No. 03-1619

In The
# Supreme Court of the United States

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

*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**

## *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS


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## QUESTIONS PRESENTED

1. Whether the United States Fish and 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.

## LIST OF PARTIES

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| Petitioners: | GDF Realty Investments, Ltd.; Parke Properties I, L.P.; and Parke Properties II, L.P., are Texas limited partnerships that have never issued shares to the public. They do not have a parent corporation, nor is there any publicly held company that owns 10 percent or more of its stock. |
| Respondents: | Gale A. Norton, Secretary, United States Department of the Interior; and Steven A. Williams, Director, United States Fish and Wildlife Service. |
| *Amicus Curiae*: | Mountain States Legal Foundation. |

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## *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners, GDF Realty Investments, Ltd.; Parke Properties I, L.P.; and Parke Properties II, L.P. (collectively, "GDF"). Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Endangered Species Act, are implemented

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

and enforced in a manner consistent with the Constitution of the United States.

## SUMMARY OF ARGUMENT

The Commerce Clause gives Congress the authority to "regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. I, § 8, cl. 3. The scope of congressional authority under the Commerce Clause continues to be the subject of heated debate and litigation within the courts. In particular, the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531, *et seq.*, raises concerns regarding whether various intrastate activities sufficiently affect interstate commerce to permit Congress to regulate them. Thus, in determining whether the Commerce Clause authorizes regulation of various endangered or threatened species under the ESA, a determinative issue is whether those species, and the possible "take" of an individual specimen of those species, individually affect interstate commerce.

Misconstruing this determinative issue and acting contrary to the precedents of this Court, the Fifth Circuit Court of Appeals upheld the federal government's regulation of an activity that neither affects interstate commerce nor constitutes commerce under the Commerce Clause. Pet. App. 1-74. The Fifth Circuit allowed the U.S. Fish and Wildlife Service ("FWS") to exceed the scope of the Commerce Clause by extending Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), to wholly intrastate, non-commercial species – specifically, several almost microscopic, eyeless insects, that live their entire lives underground in caves and have never been bought, sold, or traded in commerce

in any form or fashion.[2] The result is confusion and disarray regarding the scope of the federal government's Commerce Clause authority to regulate takes of intrastate, non-commercial species under the ESA. This confusion has led to unfettered, and seemingly unlimited, federal regulatory power over species and, consequently, over property rights of private landowners. This result warrants *certiorari* to limit congressional authority to regulate species solely to the extent permitted by the Commerce Clause.

## ARGUMENT IN SUPPORT OF PETITION

### I. THE RIGHTS OF PRIVATE LANDOWNERS AND STATES MAY NOT BE ENCROACHED UPON BY REGULATING TAKES OF INTRASTATE, NON-COMMERCIAL SPECIES UNDER AUTHORITY OF THE COMMERCE CLAUSE.

The Fifth Circuit's holding that Congress has the authority, under the Commerce Clause of the Constitution, to authorize, through the ESA, the regulation of private lands to protect wholly intrastate and commercially irrelevant cave bugs has stretched the Commerce Clause to the point of providing federal agencies unlimited power to regulate all state and local land use activity. Pet. App.

[2] The FWS has listed a total of six species of insects that live in caves and sinkholes on the petitioners' property as "endangered" under § 4 of the ESA, 16 U.S.C. § 1533(a)(1). These "endangered" cave insects are: (1) Bee Creek Cave Harvestman; (2) Tooth Cave Pseudoscorpion; (3) Tooth Cave Spider; (4) Tooth Cave Ground Beetle; and (5) Kretschmarr Cave Mold Beetle. The final rule listing these five cave insects as "endangered" was adopted on September 16, 1988. 53 Fed. Reg. 36029. The FWS subsequently listed a sixth species, the Bone Cave Harvestman, as "endangered" on August 18, 1993. 58 Fed. Reg. 43818.

36. The most significant impact of such unlimited authority will not be upon any purported "threatened" or "endangered" species, but upon private landowners who will be forced to surrender their property rights, including the value of their property, in response to direct federal regulation of wholly intrastate, non-commercial species.

