No. 03-1619

IN THE

Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD., *ET AL.*

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fish & Wildlife Service violated the Commerce Clause by regulating "takes" of intrastate, non-economic species under the Endangered Species Act.

2. Whether aggregation of all takes of all endangered species may sustain the regulation of intrastate, non-economic species whose takes, considered alone, do not substantially affect interstate commerce.

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that We the People delegated to the national

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

government only certain, specifically enumerated powers and that the bulk of sovereign power, including the police power at issue here, was reserved to the States or to the people.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as *amicus curiae* in cases of constitutional significance. Of particular relevance here, the Institute has a Center for Local Government, which promotes the theory and practice of self-government, emphasizing the themes of limited, constitutional government, federalism, property rights, and energetic citizenship. In addition, the Institute has published extensively about the constitutional limitations on the powers delegated to the national government, including a book edited by Gordon Jones and Institute Senior Fellow John Marini entitled *The Imperial Congress: Crisis in the Separation of Powers*.

In order to further advance its mission, the Claremont Institute in 1999 established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of *amicus curiae* briefs in cases such as this that involve issues of constitutional significance going to the heart of the founding principles of this nation. The Center for Constitutional Jurisprudence has previously participated as *amicus curiae* before this Court in related cases addressing the scope of Congress's powers under the Commerce Clause: *Solid Waste Agency of Northern Cook Cty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

REASONS FOR GRANTING THE WRIT

I. The Federal Government's Regulation of the Wholly Intrastate, Non-Commercial Species at Issue Here Exceeds Congress's Powers Under the Commerce Clause, Both as Originally Understood and As Recently Interpreted by this Court.

A. As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade.

For our nation's Founders, "commerce" was trade, and "commerce among the states" was interstate trade, not the ordinary activities of business enterprises in a single state or community. *See*, *e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *United States* v. *Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield,* 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce,

which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 529 U.S., at 616 n.7). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate other kinds of business activity such as hunting or trapping (assuming that the hunting and trapping referenced by the Court of Appeals was for business rather than recreational purposes), therefore, was completely foreign to them. And *a fortiori*, any claim that the Commerce Clause encompassed a power effectively to trump local land use regulations and local development merely because of the presence of a couple of wholly intrastate species of bugs that have never been articles of commerce would have been beyond the pale.

This understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895), because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id*., at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the

hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture (as well as building construction, at issue here), was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See*, *e.g.*, *E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons,* 22 U.S. (9 Wheat.), at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891); *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the States and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government....

156 U.S., at 13; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 301 (1936) (quoting *E.C.* Knight); *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally

mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S., at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of . . . of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S., at 203; see also *id*., at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government." 514 U.S., at 555 (quoting *Schechter Poultry*, 295 U.S., at 548).

As should be obvious, the expansion of the Endangered Species Act to the wholly intrastate, non-commercial species at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. GDF Realty seeks to develop some of its land that exists wholly in the State of Texas. Land, of course, is the quintessential thing that does not move in interstate commerce. *See Camps Newfound/ Owatonna* v. *Town of Harrison, Maine*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

To be sure, once its development was completed, GDF Realty planned to sell or lease some of its developed property to those engaged in retail sales (other portions of its planned development were destined for residential housing). Some of the goods sold in those retail outlets may well have traveled in interstate commerce, but the regulation at issue here does not address the interstate shipment of goods—the ESA's restrictions on the interstate shipment of endangered species, which are a valid exercise of the Commerce Clause power, are not at issue here. *See* 15 U.S.C. § 1538(a)(1)(E) (making it unlawful to transport endangered species in interstate or foreign commerce). Nor does the regulation at issue here address retail sales of goods that have moved in interstate commerce. It does not address construction of the buildings in which those retail goods will be sold. It does not even directly address the preparation of the land on which those buildings will ultimately be constructed. Rather, it aims at any activity, without regard to its commercial nexus, that might cause "harm" to some cave bugs that never have been articles of commerce, and thereby indirectly regulates a wholly intrastate business enterprise whose activity is 4 steps removed from the Founders' understanding of "commerce among the states."

