Case No. 19-50321

In the United States Court of Appeals for the Fifth Circuit

JOHN YEARWOOD; WILLIAMSON COUNTY, TEXAS,
INTERVENORS PLAINTIFFS – APPELLANTS – CROSS APPELLEES,

v.

DEPARTMENT OF INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE; DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, in his official capacity; MARGARET E. EVERSON, in her official capacity as Director of the U.S. Fish and Wildlife Service; AMY LUEDERS, in her official capacity as the Southwest Regional Director of the U.S. Fish and Wildlife Service,
INTERVENOR DEFENDANTS – APPELLEES – CROSS APPELLANTS,

CENTER FOR BIOLOGICAL DIVERSITY; TRAVIS AUDUBON; DEFENDERS OF WILDLIFE,
INTERVENOR DEFENDANTS – APPELLEES.

On Appeal from the United States District Court for the Western District of Texas, Austin Division

Brief of the Cato Institute, Southeastern Legal Foundation, and Mountain States Legal Foundation as *Amici Curiae* in Support of Plaintiff-Appellants

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 19-50321,
Am. Stewards of Liberty, et al. v. Dep't of the Interior, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Ilya Shapiro	Counsel to *amici*
Trevor Burrus	Counsel to *amici*
Cato Institute	*Amicus curiae*
Southeastern Legal Foundation	*Amicus curiae*
Mountain States Legal Foundation	*Amicus curiae*

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/s/ Ilya Shapiro

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public policy research foundation that advances individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutionalism that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

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This case concerns *amici* because liberty is best preserved by a constitutionally constrained Congress consistent with the Framers' design.

[1] The parties have consented to this filing. No one other than *amici* and their counsel wrote any part of this brief or paid for its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below applied a superseded precedent to hold that Congress's power to regulate commerce extended to a blind, translucent spider—the bone cave harvestman—so small and insignificant that it took nearly 14 surveys to even establish its presence. The Endangered Species Act (ESA) prevents a private property owner from effecting a "take" of this creature—which, considering its miniature size, could easily happen accidentally. The panel decision incorrectly dismissed this case on jurisdictional grounds for reasons that the petitioners outline in their brief. *Amici*, however, urge this court to rehear the case because the underlying question of the sweep of Congress's commerce power is of paramount importance.

Even though the bone cave harvestman is not a marketable commodity, the court below followed the spurious reasoning of *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003)—a decision made obsolete by subsequent Commerce Clause cases—to aggregate all endangered species together as a single comprehensive scheme that includes commercially relevant critters.

This Court should rehear this case to affirm that constitutional limits require a regulation of interstate commerce be both necessary and proper to a *commercial* concern, and to vacate the district court decision left in place by the panel. To do otherwise would license a general police power that would turn Article I, Section 8 into a mere ink blot.

ARGUMENT

I. THE DECISION BELOW THREATENS TO ELIMINATE ALL LIMITS ON FEDERAL POWER

Congress has "the power to regulate, that is, to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824). There are only "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). These categories are: 1) the channels of interstate commerce; 2) the instrumentalities of, objects in, and persons engaged in interstate commerce; and 3) activities that have substantial effects on interstate commerce. *Id.* The "take" regulation challenged here must flow from the third category. But regulating "takes" of bone cave harvestmen has nothing to do with interstate commerce, nor is it necessary and proper to regulating interstate commerce. Pretending that it does would give Congress unlimited regulatory authority.

A. The Bone Cave Harvestman Is Not Substantially Related to Interstate Commerce

The government seeks to protect an unknown number of commercially irrelevant and wholly intrastate arachnids without regard for whether such regulation has any connection to economic activity, interstate or otherwise. Federally fining landowners if they accidentally squish a nearly invisible spider is not a congressional power enumerated in Article I, Section 8.

A hypothetical harvesting of the bone cave harvestman would exert no substantial effect on interstate commerce, even in the aggregate. There is no evidence that a decline in the harvestman population would affect any other species around which any commercial activity exists. This Court should thus reaffirm that the Constitution's structural limitations exist to protect neither flock, nor fowl, nor spider, but "We the People."

