated or prohibited—here, the take of the BCH. *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 610. Applying the *Morrison* framework to the take of the BCH, it is apparent that take of the BCH is not an economic activity that substantially affects interstate commerce.

First, the regulated activity is not "some sort of economic endeavor." *See Morrison*, 529 U.S. at 610–11. The BCH is found only in underground caves in two central Texas counties. 58 Fed. Reg. at 43,818–19. No evidence indicates that the BCH has ever been bought or traded in interstate commerce or has any commercial value, and the Fifth Circuit has found as much. *GDF Realty I*, 326 F.3d at 632–33, 637–38; *see also* Dkt. 18 at 6. The FWS's regulation of the take of the BCH here is in stark contrast to those cases where the Supreme Court has upheld statutes that target economic activities. In *Raich*, the Court upheld a statute criminalizing intrastate manufacture, distribution, and possession of marijuana because it determined that marijuana

produced for home consumption would affect price and market conditions. 545 U.S. at 17–19; *see also Wickard v. Fillburn*, 317 U.S. 111, 127–28 (1942) (regulating the production and consumption of homegrown wheat did not violate the Commerce Clause).[2] Conversely, in *Lopez*, the Court found that an individual's possession of a gun in a school zone was not an economic endeavor. 514 U.S. at 567. And in *Morrison*, the Court explained that gender-motivated crimes of violence "are not, in any sense of the phrase, economic activity." 529 U.S. at 613.

In analyzing the take of the BCH (and five other subterranean invertebrate species), the court in *GDF Realty I* determined that the regulated activity at issue was economic. 326 F.3d at 633. Specifically, the plaintiffs in *GDF Realty I* had planned future commercial development, including "a shopping center, a residential subdivision, and office buildings" on their property. *Id.* Rather than looking "only to the expressly regulated activity—Cave Species takes[,]" the court zeroed in on the particular *plaintiffs'* "expressly regulated activity" and determined that such future conduct would be economic in nature. *Id.* at 633–34. This approach was erroneous for several reasons. First, the ESA's prohibition on take of an endangered species does not "expressly regulate[]" commercial development; it regulates all activity that results in the take of an endangered species. *Compare id.* at 634 *with* 16 U.S.C. § 1538(a). Furthermore, the inquiry under *Morrison*'s first factor is whether the regulated activity, as a whole, is economic in nature; not whether one facet of regulated activity is economic in nature.[3] 529 U.S. at 610; *see Lopez*,

[2] *Wickard* is viewed as the "most far reaching example of Commerce Clause authority over intrastate activity[.]" *Lopez*, 514 U.S. at 560; *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2588 ("The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce.").

[3] *GDF Realty I*'s confused analysis resulted in the court's recent decision in *Markle Interest, L.L.C. v. U.S. Fish and Wildlife Service*, 827 F.3d 452 (5th Cir. 2016), which improperly focused on the *agency*'s activity—designating critical habitat—rather than the regulated activity at issue

514 U.S. at 560–61 (even though the individual's possession of a gun in a school zone could be considered economic, the statute itself purported to regulate activity that had "nothing to do with 'commerce' or any sort of economic enterprise"); *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 291 (5th Cir. 2004) ("*GDF Realty II*") (Jones, J., dissenting from denial of rehearing en banc) (Criticizing *GDF Realty I*'s conclusion that the majority of species takes would result from economic activity because "the panel had … rejected this argument earlier, when it found that the regulated activity is the take, not the planned commercial land development."); *People for the Ethical Treatment of Property Owners*, 57 F. Supp. 3d at 1344 (FWS's regulation of a wholly intrastate species targeted activity that was noneconomic because "the Service is regulating every activity, regardless of its nature, if it causes harm to a Utah prairie dog.").

Additionally, *GDF Realty I*'s focus on future possible effects of the take of the BCH on interstate commerce cannot be reconciled with the Supreme Court's most recent Commerce Clause decision. *Compare GDF Realty I*, 326 F.3d at 633–34, 639 (discussing the potential economic effects of future commercial development on BCH) *with Nat'l Fed. of Indep. Bus.*, 132 S. Ct. at 2590 ("[W]e have never permitted Congress to anticipate [an economic] activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases … involved preexisting economic activity."). Finally, even assuming that *GDF Realty I* correctly framed the inquiry as focused on the specific regulated activity at issue in that case, the take of the BCH at issue here is noneconomic. *See* Dkt. 18 at 7–10 (listing activities conducted by Plaintiff-Intervenors that are noneconomic in nature but may result in incidental take of the

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in determining that the agency's action survived a Commerce Clause challenge. *Id.* at 476. A petition for rehearing en banc is currently pending in that case. *Markle Interest, L.L.C. v. U.S. Fish and Wildlife Service*, No. 14-31008 (July 29, 2016).