The Fifth Circuit's holding disregards totally this Court's Commerce Clause jurisprudence and will, if allowed to stand, permit the ESA and its "take" provisions to regulate private property in every State of the Nation with no constitutional limit.[3] The reach of this unbridled authority is indeed significant because "[a]pproximately [half of the] species in the United States currently designated as threatened or endangered [under the ESA] are found in only one state." *National Association of Home Builders v. Babbitt*, 130 F.3d 1041, 1052 (D.C. Cir. 1997).[4] Furthermore, according to one report, "[m]ore than half of the species in the United States that are protected by the [ESA] have at least eighty-one percent of their habitat on non-federal land. Between a third and a half do not occur at all on federal land." R. Thornton, *Habitat Conservation*

[3] Section 9(a)(1)(B) of the ESA makes it unlawful to "take" any species listed as endangered or threatened without a permit. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at § 1532(19). Moreover, "harm" has been defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding." 50 C.F.R. § 17.3; *see also, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995).

[4] Currently, 1,265 "threatened" or "endangered" animal and plant species are listed under the ESA in the United States. 50 C.F.R. § 17.11 (2004).

*Planning In The Babbitt Interior Department – Environmental Salvation or Landowner Giveaway*, 1 Rocky Mtn. Min. L. Fdn. 1, 9 (1997).[5]

Thus, it is clear that the ESA, including the broad authority that federal agencies accord themselves from their ESA regulations, necessarily affects the rights of private property owners. Allowing federal regulatory power under the ESA to extend to wholly intrastate, non-commercial activity forces an individual, who attempts to engage in an otherwise legal activity and to manage his property to ensure his livelihood and economic needs, to bear a disproportionate cost of protecting species in an unconstitutional manner. Moreover, this cost often includes criminal sanctions.

In 1993, Fred Purcell became acutely aware of the potential cost he could be forced to bear simply because he was a private landowner. Pet. App. 4. Attempting to maintain his property, Mr. Purcell began removing brush and trash; an activity that in no way affects interstate commerce. *Id.* Yet, because of the FWS's broad authority to regulate wholly intrastate, non-commercial species, Mr. Purcell was advised that he was under federal criminal investigation and was threatened with criminal penalties for the possible "take" of endangered species – cave bugs. *Id.* Threats by the FWS are not idle and the criminal penalties imposed for a purported "take" of a threatened or endangered species are not insubstantial. The ESA provides for civil penalties of up to $25,000.00 per occurrence, along with criminal penalties of up to $100,000.00 and a year in jail, for activities that "take" an "endangered"

[5] Non-federal land refers to privately-owned and state-owned land.

species. 16 U.S.C. § 1540(a)(1)-(b)(1). For activity affecting a "threatened" species, the ESA provides for civil penalties of up to $12,000.00 per occurrence and criminal penalties of up to $25,000.00 and six months in jail. *Id.* Although Mr. Purcell was never prosecuted, the threats of the FWS alone were enough to restrict his right simply to maintain his private property.

Unfortunately, Lin Drake of Cedar City, Utah, encountered more than mere threats when he attempted to farm his private land. In 1995, Mr. Drake contacted the FWS regarding the possibility of the existence of Utah prairie dogs on his property, a wholly intrastate species listed as "threatened" under the ESA. The FWS advised Mr. Drake that he could proceed with farming operations, at which time he began normal agricultural activities. Subsequent to this action, however, the FWS sent notice to Mr. Drake that he was being charged for violating the "take" provision of the ESA and was assessed a civil penalty of $15,000.00 for the purported taking of numerous Utah prairie dogs. This penalty was levied against Mr. Drake despite that the FWS could not prove that a "take" had occurred; that is, that Utah prairie dogs had been injured or killed. *See, Sweet Home*, 515 U.S. at 708 (defining "harm" as where modification or degradation of habitat actually kills or injures wildlife). All of this occurred regarding a wholly intrastate species that does not substantially affect interstate commerce under the ESA.

Due to the broadening scope of Commerce Clause authority to regulate "takes" of intrastate, non-commercial species, private landowners, like Mr. Purcell and Mr. Drake, are forced to bear substantial costs and significant risks in attempting to exercise their rights as owners of private property. However, this broadening of authority

under the ESA does not just limit the rights of landowners; it encroaches upon the very rights of the states themselves to regulate lands within their borders.

Land-use planning, regulation, and zoning are not enumerated powers granted to the federal government. Authority over these activities, including the activities of GDF, are reserved to the States under the Tenth Amendment. They are the basic, fundamental functions of local governmental entities. Justice Marshall recognized the right of the States to regulate private lands within their borders in *Village of Belle Terre v. Boras*, 416 U.S. 1, 13 (1974):

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.

