No. 03-1619

IN THE

# Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; PARKE PROPERTIES II, L.P.,

*Petitioners,*

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.,

*Respondents.*

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

## BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE SUPPORTING PETITIONER


DANIEL J. POPEO
PAUL D. KAMENAR
Washington Legal Foundation
2009 Mass. Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

MARK A. PERRY
*Counsel of Record*
AMIR CAMERON TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

*Counsel for Amici Curiae*

## QUESTION PRESENTED

In every case in which this Court has relied upon the aggregation principle to sustain a federal regulation against a Commerce Clause challenge, "the regulated activity was of an apparent commercial character." The regulated activity here—potential interference with miniscule subterranean invertebrates that are wholly intrastate and lack any commercial value—is non-economic. Did the court of appeals err by relying upon aggregation to conclude that Congress has authority under the Commerce Clause to regulate this activity?

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## BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE SUPPORTING PETITIONER

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*Amici curiae* Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) respectfully submit that the petition for a writ of certiorari should be granted.[1]

### INTEREST OF AMICI CURIAE

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF engages in litigation and the administrative process in a wide variety of areas, including cases involving property rights and the scope of the federal government's Commerce Clause powers. In particular, WLF has argued as *amicus curiae* in several recent cases that the commerce power does not extend to federal regulation of wild animals. *See, e.g., Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1506 (2004); *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*"), *cert. denied*, 524 U.S. 937 (1998).

AEF is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

and public policy. AEF has appeared as *amicus curiae* in many cases in which WLF is also involved, including *Rancho Viejo*, *Gibbs*, and *NAHB*.

## ARGUMENT

The court of appeals held that the Commerce Clause affords Congress the authority to apply section 9(a)(1) of the Endangered Species Act (ESA), 16 U.S.C. § 1538(a)(1), which makes it unlawful to "take" any endangered species, to six species of largely sightless, subterranean invertebrates that live exclusively within caves in two Texas counties. Pet. App. 3-4.[2] The Cave Species, which grow to no more than 8 mm in length and spend their entire lives underground, have absolutely no commercial value. *Id.*

Petitioners have owned a 216-acre parcel of land in Travis County, Texas, for more than twenty years. Pet. App. 2. Their lawful efforts to develop that land, however, have been thwarted by the mere presence of the endangered Cave Species. Petitioners have attempted to ameliorate the Fish and Wildlife Service's (FWS) concerns by deeding several acres on which the Cave Species live to a nonprofit environmental organization and by fencing off other caves. *Id.* at 4, 48. FWS has nevertheless refused to grant petitioners the requisite permits to develop the property and has even threatened one of the owners with criminal prosecution for clearing brush on the land he owns with others. *Id.* at 4-6.

In an effort to realize their substantial financial investment in this property, petitioners initiated this suit and contended that, as applied to the wholly intrastate and commer-

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[2] These species—collectively referred to as the "Cave Species"—are the Bee Creek Cave Harvestman, the Bone Creek Harvestman, the Tooth Cave Pseudoscorpion, the Tooth Cave Spider, the Tooth Cave Ground Beetle, and the Kretschmarr Cave Mold Beetle. Pet. App. 2-3.

cially irrelevant Cave Species, section 9(a)(1) of the ESA exceeds the bounds of Congress' Commerce Clause authority. The district court—relying upon a rationale that has also been endorsed by the D.C. Circuit—upheld the constitutionality of the take prohibition on the ground that petitioners' planned commercial development, which includes a Wal-Mart and apartment complexes, has a substantial effect on interstate commerce. Pet. App. 65.

The Fifth Circuit expressly disavowed the lower court's reasoning but nonetheless affirmed its decision. The court of appeals held that the lower court was incorrect to focus its Commerce Clause analysis upon petitioners' future commercial development, rather than upon whether the regulated activity—the taking of Cave Species organisms—possesses the requisite link to interstate commerce. Pet. App. 22, 27. The court of appeals explained, "[t]o accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors" and thereby "'effectually obliterate' the limiting purpose of the Commerce Clause." *Id.* at 23. The court concluded, however, that the prohibition on Cave Species takes is constitutional because it is essential to the economic regulatory scheme purportedly embodied in the ESA. *Id.* at 36. On this basis, the court deemed it permissible to aggregate takes of these non-economic, intrastate species with takes of all other endangered species. *Id.* By aggregating the effect of all endangered species takes—both commercial and noncommercial in nature—the court of appeals divined a substantial commercial nexus adequate to sustain the prohibition on Cave Species takes. *Id.*

Six judges dissented from the Fifth Circuit's refusal to rehear the case en banc. Pet. App. 75. Judge Jones' dissent identified a number of serious flaws in the panel's reasoning and observed that the "approval of aggregation in this case would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id.* at 80.