Despite this most tenuous connection to interstate commerce as originally understood, the Department of Justice nevertheless takes issue in its opposition to the

petition for certiorari with the portion of the Fifth Circuit's opinion holding that the mere fact that GDF Realty is a business is not a sufficient ground for the assertion of federal regulatory authority over matters having nothing to do with interstate commerce. *GDF Realty* v. *Norton*, Brief of the United States in Opposition to Petition for Writ of Certiorari, at 12 n.5. The Department's repudiation of part of the Fifth Circuit's holding—a holding admittedly in conflict with the D.C. Circuit's holding in *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *reh'g en banc denied*, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 1506 (Mar. 1, 2004), *reh'g denied*, 124 S.Ct. 2061 (April 19, 2004)—alone warrants this Court's attention.

Yet even if that aspect of the Fifth Circuit's decision was not in conflict with the D.C. Circuit's decision in *Rancho Viejo*, the circle-of-life rationale upon which the Fifth Circuit ultimately based its decision upholding the expansion of the Endangered Species Act at issue here brings this regulation no closer to the Founders' understanding of the Commerce Clause than does the Department of Justice's rationale—at least, if the Commerce Clause is to retain any of the limits envisioned by our nation's Founders. The Texas cave bugs that the federal government seeks to regulate are not articles of commerce, so the regulations at issue here are readily distinguishable from regulations designed to protect species that actually are articles of commerce. *See* Black Bass Act, ch. 346, 44 Stat. 576 (1926), (repealed by Act of Nov. 16, 1981, Pub. L. No. 97-79, § 9(b)(2), 95 Stat. 1079 (1981)); Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (16 U.S.C. 668 et seq.).

Nor can this regulation be sustained as a valid exercise of Congress's powers under the Necessary and Proper Clause. As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.), at 187

(describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819) (describing the Necessary and Proper Clause as merely a means clause). There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here, because the cave bugs are simply not articles of commerce. Congress cannot use a Commerce Clause pretext, therefore, to support its exercise of what is essentially a police power. *Id.*, at 423. Thus, while it is undoubtedly true that, in today's world, the quantum of "commerce among the states" is much larger than in the founding era, the expansion in *quantity* does not give Congress the different *qualitative* power that it seeks to exercise here.

Under the original view of the Commerce Clause, therefore, this is an extremely easy case, and the fact that the lower courts are simply refusing to enforce the limits of the Commerce Clause, particularly in an area of such traditional State concern as local land regulation and wildlife protection, warrants this Court's review.

B. Even under the expanded view of the Commerce Clause taken in this Court's modern-era precedents, the expansion of the Endangered Species Act at issue here exceeds the outer limits of the power afforded to Congress.

Even when this Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress.

Thus, in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of

government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *Morrison*, 529 U.S., at 608). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S., at 554 (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S., at 567; *Morrison,* 529 U.S., at 616 n.6).

These reservations were key to this Court's decisions in *Lopez* and *Morrison*. *See Lopez*, 514 U.S., at 566; *Morrison*, 529 U.S., at 608. As in those cases, the expansion of the Endangered Species Act at issue here does not regulate the channels or the instrumentalities of interstate commerce. Instead, the Court of Appeals based its decision on the claim that federal regulation of any activity that affected even a single, wholly intrastate, non-commercial species was permissible because, due to the interdependence of species, such harm to a single species, when aggregated with unrelated harm to all other species (including commercial species), could reasonably be thought to have a "substantial effect" on interstate commerce. *GDF Realty Investments, Ltd.* v. *Norton*, 326 F.3d 622, 640 (5th Cir. 2003), *reh'g en banc denied*, 362 F.3d 286 (5th Cir. 2004). Quite apart from the fact that one of the unique features of the particular species at issue here is that they are *not* interconnected with other species, the Fifth Circuit's rationale, like a ripple of water spreading throughout an entire pond, would leave nothing outside the scope of federal power. *See Lopez,* 514 U.S., at 567. As this Court has made clear, rationales for the exercise of Commerce Clause power that have no stopping point, and that as a result would displant State policy-making authority, cannot be sustained. *See id.* (rejecting an

"inference upon inference" assertion of power that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *Morrison,* 529 U.S., at 615.