B. The Lower Court Failed to Apply the Limits on Federal Power Described in *Lopez*, *Morrison*, *Raich*, and *NFIB*

As the district court below recognized, there is no conclusive data about the bone cave harvestman population. *Am. Stewards of Liberty v. DOI*, 370 F. Supp. 3d 711, 727 (W.D. Tex. 2019). But the court endeavored

to find a connection to interstate commerce anyway, claiming that the obsolete *GDF Realty* test still controls. *Id.* at 732. That case held that Congress had the authority to regulate individual conduct to protect cave spiders despite the species' lack of commercial value. *See GDF Realty*, 326 F.3d at 640–41. It found that the "interdependence of species," writ large, is a sufficient tie to interstate commerce to justify listing a species as endangered, and that the ESA is a larger regulation of economic activities justified by the commercial effects it creates. *Id.* at 639–40.

But "interdependence of species" cannot create commerce where none exists. By the same logic: a healthy environment is good for the national economy; protecting important species is good for the environment; a spider in a corner of Texas is an important species. Ergo, the bone cave harvestman is vital to the national economy, as is nearly everything else.

Two Supreme Court dissents also dealt in this logic—and there's a reason they were dissents. In his *Lopez* dissent, Justice Breyer argued that Congress could outlaw guns in school zones because a healthy economy requires quality education, which guns near schools undermined. *Lopez,* 514 U.S. at 618 (Breyer, J., dissenting). Likewise, in *United States v. Morrison*, Justice Souter's dissent argued that Congress could create a

civil remedy for women who suffer domestic or sexual violence because women vitally contribute to commerce, and domestic and sexual violence harms their ability to contribute. 529 U.S. 598, 631 (2000) (Souter, J., dissenting).

The lower court insists that the ESA in itself "is a general regulatory statute that is economic in nature and has a substantial relation to commerce." *Am. Stewards of Liberty*, 370 F. Supp. 3d at 732–33. But the ESA's economic nature, if any, comes from the government's restricting possible commercial activity related to a take, not the commercial nature of the take itself. *GDF Realty*, 326 F.3d at 639. To hold otherwise is to conclude that the ESA is self-justifying, generating an economic effect where there is none so it can retroactively seek refuge in the Commerce Clause. But Congress cannot create economic effects in order to regulate them. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 561 (2012) (*NFIB).*

To be sure, the Supreme Court has held that Congress's power to regulate interstate commerce includes a power to undermine certain in-state economic activity. *Gonzales v. Raich*, 545 U.S. 1, 18 (2005). But Congress's jurisdiction over marijuana doesn't come from the black market

that prohibition creates. Instead, unlike the bone cave harvestman, marijuana was a bought-and-sold commodity *before* any government action. If Congress's own laws can create the jurisdictional hook for Commerce Clause regulation, then Congress is the progenitor of its own power.

Wickard and *Raich* reason that when dealing with a fungible commodity, there is no zone of consumption that can be considered truly detached from the relevant commodity's national market. Aggregating demand means considering wants satisfied at home to be the same as those satisfied at market. *Wickard v. Filburn*, 317 U.S. 111, 127 (1942); *Raich*, 545 U.S at 18. The internal logic of these holdings relies on the commodities in question being the same: backyard wheat/marijuana and commercial wheat/marijuana. But different commodities are treated differently, and the bone cave harvestman is neither a commodity nor the same thing as a bald eagle. Species aren't fungible.

C. The Opinion Below Has No Limiting Principle and Would Grant Congress Unlimited Power

This Court should grant rehearing to overrule *GDF Realty*'s obsolete aggregation of all listed species for purposes of Commerce Clause analysis. 326 F.3d at 640. The court below did not look for a substantial

connection between the harvestman and some commercial end but instead applied *GDF Realty*. *Am. Stewards of Liberty*, 370 F. Supp. 3d at 734–35. By that logic, Congress would be justified in preventing an individual from using his own property because the harvestman *might* affect another species.