A. In *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), this Court refined the framework for evaluating the propriety of federal action under the Commerce Clause. The Court explained that there exist three categories of activities that Congress can regulate pursuant to its commerce power:

> First, Congress may regulate the use of the *channels of interstate commerce.* Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or *persons or things in interstate commerce*, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate *those activities having a substantial relation to interstate commerce, i.e.*, those activities that substantially affect interstate commerce.

*Lopez*, 514 U.S. at 558-59 (citations omitted; emphases added); *see also Morrison*, 529 U.S. at 609. It is beyond reasonable dispute that the prohibition on Cave Species takes regulates neither the channels nor the instrumentalities of interstate commerce. Accordingly, the ESA's application to the Cave Species can be sustained, if at all, only if it regulates an activity that substantially affects interstate commerce.

*Lopez* and *Morrison* instruct that four inquiries are relevant to determining whether a regulated activity has a substantial effect on interstate commerce: (i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the regulation includes an express jurisdictional element; (iii) whether Congress has made findings regarding the regulated activity's effect on interstate commerce; and (iv) whether the link between the regulated activity and interstate commerce is direct or attenuated. *Lopez*, 514 U.S. at 559-65; *Morrison*, 529 U.S. at 610-12.

A faithful application of this test unequivocally demonstrates that the taking of a wholly intrastate and commercially irrelevant Cave Species organism does not substantially affect interstate commerce. The court of appeals avoided the implications of this inescapable conclusion by aggregating non-economic Cave Species takes with the takes of all other endangered species. This Court has *never* endorsed the aggregation of non-economic activity as part of "substantial effects" analysis. Indeed, such a methodology would significantly undercut the limitations inherent in Congress' Commerce Clause authority. This Court should grant certiorari to clarify that non-economic activities cannot be aggregated and to resolve the split in authority on this issue between the Fifth and the Ninth Circuits.

1. This Court explained in *Morrison* that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. The court of appeals recognized that the taking of Cave Species organisms is a non-economic activity, but nevertheless sustained application of the ESA's take prohibition to these commercially irrelevant species.

In order to determine whether a regulation reaches economic activity, it is necessary to focus upon the commercial attributes of the expressly regulated *activity*, rather than the commercial links of the regulated *entity*. In *Lopez*, for example, the Gun-Free School Zones Act made it illegal for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A). This Court explained that this is "a criminal statute that *by its terms* has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561 (emphasis added). In framing its Commerce Clause inquiry, the Court looked to the activity that the statute's terms expressly regulated, and concluded

that commerce was not implicated because the relevant activity for Commerce Clause purposes was the carrying of a gun in a school zone. The fact that the defendant to whom the statute was being applied was engaged in commerce—he had brought the gun to school to sell it—did not alter the Court's conclusion that the statute did not regulate commercial activity. *See United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

Similarly, in *Morrison*, the provision of the Violence Against Women Act under consideration provided a federal civil remedy for the victims of gender-motivated violence. 42 U.S.C. § 13,981. This Court concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. Again, the Court framed its analysis in the terms of the statute itself and paid no heed to the activities in which the regulated individual was engaged.

Section 9(a)(1) of the ESA prohibits endangered species takes. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct." 16 U.S.C. § 1532(19). As applied in this case, the statute by its terms proscribes the taking of a Cave Species organism, and the relevant question for Commerce Clause purposes is whether a Cave Species take constitutes commercial activity (and whether that activity has a substantial effect on interstate commerce). The answer to this question is clearly "no." The diminutive Cave Species organisms, which are found only in two Texas counties and spend their entire lives underground, have absolutely no commercial value.

It is irrelevant to this analysis that the activity threatening the Cave Species is petitioners' commercial development of their property. The court of appeals recognized as much, explaining:

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

Pet. App. 22.