Thus, even under the expanded view of the Commerce Clause that has been in place since the New Deal, the expansion of the Endangered Species Act proffered by the government remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.

Judge Jones' opinion dissenting from the denial of the petition for rehearing *en banc* in this case also highlights how fundamentally—despite their contradictory reasoning—the Fifth Circuit's decision here and the D.C. Circuit's decision in *Rancho Viejo* are at odds with this Court's decision in *Lopez*, *Morrison*, and *Solid Waste Agency of Northern Cook County. v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). The Fifth Circuit "panel's 'interdependent web' analysis of the Endangered Species Act," she wrote, "gives . . . subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in M*orrison*." *GDF Realty*, 362 F.3d, at 287 (Jones, J., dissenting from denial of petition for rehearing *en banc*). Judge Jones properly concluded that "the panel's commerce clause analysis is in error," and later that the panel's broad interpretation of the aggregation principle "would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id*., at 287, 289. *See also id*. at 292 n.6 (noting that the panel's decision is also "contrary" to *SWANCC*).

As the facts of this case make amply clear, the protection of the health, safety, and welfare of the people—the traditional definition of the police power reserved to the States, *see*, *e.g.*, *South Covington & C. St. R. Co. v. City of*

Covington, 235 U.S. 537, 546 (1915)—requires a careful balancing of competing concerns, a balancing that is best left to the people and governments who will most directly bear the consequences of the decision. *See*, *e.g.*, *Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago*, 107 U.S. 678 (1883) (noting that the police power "can generally be exercised more wisely by the states than by a distant authority"). Here, the preservation of some cave bugs is pitted against the construction of the residential housing and businesses necessary to the people who would make their homes in the area surrounding Austin, Texas. *See* Petn., at 10.

The local governmental authorities had already given full consideration to (and approved) GDF's proposed developments before the federal government even added cave bug species to its endangered list. Pet'n at 6. That approval process required GDF Realty to invest millions of dollars toward the construction of water lines, wastewater gravity lines, and other utility infrastructure improvements which were then deeded to the City of Austin, Texas. *Id.* GDF Realty had deeded portions of its land to the Travis County government as a highway right-of-way. *Id.* And it had obtained approval for its platt maps and development plans, *id.*, undoubtedly after undertaking the numerous environmental and safety studies that are the hallmark of modern-day land-use planning.

The process described above demonstrates the proper exercise of the state police powers in action. Given this Court's recent solicitude for the sovereignty of the States, *see*, *e.g.*, *Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 527 U.S. 706 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999), it would be odd indeed if Congress could intrude upon the powers

reserved to the States, and hence on state sovereignty, in the much more substantial way presented by the expansion of the Endangered Species Act at issue here.

That does not mean that without comprehensive and expansive federal regulation, a State, through the exercise of its police powers, could immunize actions that have a detrimental effect in other states. Traditional tort and nuisance law remains available. *See, e.g.*, *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840 (4th Cir. 1999), *aff'd sub nom, United States* v. *Morrison*, 529 U.S. 598 (2000); *Missouri* v. *Illinois*., 180 U.S. 208 (1901). Even for species that migrate between two or more States, the States remain free to enter into agreements to regulate species takes to their mutual benefit. *See*, *e.g.*, *Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1893) (describing an agreement to drain a malarial district on the border between two States as an example of an interstate agreement that could "in no respect concern the United States"). And on the chance that such an agreement might be made to the detriment of other states, the Congressional consent requirement of the Compacts Clause of Article I, Section 10 provides a sufficient check. U.S. Const., Art. I, Sec. 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power"); *see also West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. . . . [I]t is also a means of safeguarding the national interest").