BCH, such as maintenance of an outdoor shooting range and campground for the local 4-H club to use free of charge and the county's maintenance of its property).

Second, neither the ESA nor the BCH listing contains an "express jurisdictional element" which may limit its reach to a discrete set of BCH takes that additionally "have an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 607. Such a limitation is important to demonstrate that the statute or regulation in question is in "pursuance of Congress' regulation of interstate commerce." *Id.* at 612. As in *Lopez*, the economic nature of the regulated activity here is merely coincidental, and the ESA's prohibition on take is not limited to reach only economic activities. *See* 514 U.S. at 551. Nor does the ESA impose such a limitation. *Cf.*, *United States v. Whited*, 311 F.3d 259, 268 (3d Cir. 2002) (where a statute contains an express limitation criminalizing only behavior that "affects interstate commerce," such jurisdictional element weighs in favor of Commerce Clause power). Accordingly, there is no jurisdictional limit ensuring that the ESA or the BCH listing prohibits a take that substantially affects interstate commerce.

Third, the legislative history of the ESA does not contain express findings regarding the regulated activity's effects on interstate commerce. *See Morrison*, 529 U.S. at 614. Although the ESA's legislative history contains *some* general language regarding the "incalculable" value of biodiversity and preserving endangered species' genetic heritage, it contains no express findings that the take of a particular species substantially affects interstate commerce. *See* H.R. Rep. No. 93-412, at 4 (1973). Additionally, the ESA's broad values of biodiversity and conservation of natural resources are indistinguishable from the values advanced by the statutes in both *Lopez* and *Morrison*, except that they concern plants and animals rather than humans. *See Lopez*, 514 U.S. at 561 (rejecting the government's argument that the costs of violent crime

are spread throughout the population and violent crime reduces the willingness of individuals to travel, which collectively has an adverse effect on the nation's economic well-being); *Morrison*, 529 U.S. at 614 (holding insufficient Congressional findings regarding the economic impact of gender-motivated violence on victims and their families; including impacts on travel, economic productivity, increased medical costs, and decreased demand for interstate products). It is absurd to give "subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*." *GDF Realty II*, 362 F.3d at 287 (Jones, J., dissenting from denial of rehearing en banc).

Finally, the link between the take of the BCH and a substantial effect on interstate commerce is far too attenuated to justify regulation under the Commerce Clause. *See Morrison*, 529 U.S. at 613. Indeed, there is no evidence in the BCH listing that the take of the BCH, standing alone, has any impact on interstate commerce at all. *See* 53 Fed. Reg. at 36,031–32 (summarizing the threats to the BCH generally as including habitat loss resulting from "land alterations," changes to groundwater runoff, and development); *GDF Realty I*, 326 F.3d at 638 ("Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture."). As six members of the Fifth Circuit have recognized, "[i]t is undeniable that many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under *Lopez* and *Morrison* because they involve commercial or commercially-related activities like hunting, tourism, and scientific research." *GDF Realty II*, 362 F.3d at 291 (Jones, J., dissenting from denial of rehearing en banc). However, "there is no link … between Cave Species takes and *any* sort of commerce, whether tourism, scientific research, or agricultural markets." *Id.* Here, there is no link between the take of the BCH and interstate commerce, as illustrated by the noneconomic nature of the activities conducted by Plaintiffs and

Plaintiff-Intervenors on their private properties. Accordingly, the take of the BCH may not be regulated under the Commerce Clause.

III. NONECONOMIC TAKES OF THE BCH MAY NOT BE AGGREGATED WITH TAKES OF ALL OTHER SPECIES TO FIND A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

As discussed above, in *GDF Realty I*, the Fifth Circuit erred by focusing on the specific "planned development" at issue, rather than solely on the take of the BCH generally, in determining the regulated activity at issue was economic in nature. 326 F.3d at 633. It then compounded its error by improperly aggregating noneconomic activities to find a substantial effect on interstate commerce. 326 F.3d at 629–32. It also engaged in a confused analysis of *Lopez* and *Morrison* that failed to recognize the unambiguous limits placed on Congress's power under the Commerce Clause. *Id.*