It is therefore evident that the prohibition on Cave Species takes regulates an activity that lacks commercial (and interstate) attributes. Indeed, neither the taking of a single Cave Species organism nor the aggregated effect of all Cave Species takes has a substantial effect on interstate commerce. *See* Pet. App. 28-30 (rejecting the argument that Cave Species takes have a substantial effect on commerce attributable to the minor scientific interest in the species or their hypothetical future commercial benefits). Upon reaching this conclusion, the court of appeals should have ended its Commerce Clause analysis and invalidated the prohibition on Cave Species takes. Instead, the court held that—notwithstanding the noncommercial nature of the activity—it is permissible to aggregate Cave Species takes with the takes of all other endangered species, and thereby obtain the requisite substantial effect on interstate commerce. The court contended that aggregation of non-economic activity is appropriate where that activity is "'*an essential part of a larger regulation of economic activity*, in which the regulatory scheme *could* be undercut unless the intrastate activity were regulated.'" *Id.* at 13 (quoting *Lopez*, 514 U.S. at 561 (emphasis in original)). The court of appeals concluded, "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes." *Id.* at 36.

The court of appeals misconstrued the language from *Lopez* that it quoted to support its aggregation of noncommercial activities. Indeed, this unwarranted expansion of the aggregation principle is at odds with both the letter and spirit of *Lopez*. *See Lopez*, 514 U.S. at 561 ("our cases [have upheld] regulations of activities that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce" (emphasis added)). According to the court of appeals, Congress is authorized to regulate intrastate, noncommercial activities so long as it locates that regulation within the framework of a larger economic regulatory scheme. Such a boundless methodology eviscerates the reasonable—and constitutionally compelled—constraints that *Lopez* and *Morrison* sought to place on the commerce power.

There is no support in this Court's jurisprudence for the aggregation of noncommercial activities. The Court first endorsed the limited use of aggregation in *Wickard* v. *Filburn*, where a farmer's cultivation of wheat for home-consumption was aggregated with the consumption of other similarly situated individuals in order to sustain a provision of the Agricultural Adjustment Act of 1938. 317 U.S. 111, 127 (1942). Since then, "in every case where [this Court] ha[s] sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611 n.4; *see also Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (coal industry); *Perez* v. *United States*, 402 U.S. 146 (1971) (loan sharking); *Maryland* v. *Wirtz*, 392 U.S. 183 (1968) (wages of workers employed by businesses engaged in interstate commerce); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (restaurant service); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964) (hotel accommodations).

The court of appeals' unprecedented expansion of the aggregation principle distorts the delicate balance between federal and state power by extending Congress' Commerce

Clause authority to intrastate, non-economic activity that the Constitution firmly places within the exclusive purview of the States. *See Morrison*, 529 U.S. at 617-18 ("The Constitution requires a distinction between what is truly national and what is truly local"). This Court should grant certiorari to clarify that the aggregation of noncommercial activity is not an acceptable mode of Commerce Clause analysis.[3]

2. The second aspect of substantial effects analysis is an inquiry into whether the statute includes an express jurisdictional element limiting its reach to matters that impact interstate commerce. The language of the ESA's take prohibition lacks any such limitation—a shortcoming that the court of appeals acknowledged but refused to accord any weight.

If section 9(a)(1) of the ESA did include a clause limiting its reach to takes that possess a connection with interstate commerce, takes of the wholly interstate and commercially irrelevant Cave Species would be excluded from the statute's

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[3] Moreover, even on its own terms, the court of appeals' analysis is flawed. The ESA is not an economic regulatory scheme. As the court of appeals correctly recognized in other portions of its opinion, to determine whether a statute regulates economic activity, it is necessary to focus upon the commercial characteristics of the regulated conduct without regard to the economic links of the regulated entity. Pet. App. 22. The ESA regulates the taking of endangered species—an activity that lacks a commercial nexus unless the regulated species itself has economic attributes. As applied to that significant category of commercially irrelevant endangered species—including the Cave Species, the arroyo toad, and the Delhi Sands Flower-Loving Fly—the ESA regulates non-economic conduct. The statute as a whole thus cannot accurately be classified as an *economic* regulatory scheme. Accordingly, even if it were permissible to aggregate non-economic activity essential to a larger economic regulatory program, aggregation would nevertheless be inapplicable in the context of the ESA.

scope. The absence of a jurisdictional element impermissibly extends the reach of the ESA to takes of all endangered species—including those that lack the constitutionally mandated nexus with interstate commerce. The result is a statute that is susceptible to as-applied challenges where, as here, the take in question does not fall within the confined boundaries of Congress' Commerce Clause authority.

