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, AND CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Defendant-Intervenors.	)	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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STATEMENT OF THE CASE

In 2015, in response to a delisting petition from several property owners and American Stewards of Liberty (collectively, "Plaintiffs"), the U.S. Fish and Wildlife Service ("FWS") determined that delisting of the bone cave harvestman ("BCH") was not warranted. 80 Fed. Reg. 30,990 (June 1, 2015). Plaintiffs filed suit, arguing that continued listing of the BCH violates the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"), because FWS failed to recognize a listing error. ECF No. 24 at 22.[1] John Yearwood, another property owner, and Williamson County, Texas (collectively, "Plaintiff-Intervenors"), intervened, arguing that continued listing of the BCH violates the Commerce Clause of the U.S. Constitution. ECF No. 18 at 13-14.

Plaintiff-Intervenors moved for summary judgment. ECF No. 42. Mountain States Legal Foundation ("MSLF") filed an amicus brief in support of Plaintiff-Intervenors' motion. ECF No. 107. On July, 25, 2017, due to the filing of amended complaints, this Court dismissed Plaintiff-Intervenors' motion without prejudice. ECF Nos. 112-14. Pursuant to this Court's Amended Scheduling Order, MSLF files this renewed amicus curiae brief in support of Plaintiff-Intervenors' renewed motion for summary judgment.[2]

ARGUMENT

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

The U.S. Constitution authorizes Congress "to regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court set forth three areas of permissible regulation under the Commerce Clause. The federal

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

[2] This amicus curiae brief supersedes and replaces MSLF's earlier amicus curiae brief.

government may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and *economic* activities that "substantially affect interstate commerce." *Id.* at 558; *see also Gonzales v. Raich*, 545 U.S. 1, 34-36 (2005) (Scalia, J., concurring) (the "third [*Lopez*] category" is "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 Congress's power cannot reach "'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 Court took care to emphasize the importance of Commerce Clause limits to maintain "'the distinction between what is national and what is local[.]'" *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 Gun-Free School Zones Act ("GFSZA"), 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 ("VAWA")—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. *Id.* 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…." *Id.* at 616. That obliteration of the distinction between local and national would imbue Congress with the very "police power[] which the Founders denied the National Government …." *Id.* at 618.

It is well-established that federalism 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" to find that noneconomic, intrastate activities

affect 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.); *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."). The economic/noneconomic distinction provides "outer limits" to Congress's power. *Lopez*, 514 U.S. at 557, 566; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) ("[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))).

II. THE TAKE OF BCH IS NOT AN ECONOMIC ACTIVITY THAT HAS A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

Under the ESA, 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). Thus, activity regulated under the ESA must fit within one of the three *Lopez* categories. Here, only the third *Lopez* category is at issue—whether the take of BCH has a substantial effect on interstate commerce. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 628 (5th Cir. 2003), *petition for reh'g denied*, 362 F.3d 286, 291 (5th Cir. 2004). In those cases where the Court has upheld federal regulation under the third *Lopez* factor, "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 BCH. *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 610. Under the *Morrison* framework, it is apparent that the take of 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. 80 Fed. Reg. at 30,990. No evidence indicates that the BCH has ever been bought or traded in interstate commerce or has any commercial value. *GDF Realty*, 326 F.3d at 632-33, 637-38; 80 Fed. Reg. at 30,995; ECF No. 112 at 6. The FWS's regulation of the take of 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, in the aggregate, affect price and market conditions. 545 U.S. at 17-19. Conversely, in *Morrison* and *Lopez*, the Court found that gender-motivated crimes of violence and possession of a gun in a school zone, respectively, were not, "in any sense of the phrase, economic activity." *Morrison*, 539 U.S. at 613; *Lopez*, 514 U.S. at 567.

In analyzing the take of BCH (and five other subterranean invertebrate species), the Fifth Circuit determined that the regulated activity at issue was economic because the plaintiffs had planned future commercial development. *GDF Realty*, 326 F.3d at 633. 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 the 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. 529 U.S. at 610; *see Lopez*, 514

U.S. at 560-61 (even though 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*, 362 F.3d at 291 (Jones, J., dissenting from denial of rehearing en banc) (criticizing the panel'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.").