GDF Realty I's aggregation of a noneconomic activity in order to find an impact on interstate commerce is inconsistent with *Lopez* and *Morrison*, as six members of the Fifth Circuit recognized. *GDF Realty II*, 362 F.3d at 290–91 (Jones, J., dissenting from denial of rehearing en banc) (Describing the panel opinion as "confusing and self-contradictory."). *GDF Realty I* attempted to circumvent the difficulty of characterizing the take of the BCH as economic by aggregating BCH takes with all other endangered species takes, which, it held, would provide the requisite impact on interstate commerce. 326 F.3d at 638. The court reasoned that takes of any species "threaten the interdependent web of all species[]" and "the interdependence of species compels the conclusion that regulated takes under [the] ESA do affect interstate commerce." *Id.* at 640. Six members of the Fifth Circuit condemned this approach as "unsubstantiated reasoning [that] offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce." *GDF Realty II*, 362 F.3d at 287 (Jones, J., dissenting from denial of

rehearing en banc). Perhaps most importantly, *GDF Realty I*'s approach would provide no foreseeable limit to Congress's powers under the Commerce Clause. *Compare id.* at 292 ("[T]he panel's conclusion tramples th[e] precept" that "federal legislation under the Commerce Clause must have a limiting principle so as not to obliterate the distinction between that which is truly national and that which is local ….") *with Morrison*, 529 U.S. at 615–17 (finding determinative the fact that the government's reasoning would provide no stopping point).

Several legal scholars agree with *GDF Realty II* that *GDF Realty I* is fundamentally inconsistent with the Court's Commerce Clause jurisprudence. *See, e.g.*, Note, *The Latest and Greatest Commerce Clause Challenges to the Endangered Species Act: Rancho Viejo and GDF Realty*, 31 Ecology L.Q. 459, 481 (2004) ("The efficacy of the Fifth Circuit's reasoning is questionable …. The Supreme Court continues to require a close fit between the regulated activity and the impact on interstate commerce …."); Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 406, 413–14 (2005) (Explaining that *GDF Realty I* was "fundamentally … inconsistent" with other Commerce Clause cases and "suggests a near unlimited federal authority to regulate environmental concerns under the Commerce Clause. Yet it is an essential part of *Lopez* and *Morrison* that any viable Commerce Clause rationale must have a stopping point."). It is a "basic ecological postulate" that "all activities have ecological impacts and that due to such effects and interconnections, everything is connected to everything else." *Id.* at 413.

The "interdependent web of species" rationale could be applied to virtually any regulated activity, including the possession of guns at issue in *Lopez* and the gender-motivated violence targeted by the statute in *Morrison*. *See* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. 174, 199 (1998) ("The biodiversity argument

comes close to saying that because the earth is necessary for interstate commerce, anything that adversely affects the earth can be regulated by Congress."). Even a case in a sister circuit upholding the FWS's regulation of take of an intrastate species recognized that "a take can be regulated if—but only if—*the take itself* substantially affects interstate commerce." *Rancho Viejo*, 323 F.3d at 1080 (Ginsburg, J., concurring) ("Without this limitation, the Government could regulate as a take *any kind of activity*, regardless of whether that activity had any connection with interstate commerce.") (all emphasis added).

Because *GDF Realty I*'s interdependence rational suffers from "the inability … to suggest a limiting principle" that prevents "every transaction in the American economy [from] be[ing] within Congress's reach[,]" it is inconsistent with *Lopez* and *Morrison*. *See United States v. Marrero*, 299 F.3d 653, 656 (7th Cir. 2002); Daniel J. Lowenberg, *The Texas Cave Bug and the California Arroyo Toad "Take" on the Constitution's Commerce Clause*, 36 St. Mary's L.J. 149, 182 (2004) (Criticizing *GDF Realty I* as "typify[ing] the overly-attenuated rationales *Lopez* and *Morrison* intended to abolish—engagement in intellectual exercises finding any chain of inferences linking the regulated activity, whatever its nature, to an effect on commerce, whatever its magnitude."); Adler, *Judicial Federalism*, at 415 ("[T]he logic of [*GDF Realty I*] either obliterates the limited nature of Congress's commerce power, or it creates an implicit environmental exception for the Clause's otherwise justiciable limits."). Therefore, *GDF Realty I* should be limited to its facts and its erroneous conclusion that the regulated activity at issue was economic in nature. *Compare* 326 F.3d at 638 *with Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."). Because the

take of the BCH in general, as well as the potential takes of the BCH at issue here, are not economic; *Lopez* and *Morrison* control.

CONCLUSION

This Court should grant Plaintiff-Intervenors' motion for summary judgment.

DATED this 15th day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Western District of Texas by using the appellate CM/ECF system on this 15th day of December 2016.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. A courtesy copy has been sent via U.S. Mail to proposed Defendant-Intervenors Center for Biological Diversity *et al.*

DATED this 15th day of December 2016.

s/ Gina Cannan
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