3. The third factor that a court must weigh as part of its substantial effects analysis is whether Congress made legislative findings regarding the manner in which the regulated activity impacts interstate commerce. There are no legislative findings that address the (nonexistent) connection between Cave Species takes and interstate commerce. As with the absence of a jurisdictional element, the court of appeals did not give any weight to the lack of Cave Species-specific legislative findings and focused instead upon ambiguous congressional statements positing a generalized link between endangered species and human welfare. Pet. App. 33. The absence of species-specific legislative findings is critical because there is no other evidence that suggests that interference with the habitat of these diminutive subterranean invertebrates exerts a substantial effect on interstate commerce. "To the extent that congressional findings would enable [this Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." *Lopez*, 514 U.S. at 563.

4. The final issue that must be considered by a court engaged in substantial effects analysis is whether the link between the regulated activity and interstate commerce is so attenuated that there exists no logical stopping point to Congress' commerce power. *See Lopez*, 514 U.S. at 567 (explaining that it is impermissible for a court, in an effort to discern a link between a regulated activity and interstate commerce, to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the

Commerce Clause to a general police power of the sort retained by the States"). Relying upon its aggregation of all endangered species takes, the court of appeals expended only two conclusory sentences dismissing the notion of an attenuation problem. Pet. App. 36.

When the substantial effects inquiry is reconfigured to reflect accurately the methodology outlined by this Court in *Lopez* and *Morrison*, however, significant attenuation problems emerge. Even if aggregation is employed, any link between the destruction of the habitat of the intrastate, economically irrelevant Cave Species and interstate commercial activity is dangerously attenuated. The court of appeals found such a connection by relying upon a hypothetical "interdependent web" binding all species. Under that theoretical framework, the link between harm to a nearly microscopic subterranean organism and interstate commerce can only be arrived at by undertaking vast inferential leaps and indulging questionable suppositions. If, through some Herculean feat of factual extrapolation, this Court were to find that a Cave Species take exerts a substantial impact on interstate commerce, then there would truly be no logical stopping point to confine Congress' Commerce Clause authority, and the distinction between the sphere of the federal government and that of the States would be wholly obliterated.

On the contrary, it is the States that have long enjoyed plenary authority over the wild animals within their borders. *See, e.g., Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 287-88 (1977) (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). The broad scope of state authority in this realm contrasts sharply with the narrow reach of the federal government, which is limited to regulating wild animals through invocation of its enumerated powers. *See, e.g., id.* (holding that the commerce power authorizes the regulation of animals within the nation's territorial waters (*i.e.*, the channels of

commerce)); *North Dakota* v. *United States*, 460 U.S. 300 (1983) (concluding that the spending power authorizes the federal government to acquire, by purchase or easement, private land that may be used as animal habitat); *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) (explaining that the federal government's property power authorizes it to proscribe the harming of wild animals on federal land); *Missouri* v. *Holland*, 252 U.S. 416 (1920) (holding that the treaty power authorizes the federal government to protect animals that are the subject of international concern). This Court has never held, however, that the commerce power authorizes the federal government to regulate wild animals *qua* wild animals. To the contrary, this Court has indicated that such regulation raises serious questions under the Commerce Clause, *see Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001), and such an incident of centralization would do much to undermine the delicate federal/state balance that is the hallmark of Our Federalism.

In light of the foregoing, it is evident that—when applied correctly—each of the four factors that this Court identified in *Lopez*, and reaffirmed in *Morrison*, indicates that Congress lacks authority under the Commerce Clause to regulate Cave Species takes. This Court should grant certiorari to correct the court of appeals' flawed analysis and to clarify that it is impermissible for lower courts to circumvent the limitations on Congress' commerce power by engaging in the type of judicial legerdemain employed in this case.

B. The significant inconsistencies between the court of appeals' decision and the Commerce Clause framework outlined by this Court in *Lopez* and *Morrison* constitute a weighty reason to grant certiorari. The split between the Fifth and Ninth Circuits regarding the applicability of *Wickard*'s aggregation principle to non-economic activity, as well as the sharp disagreement among both lower-court judges and legal scholars regarding the constitutionality of

endangered species regulations, further demonstrate the necessity for a definitive ruling from this Court.[4]

The Ninth Circuit has repeatedly and explicitly proclaimed a categorical rule against the aggregation of noncommercial activity. In *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003), for example, the Ninth Circuit invalidated a statute making it unlawful to possess child pornography manufactured with implements that move in interstate commerce. The court disavowed a Third Circuit decision that had utilized aggregation to sustain the same provision, and, in so doing, it held that "*Wickard*'s theory of aggregate impact . . . applies *only* when the regulated intrastate activity is a commercial or economic one." *Id.* at 1122 n.17 (emphasis in original; internal quotation marks omitted); *see also United States* v. *Stewart*, 348 F.3d 1132 (9th Cir. 2003) (holding that a federal statute prohibiting the possession of machineguns contravened the Commerce Clause when applied to a defendant who assembled a homemade weapon for his own collection, and refusing to aggregate the defendant's