In *United States v. Lopez*, this Court suggested that, whenever Congress attempts to regulate areas traditionally regulated by state or local governments, including the rights of private property owners, this Court will review that legislation with caution. 514 U.S. 549, 557-68 (1995). Foretelling the scrutiny it would apply, this Court rejected, in *Lopez*, the "costs of crime" and "national productivity" justifications for the Gun-Free School Zones Act ("GFSZA") proffered by Congress both because, had it accepted those justifications, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign," *Id.* at 564, and because such a broad

reading of the Commerce Clause would undermine the federal system of government. *Id.* at 561, n.3, 564, 567-68.

Likewise, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), congressional authority under the Commerce Clause was tested. In *SWANCC*, this Court addressed whether the Environmental Protection Agency and the Army Corps of Engineers ("the Corps") could regulate isolated intrastate waters and wetlands that are not connected or adjacent to navigable waters "based on their actual or potential use as habitat for migratory birds." *SWANCC*, 531 U.S. at 163-64. This Court held that the migratory bird regulation was invalid because Congress did not intend to include "isolated" wetlands or waters within the term "navigable waters" when it enacted the Clean Water Act ("CWA"). *Id.* at 162-63.

Although the *SWANCC* decision did not decide whether federal regulation of isolated intrastate wetlands exceeded congressional authority under the Commerce Clause, this Court did suggest that the Corps' interpretation may have exceeded that authority. *Id.* at 172-73. This Court indicated that the Corps' regulation of isolated intrastate wetlands would raise serious questions under the Commerce Clause because local land use regulation is a traditional state and local function. *Id.* at 172-74. Even though previous rulings had found that migratory bird protection was a "national interest of very nearly the first magnitude," this Court determined it was "not clear" whether the regulated activity or object, in the aggregate, affects interstate commerce. *Id.* at 173 (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). Because there was no clear statement in the CWA that Congress intended to give the federal government authority over isolated wetlands,

this Court refused to interpret the regulation to include "federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

Because local land use and private property rights are necessarily intertwined, this Court's holdings in *Lopez* and *SWANCC* control in this matter. The application of the ESA's "take" provisions to the cave bugs substantially intrudes on the rights of GDF, as private landowners, and on the sovereign power of the state to control local land. *See, FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (the regulation of land use is the most prominent activity of any State). Justice Kennedy, concurring in the *Lopez* decision, argued that courts should be hesitant to allow Congress to use the Commerce Clause as its basis for federal regulation in an "area of traditional state concern" that "States lay claim [to] by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring). Justice Kennedy elaborated that, with such an expansive definition of the Commerce Clause, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

Thus, the Fifth Circuit's ruling upholding the authority of the FWS to apply the "take" provision of the ESA to GDF regarding wholly intrastate, non-commercial species intrudes unconstitutionally on the rights of private landowners to use their land and the responsibilities of States to regulate local land use. Accordingly, *certiorari* is warranted to ensure that private property rights and State authority do not themselves become threatened or endangered.

## II. THE AGGREGATION OF NON-ECONOMIC ACTIVITY BROADENS THE SCOPE OF CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE WITH NO LOGICAL STOPPING POINT.

The description that six judges of the Fifth Circuit, in dissenting from the denial of rehearing *en banc*, accorded the decision of the circuit panel in this case was: *reductio ad absurdum*. Pet. App. 76. Indeed; the absurd consequence of the Fifth Circuit's decision broadened the scope of congressional authority under the Commerce Clause with no logical stopping point. The Fifth Circuit did so by ignoring the limits imposed by the Commerce Clause and by aggregating the effects of all species listed as "endangered" or "threatened" under the ESA on the ground that regulation of the cave bugs, which have no commercial value, intrastate or interstate, is an essential part of the ESA's regulation of economic activity. Pet. App. 32-33. The dissent called this "interdependent web" connection a "remote, speculative, attenuated, indeed more than improbable connection to interstate commerce." Pet. App. 76.