In short, there is as little need for federal regulation here as there is constitutional authority. That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of Texas provides no constitutional title for them to do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are almost exclusively borne by the

people of Texas. Our Constitution leaves such decisions to the States for good reason. The inference-upon-inference reasoning of the federal government and the Court of Appeals below should not be allowed to alter that fundamental constitutional structure.

C. This Court Should Grant the Writ of Certiorari in order to repudiate the aggregation principle of *Wickard* v. *Filburn*, thereby removing from Congress and the regulatory agencies the remotely colorable claim to unconstitutional assertions of power that it provides.

More fundamentally, the decision by the Court of Appeals below demonstrates just how pernicious the combination of the aggregation principle from *Wickard* v. *Filburn*, 317 U.S. 111, 127-28 (1942), and the substantial effects test discussed in *Lopez* really is. Standing alone, the substantial effects test essentially converts the Necessary and Proper Clause from a means clause to an ends clause, and therefore renders it constitutionally suspect. *See Lopez*, 514 U.S., at 584-85 (Thomas, J., concurring); *M'Culloch*, 17 U.S. (4 Wheat.), at 423; *Carter Coal*, 298 U.S., at 317 (Hughes, C.J., separate opinion). But when combined with *Wickard*'s aggregation principle, there is absolutely nothing over which clever lawyers and bureaucrats in federal regulatory agencies cannot stake some claim of regulatory power, as this case amply demonstrates.

Striking down the expanded interpretation of the Endangered Species Act at issue here is not enough. *Lopez* has been on the books for almost ten years, yet federal agencies have persisted in asserting jurisdiction where, under any reasonable reading of *Lopez*, they have none. The potential for unlimited and abusive assertions of power is the reason that many constitutional scholars over the past half century have criticized *Wickard* as extra-constitutional, even those who favor the resulting expansion in federal powers.

See, e.g., R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN 148-51 (1987); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 56-57 (1990) (explaining that *Wickard* "abandoned" aspects of the Constitution that defined and limited national power); R. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 139 (1992) (contending that *Wickard* was a "manifestly erroneous" decision that left "no conceivable stopping point for the federal commerce power"); L. Graglia, *United States v. Lopez: Judicial Review Under The Commerce Clause*, 74 TEX. L. REV. 719, 745 (1996) (referring to *Wickard* as a "notorious" decision); C. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253 & n.18 (1996) (describing *Wickard* as a "repudiation" of the original Constitution that gave the national government "something close to general police powers"); B. Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 322, 324 (1992) (describing *Wickard* as a "wrenching break with the constitutional past," ringing the "death-knell for traditional notions of limited national govern-ment"); *cf*. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. 1, p. 831 n.29 (3d ed. 2000) (describing hypothetical "sham" legislation that could result from the combination of the substantial effects test and the aggregation principle); G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 191 (13th ed. 1997) (suggesting that *Wickard* "in effect abandon[ed] all judicial concern with federalism-related limits on congressional power"). The expansion of federal power that has followed on the *Wickard* decision and the concomitant retraction of liberty, not just in this arena but in numerous others, suggests that the time is long overdue for a reversal of that decision. *See Lopez*, 514 U.S., at 585 (Thomas, J., concurring). Nothing short of a full repudiation of that decision will suffice to rebuild the limits of the Commerce Clause and to reign in a federal government that continues to believe that the Constitution sets no bounds on its power.

II. The Fifth Circuit's Rationale Conflicts with that of the D.C. Circuit in *Rancho Viejo* v. *Norton*.

In his opinion dissenting from the denial of the petition for rehearing *en banc* in *Rancho Viejo*, Judge Sentelle noted that the reasoning upon which the D.C. Circuit grounded its ruling was "conspicuously in conflict" with the reasoning of the Fifth Circuit in the case below. *See Rancho Viejo*, 334 F.3d, at 1159 (Sentelle, J., dissenting from denial of petition for rehearing *en banc*). There are several grounds of disagreement that merit this Court's attention.