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[4] Moreover, the frequency with which the federal government invokes the ESA in the name of wholly intrastate, noncommercial species evidences the significant real-world repercussions of this issue. *See, e.g.*, Botkin, *Firth Bridge Work Still Slowed by Endangered Snails in River*, Idaho Falls Post Reg., Dec. 10, 2003, at A1 (demolition of bridge delayed while FWS studies the impact on the Utah Valvata Snail); Kresge, *Fontana Project Hits Old Snag; D.C. Meeting Fails to Give Any Ground for Empire Center's Impact on Endangered Flower-Loving Fly*, San Bernardino Sun, Oct. 16, 2003 (planned development placed in doubt due to the presence of the Delhi Sands Flower-Loving Fly); Witt, *A Showcase and a Battleground; Fry, Regulators at Odds over How to Protect Habitat at Golf Course*, San Jose Mercury News, July 13, 2003, at A1 (modifications to golf course required to protect the California Red-Legged Frog).

non-economic activity with that of similarly situated persons).

The Ninth Circuit's categorical prohibition upon the aggregation of noncommercial activities is inconsistent with the Fifth Circuit's conclusion in this case that aggregation is appropriate where a noncommercial activity is an essential component of an economic regulatory scheme. This methodological disagreement has profound ramifications for Commerce Clause jurisprudence. The choice between the Fifth Circuit's expansive conception of aggregation and the Ninth Circuit's constrained application of this principle is a proxy for whether this Court's recent Commerce Clause decisions are to have any enduring jurisprudential effect. Indeed, the Fifth Circuit's methodology, which facilitates the extension of the federal commerce power to areas of traditional state concern, harkens back to the pre-*Lopez* era during which Congress exercised a seemingly boundless Commerce Clause authority. *See* Kozinski, *Introduction to Volume 19*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995) (writing that in the pre-*Lopez* era the Commerce Clause should more accurately have been known as the "'Hey, you-can-do-whatever-you-feel-like Clause'"). Certiorari is therefore warranted to address this disagreement among the circuits and to reaffirm the holdings of *Lopez* and *Morrison*.

In addition to this split concerning the scope of the aggregation principle, the circuits also disagree about the proper focus of the substantial effects inquiry. Whereas the Fifth Circuit has endorsed a methodology that considers only the commercial links of the activity expressly regulated by the statute's terms, *see* Pet. App. 22, the D.C. Circuit has formulated an expanded inquiry—akin to that employed by the district court in this case—that focuses upon the commercial attributes of the regulated entity itself. In *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1506 (2004), the court upheld a regulation precluding

cluding takes of the intrastate, economically irrelevant arroyo toad solely because the take was committed by a real-estate development company that had connections with interstate commerce. In so doing, the D.C. Circuit disregarded this Court's clear instruction in *Lopez* and *Morrison* that the expressly regulated activity—*i.e.*, the endangered species take—is the proper object of the substantial effects inquiry. Conversely, the Fifth Circuit's refusal to consider petitioners' economic links as part of its substantial effects analysis represents a faithful implementation of this Court's guidance.

Judge Sentelle, dissenting from the denial of rehearing en banc in *Rancho Viejo*, recognized the split between the Fifth and D.C. Circuits on this issue, stating that the panel's decision "is . . . conspicuously in conflict with another circuit. The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the 'take' was itself economic." 334 F.3d 1158, 1159 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of rehearing en banc). Judge Roberts acknowledged the same point. *Id.* at 1160 ("the approach of the panel in this case and *NAHB* now conflicts with the opinion of a sister circuit . . . ") (Roberts, J., dissenting from denial of rehearing en banc). This Court should act to resolve the split between these two circuits and to reaffirm the proposition that Congress' commerce power is not without limits.