Additionally, *GDF Realty* cannot be reconciled with the Supreme Court's most recent Commerce Clause decision. *Compare* 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."). And, even assuming that *GDF Realty* correctly focused on the specific regulated activity at issue in that case, the take of BCH at issue here is noneconomic. *See* ECF No. 112 at 7-10 (listing activities conducted by Plaintiff-Intervenors that are noneconomic in nature but may result in the incidental take of 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).

Under the second *Morrison* factor, 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 "have an explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 607. Such a jurisdictional hook is important to demonstrate that the statute or regulation in question is in "pursuance of Congress'[s] 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 the take of BCH 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 limit weighs in favor of Commerce Clause power). Accordingly, there is no jurisdictional limit ensuring that the ESA or the BCH listing prohibits only takes that substantially affect 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 legislative history contains *some* general language regarding the "incalculable" value of biodiversity and preserving species' genetic heritage, it contains no express findings that take of a particular species substantially affects interstate commerce. H.R. Rep. No. 93-412, at 4 (1973). Additionally, the ESA's broad values of biodiversity and conserving natural resources are virtually 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 argument that the costs of violent crime are spread throughout the population and reduce the willingness of individuals to travel, which collectively has an adverse effect on the nation's economy); *Morrison*, 529 U.S. at 614 (holding insufficient Congressional findings regarding the economic impact of gender-motivated violence on victims and their families). 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*, 362 F.3d at 287 (Jones, J., dissenting).

Finally, the link between the take of 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 BCH, standing alone, has

any impact on interstate commerce at all. *See* 53 Fed. Reg. 36,029, 36,031-32 (Sep. 16, 1988) (summarizing the threats to the BCH generally as including habitat loss resulting from "land alterations," changes to groundwater runoff, and development); *GDF Realty,* 326 F.3d at 638 ("Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture."); *GDF Realty*, 362 F.3d at 291 (Jones, J., dissenting) ("[T]here is no link … between Cave Species takes and *any* sort of commerce, whether tourism, scientific research, or agricultural markets." (emphasis in original)). Here, there is no link between the take of BCH and interstate commerce, as illustrated by the noneconomic nature of the activities conducted by Plaintiff-Intervenors on their private properties. Accordingly, the take of the BCH may not be regulated under the Commerce Clause.

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

As demonstrated above, *GDF Realty* attempted to circumvent the difficulty of characterizing the take of 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 take of *any* species "threaten[s] 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*, 362 F.3d at 287 (Jones, J., dissenting). Perhaps most importantly, *GDF Realty*'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 commentators agree with Judge Jones that *GDF Realty* is fundamentally inconsistent with the Supreme 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* 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."). Indeed, *GDF Realty*'s "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 LLC, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (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*'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); Adler, *Judicial Federalism*, at 415 ("[T]he logic of [*GDF Realty*] either obliterates the limited nature of Congress's commerce power, or it creates an implicit environmental exception for the Clause's otherwise justiciable limits."). *GDF Realty* 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."). Here, the take of BCH is not economic in nature; therefore, *Lopez* and *Morrison* control.[3]

CONCLUSION

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

DATED this 3rd day of October, 2017.

Respectfully submitted,

/s/ Gina Cannan
Gina Cannan, admitted *pro hac vice*

[3] Nor does the broader scheme doctrine set forth in *Raich* draw the FWS's regulation of the take of BCH within the outer limits of the Commerce Clause. *Raich*'s limiting principle is that noneconomic activities may be regulated only if withholding such power would frustrate Congress's ability to regulate commerce under a broad economic statutory scheme. 545 U.S. at 20-22. *Raich* focused on regulation of an illegal *market* for marijuana; neither the ESA nor the FWS's regulation of the take of BCH is focused on inherently economic activities. *See id.* at 6-7, 30-33.

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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 3rd day of October 2017.

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DATED this 3rd day of October 2017.

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