First, and perhaps most fundamentally, the two courts disagree as to whether the prohibition on the "take" of wholly-intrastate, non-commercial species can be viewed as aimed at economic activity simply because the particular litigant is an economic actor. The D.C. has held that it could, while the Fifth Circuit held that it could not. *Compare National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1049 (D.C. Cir. 1997) with *GDF Realty*, 326 F.3d, at 634-35.

Second, the D.C. Circuit and the Fifth Circuit disagree as to whether this Court's decision in *United States* v. *Salerno*, 481 U.S. 739 (1987), prevents a facial challenge on Commerce Clause grounds to any statute that reaches some commercial activity. As Judge Roberts noted in his dissent from the denial of the petition for rehearing *en banc* in *Rancho Viejo*, "the approach [regarding *Salerno*] of the panel in this case . . . now conflicts with the opinion of [the Fifth Circuit] . . . ." *See Rancho Viejo*, 334 F.3d, at 1160 (Roberts, J., dissenting from denial of petition for rehearing *en banc*) (quoting *GDF Realty*, 326 F.3d, at 636). The D.C. Circuit relied upon *Salerno* despite the obvious inconsistency between *Salerno* and *Lopez*. The Fifth Circuit, in contrast, rejected the applicability of *Salerno* in the post-*Lopez* Commerce Clause context. *GDF Realty*, 326 F.3d, at 635-36.

The two circuit courts also disagree over the application of this Court's aggregation principle. While the D.C. Circuit

aggregates all of the activity engaged in by the regulated litigant, *Rancho Viejo*, 323 F.3d, at 1070, the Fifth Circuit held below that "[i]n light of *Lopez* and *Morrison* the key question for purposes of aggregation is whether the nature of the regulated activity is economic," *GDF Realty*, 326 F.3d, at 630. The Fifth Circuit recognized that this Court in "*Morrison* noted, for aggregation purposes, the importance of the economic nature of the regulated activity" when it specifically acknowledged that it had heretofore aggregated intrastate activity "*only* where the activity *is economic in nature*." *GDF Realty*, 326 F.3d, at 630 (emphasis in original) (quoting *Morrison*, 529 U.S., at 613 (emphasis added)). To allow aggregation of "noneconomic and noncommercial activity" "so long as, if aggregated," there would be "a substantial effect" on commerce, held the Fifth Circuit, "would vitiate *Lopez* and *Morrison*'s seeming requirement that the intrastate instance of activity be commercial." *GDF Realty*, 326 F.3d, at 638. "*Lopez* and *Morrison* stand against such a proposition." *Id.*

The D.C. Circuit, in contrast, relying on the identical passage from *Morrison*, implied that this Court had rejected a categorical rule, thus permitting the aggregation of non-economic activity in order to demonstrate a substantial effect on commerce. *Rancho Viejo*, 323 F.3d, at 1071-72; *see also United States v. Rodia*, 194 F.3d 465, 481 (3rd Cir. 1999) ("the specific activity that Congress is regulating need not itself be objectively commercial, as long as it has a substantial effect on commerce"); *cf. United States v. Bongiorno*, 106 F.3d 1027, 1031 (1st Cir. 1997) (noting that the Court consistently has interpreted the Commerce Clause "to include transactions that might strike a lay person as 'noncommercial'").

The Fifth Circuit's position is not only a better reading of *Morrison*, but it is in accord with decisions of the First, Second, Third, Fourth, Ninth, and Eleventh Circuits as well. *See United States v. Zorilla*, 93 F.3d 7, 8 (1st Cir. 1996);

United States v. Holston, 343 F.3d 83, 88 (2nd Cir. 2003); *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176, 200-03 (2nd Cir. 2002), *cert. denied*, 538 U.S. 998 (2003) ; *United States v. Whited*, 311 F.3d 259, 271 (3rd Cir. 2002), *cert. denied*, 538 U.S. 1065 (2003) ; *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000); *United States v. McCoy*, 323 F.3d 1114, 1119-20 (9th Cir. 2003); *United States v. Cortes*, 299 F.3d 1030, 1035 (9th Cir. 2002); *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002).