The pressing need for this Court's attention is further evidenced by the divergent rationales that the lower courts have adopted to sustain the ESA against the frequent Commerce Clause challenges that have followed on the heels of *Lopez* and *Morrison*. *See Rancho Viejo*, 323 F.3d 1062 (arroyo toad takes); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf takes), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*") (Delhi Sands Flower-Loving Fly takes), *cert. denied*, 524 U.S. 937 (1998). Although each

such decision has ultimately sustained the regulation at issue, a number of these holdings have drawn vigorous dissents from a member of the court (and in *NAHB*, a critical separate concurrence as well). *See Gibbs*, 214 F.3d at 506 (Luttig, J., dissenting); *NAHB*, 130 F.3d at 1060 (Sentelle, J., dissenting); *id.* at 1057 (Henderson, J., concurring); *see also Rancho Viejo*, 334 F.3d at 1158 (Sentelle, J., dissenting from denial of rehearing en banc); *id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc). The judicial disarray occasioned by the ESA is further evidenced by the fact that *six* judges dissented from the Fifth Circuit's refusal to rehear this case en banc. Pet. App. 75 (Jones, J., joined by five other judges, dissenting from denial of rehearing en banc).

The irreconcilable reasoning of the majorities in each of these decisions is indicative of the confusion that this area of the law has fomented among lower courts—and the great lengths that these courts will go to uphold endangered species protections. In the instant case, the court of appeals upheld the prohibition on Cave Species takes because it found the regulation to be essential to the economic regulatory scheme purportedly embodied in the ESA. Pet. App. 36. The D.C. Circuit sustained the ESA's take provision as applied to the arroyo toad because the entity responsible for the take was engaged in the commercial activity of home construction. *Rancho Viejo*, 323 F.3d at 1072. The Fourth Circuit found a commercial link between red wolf takes and the tourism, scientific research, and (hypothetical) pelt trade fostered by the species and so upheld the regulation before it. *Gibbs*, 214 F.3d at 492.[5] In *NAHB*, Judge Wald held that the

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[5] The *Gibbs* court undertook its Commerce Clause inquiry in a manner similar to that employed by the D.C. Circuit in *Rancho Viejo*, and thus the Fourth Circuit is also implicated in the circuit split concerning the correct framing of substantial effects analysis. The Fourth Circuit determined that the conduct being regulated by the prohibition on red wolf takes was economic in

prohibition on takes of the Delhi Sands Flower-Loving Fly was valid because the elimination of an endangered species "would have a staggering effect on biodiversity . . . and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species" for their medicinal and genetic value. 130 F.3d at 1052. In upholding the regulation, Judge Wald also relied upon the rationale that endangered species takes are the product of "destructive interstate competition," in the form of a race-to-the-bottom to attract development at the expense of the environment's well-being. *Id.* at 1054. In her concurrence, Judge Henderson expressly rejected as unduly speculative Judge Wald's invocation of the present and future commerce in endangered species. *Id.* at 1058 (Henderson, J., concurring). Instead, Judge Henderson argued that the regulation was constitutional because the extinction of species will impact "land and objects that are involved in interstate commerce." *Id.* at 1059.

This disagreement among lower-court judges has been mirrored in the legal academy, with scholars both criticizing and commending the court of appeals decisions upholding endangered species regulations against Commerce Clause challenges. *Compare* Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 Sup. Ct. Econ. Rev. 205 (2001), *and* Park, *The Endangered Species Act: Does It Have a Stopping Point?*, 4 Engage 58 (2003), *with* Fitzgerald, *Seeing Red:* Gibbs v. Babbitt, 13 Vill. Envtl. L.J. 1

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nature because the "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." *Gibbs*, 214 F.3d at 492. By focusing upon the economic motivations of the individuals responsible for the take—rather than upon the commercial connections of the take itself—the Fourth Circuit committed the same framing error that hampered the D.C. Circuit's analysis.

(2002), *and* Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 Ga. L. Rev. 723 (2002). *See also* Saad, *Commerce Clause Jurisprudence: Has There Been a Change?*, 23 J. Land Resources & Envtl. L. 143, 172 (2003) ("The Supreme Court must give a clear directive to the lower courts on how to handle environmental regulation passed under the Commerce Clause.").

In light of the multitude of theories promulgated by judges presented with Commerce Clause challenges to prohibitions on interference with commercially irrelevant, intrastate species, certiorari is warranted to afford this Court the opportunity to reconcile these divisions among the federal judiciary and to analyze this issue in a manner faithful to the framework set forth in *Lopez* and *Morrison*. *Cf. Cargill, Inc.* v. *United States*, 516 U.S. 955, 955 (1995) (Thomas, J., dissenting from denial of certiorari) (recognizing that "serious and important constitutional questions" about the limits of Congress' commerce power to regulate wild animals "provide a compelling reason to grant certiorari").

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK A. PERRY
*Counsel of Record*
AMIR CAMERON TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

DANIEL J. POPEO
PAUL D. KAMENAR
Washington Legal Foundation
2009 Mass. Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

*Counsel for Amici Curiae*

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