As noted above, "endangered species" are not a fungible commodity. *Raich,* 545 U.S at 18. While some species rely on others as a source of food and sundry benefits, the claim that the fate of the Puerto Rican Sharp-Shinned Hawk, Swayne's Hartebeest, or Dwarf Wedgemussel—*see Find Endangered Species*, U.S. Fish & Wildlife Service, http://bit.ly/2gGnDwg—are critically tied to that of Texas's bone cave harvestman is built on a foundation of far-fetched assumptions that should not persuade this Court that expansive federal regulation is an appropriate, constitutional solution. The Supreme Court has explained that this six-degrees-of-separation approach to Commerce Clause analysis renders the principle of enumerated powers a fiction. *Lopez,* 514 U.S. at 565. If the Commerce Clause delegated such broad authority, it would have been unnecessary for the Framers to enumerate any other powers.

Taking the district court's reasoning to its logical conclusion, Congress's power must extend to all American flora and fauna, endangered or not. Being "endangered" is not a jurisdictional hook. The lower court's holding would thus apply to all animals, meaning that a general jurisdiction over all wildlife is hidden in the Commerce Clause.

Moreover, because the ESA isn't limited to animals but includes plants too, 16 U.S.C. § 1541, Congress would have the power to oversee all living organisms because some living organisms *may* have a substantial effect on interstate commerce. This conclusion is what James Madison derided as "an indefinite supremacy over all persons and things." *The Federalist* No. 39, at 245 (James Madison) (C. Rossiter ed. 1961).

II. THIS COURT SHOULD REAFFIRM THAT FEDERAL JURISDICTION OVER NONCOMMERCIAL ACTIVITY IS LIMITED TO WHAT IS NECESSARY AND PROPER TO AN INTERSTATE REGULATION OF COMMERCE

As discussed above, *GDF Realty* has been superseded and the lower court erred in applying that case here. Instead, the Supreme Court's more recent decisions in *Raich* and *NFIB* expand on the third *Lopez* category.

The first two *Lopez* categories—those that constitute actual regulations of commerce—are inapplicable here. The sole remaining justification is in in the third *Lopez* category: those laws that are necessary and

proper for carrying into execution Congress's power to regulate interstate commerce. *Raich*, 545 U.S. at 34 (Scalia, J., concurring). The government must therefore rely on that "last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Printz v. United States*, 521 U.S. 898, 923 (1997).

In his *Raich* concurrence, Justice Scalia clarified the often-overlooked nuances of the commerce power. 545 U.S. at 33. He explained that the "substantial effects" prong comes not from the Commerce Clause but the Necessary and Proper Clause: "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Id.* at 34.

While many cases involving economic regulation by Congress are referred to as "Commerce Clause cases," this is often inaccurate. "Substantial effects" decisions like *Wickard*, for example, are "applications of the Necessary and Proper Clause in the context of the commerce power." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 591 (2010).

NFIB endorsed this view. The terms "necessary" and "proper" each have meaningful content that cannot be ignored. *NFIB*, 567 U.S at 560. The regulation must be *both* necessary *and* proper for executing the Commerce Clause. *Id.* Without those limitations, courts would "license the exercise of . . . great substantive and independent power[s] beyond those specifically enumerated." *Id.* at 559 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)) (cleaned up).

Indeed, this Court has already embraced the view that the Necessary and Proper Clause dictates what is constitutional under the third *Lopez* category. *United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009) (examining the interstate commerce justification for a sex offender registration scheme under the Necessary and Proper Clause). And the later Supreme Court decision in *NFIB* only brought the point home. All that remains is to repudiate *GDF Realty* explicitly.

Allowing Congress to claim jurisdiction over every animal in the country would undermine the Supreme Court's multi-decade effort to keep the Commerce Clause from swallowing the enumeration of powers. *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 Fordham L. Rev. 411, 428–31 (2013) (describing the Court's approach to the

Commerce Clause as "this far and no farther"). The Court has emphasized that, broad as the commerce power may be, it must be limited to its rightful scope. *Morrison,* 529 U.S. at 615. To do otherwise would be to grant a "great substantive and independent power" devoid of any limits.

CONCLUSION

For these reasons, the Court should grant en banc rehearing.

Respectfully submitted,

/s/ Ilya Shapiro

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July 2020

CERTIFICATE OF FILING AND SERVICE

On July 14, 2020, I filed this *Brief of the Cato Institute, Southeastern Legal Foundation, and Mountain States Legal Foundation as Amici Curiae* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

s/ Ilya Shapiro

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,194 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 365 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 12-point type for footnotes.

s/ Ilya Shapiro