Finally, the two circuit courts disagree with respect to which effects on interstate commerce are simply too attenuated to support the exercise of Commerce Clause power. The Fifth Circuit below rejected the government's claim that Cave Bugs "play a role in interstate commerce" because "some scientists" "have traveled to Texas" to study the Cave Bugs and "articles about the Cave Bugs have been published in scientific journals." *GDF Realty*, 326 F.3d, at 637. In stark contrast, and despite the admonition by this Court in *SWANCC* that even a billion dollar bird hunting and watching tourism trade was likely too attenuated a connection to interstate commerce to sustain the government's "migratory bird" rule, 131 U.S., at 166, the D.C. Circuit in *Rancho Viejo*, following the Fourth Circuit's decision in *Gibbs* lent its support to (or at least did not foreclose) such contentions. *Rancho Viejo*, 323 F.3d, at 1067 n. 2 (citing *Gibbs*, 214 F.3d at 493-95).

Six circuit judges in the case below have likewise acknowledged the extent of the disagreement between the two circuits. On Friday, February 27, 2004—the very day that this Court considered but denied the petition for writ of certiorari in *Rancho Viejo*—the Fifth Circuit released its decision in this case denying the petition for rehearing *en banc* that had been pending for nearly a year, confirming rather than ameliorating the split in rationales that has developed among the Circuit Courts. Particularly significant is the lengthy opinion by Circuit Judge Edith Jones—joined

by Circuit Judges Grady Jolly, Jerry Smith, Harold DeMoss, Edith Brown Clement, and Charles Pickering—dissenting from the denial of the petition for rehearing *en banc*.

In her opinion, Judge Jones and five other judges explicitly referenced the circuit split that has developed between the reasoning of the Fifth Circuit in this case and the D.C. Circuit in *Rancho Viejo*.

Judge Jones stated that in the *GDF Realty* panel decision, the Fifth Circuit "panel correctly determined, *unlike other courts,* that the 'regulated activity' under the ESA is Cave Species *takes*, not the appellants' planned commercial development of the land." *GDF Realty*, 362 F.3d, at 288 (first emphasis added). The reference to "other courts" that had reached the opposite conclusion is expressly to the *Rancho Viejo* case, which found, as noted by Judge Jones, "that the regulated activity was not the ESA take but rather the 'construction of a commercial housing development.'" *Id.*, at 288-89 (citing *Rancho Viejo*).

Judge Jones' opinion explains that the Fifth Circuit panel's constitutionally-mandated analysis—that the Commerce Clause analysis must center on the actual Cave Species take rather than the peripheral planned commercial development—is at odds with the Fifth Circuit's conclusion. The result (which would likewise occur if the D.C. Circuit's constitutionally-impermissible and conflicting analysis were employed) is "constitutionally limitless" and "a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce." *Id*., at 287.

Taken together, a majority of the active judges on the Fifth Circuit—the 3 panel judges, plus the six judges joining Judge Jones' opinion dissenting from the denial of the en banc rehearing petition—has adopted reasoning of fundamental constitutional significance which is in direct conflict with the D.C. Circuit's decision in *Rancho Viejo*, and has expressly acknowledged the split between the

circuits with respect to this critical reasoning.

These conflicts in rationale provide the Court with a needed opportunity to clarify the Commerce Clause analysis set forth in *Lopez* and *Morrison*, and thus warrant certiorari.

CONCLUSION

Certiorari is necessary here to address fundamental elements of this Court's post-*Lopez* Commerce Clause analysis, in the specific context of whether Congress has the authority to regulate wholly intrastate, non-commercial species, and the local activities that impact their habitats. Accordingly, this Court should grant the petition for a writ of certiorari. And if certiorari is granted in this case, this Court should revisit its recent denial of certiorari in the *Rancho Viejo* case, so that the *Rancho Viejo* case can be heard—or at least held, *see Forgett v. United States*, 390 U.S. 203 (1968); *United States* v. *Ohio Power Co.*, 351 U.S. 980 (1956)—and resolved simultaneously with the *GDF Realty* case now under consideration.

Respectfully submitted,

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