This Court's precedent determining whether the principle of aggregation should be applied is clear: the aggregation principle, as developed in *Wickard v. Filburn*, 317 U.S. 111 (1942), should be employed only to support a finding that the cumulative effect of the activities in a case actually have a commercial impact. *See, Lopez*, 514 U.S. at 558; *United States v. Morrison*, 529 U.S. 598, 611, n.4 (2000). The Fifth Circuit panel maintained that it recognized and adhered to this aggregation principle. Pet. App. 13, 32-36. They did not.

In its analysis, the Fifth Circuit panel conceded that "takes" of the cave insects are neither economic nor commercial and that such intrastate activity has a "*de minimis* effect on interstate commerce." Pet. App. 31. Moreover, the panel expressly noted that: there is no market for cave insects; any future market is conjecture; future medical benefits from the cave insects are far too speculative; there is no historic trade in the cave insects; and tourists do not travel to Texas to view them. *Id.* The panel even rejected the government's argument that "takes" of the cave insects are commercial in character once aggregated with other endangered species, noting that "[t]o accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation." Pet. App. 31-32.

The Fifth Circuit panel did not find, however, as this Court's precedent requires, that the challenged activity, the "take" of cave bugs that are exclusively intrastate, is not commercial and therefore not subject to scrutiny under *Wickard*'s aggregation principle. Instead, the Fifth Circuit panel stretched the bounds of reason to rationalize its application of the aggregation principle to this case. The panel surmised that the regulation of the cave insects, a non-commercial, intrastate species, is "part of a larger regulation of activity" that is "essential" to the ESA as an economic regulatory scheme. Pet. App. 32. Yet, as an "economic regulatory scheme," the ESA logically would apply only to the preservation and conservation of those species that are economic or commercial in nature – something that the Fifth Circuit has determined that the cave bugs are not. Pet. App. 29-31. This illustrates the fallacy of the Fifth Circuit's reasoning, reasoning that contradicts completely this Court's precedent on which the panel purportedly relied. As this Court recognized in *Lopez*

and *Morrison*, the problem with the Fifth Circuit's characterization of the ESA as an economic regulatory scheme is the lack of a stopping point short of complete federalization.

In *Morrison*, this Court held that the Violence Against Women Act ("VAWA"), a federal statute penalizing intrastate gender-based violence, intruded on traditional state authority over criminal matters and thus exceeded the scope of the Commerce Clause. This Court found that the VAWA, like the GFSZA in *Lopez*, was beyond the scope of the Commerce Clause because the activity regulated was essentially non-economic and related to interstate commerce only indirectly. *Morrison*, 529 U.S. at 613-19. Utilizing the scrutiny adopted in *Lopez*, this Court in *Morrison* emphasized that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.* at 611. Furthermore, this Court "reject[ed] the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. The reason was simple: allowing aggregation of non-economic activities to serve as a basis for regulation under the Commerce Clause would allow the federal government to regulate any and every activity with no logical stopping point. *Id.* at 615-17.

Moreover, permitting Congress, under the Commerce Clause, to justify legislation by aggregating non-economic activities would "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615. For example, the aggregation of non-economic activities could be applied just as easily "to family law and other areas of traditional state regulation since the aggregate

effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-16. *Morrison* found that the VAWA impermissibly intruded on traditional state authority over family law and criminal issues. As in *Lopez*, this Court emphasized in *Morrison* that courts should carefully evaluate federal legislation that relies on the Commerce Clause for its authority because "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 599.

The Fifth Circuit, which adopted the rationale of this Court in *Lopez* and *Morrison*, specifically recognized that Commerce Clause precedent of this Court "stand[s] against" the notion that "[n]on-economic and non-commercial activity could be aggregated" to determine a substantial effect on interstate commerce. Pet. App. 31-32. Nevertheless, the Fifth Circuit upheld the FWS's authority in this case. The Fifth Circuit's opinion, in characterizing the ESA as an economic regulatory scheme, permits the federal government infinite authority, under the Commerce Clause, to regulate any activity. There is no logical stopping point to federal legislation under the Fifth Circuit's opinion; any statute could satisfy the constitutional limitations of the Commerce Clause. No wonder the dissent declared that the panel's opinion lends "new meaning to the term *reduction ad absurdum*." Pet. App. 76.

Accordingly, *certiorari* is warranted in this case to resolve the conflict between this Court and the Fifth Circuit's decision regarding 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.

## CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court grant GDF's Petition for *Writ of Certiorari.*

Respectfully submitted,

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