No. 01-51099
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

PLAINTIFFS - APPELLANTS,

V.

GALE A. NORTON, Secretary, United States Department of Interior;
MARSHALL P. JONES, Director, United States Fish and Wildlife Service

DEFENDANTS - APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRIEF OF APPELLANTS GDF REALTY INVESTMENTS, LTD., PARKE PROPERTIES I, LP, AND PARKE PROPERTIES II, LP

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Honorable Judges of this Court may evaluate possible disqualifications or recusal:

1. *GDF Realty Investments, Ltd.*, Appellant
2. *Parke Properties I, LP*, Appellant
3. *Parke Properties II, LP,* Appellant
4. *Gale A. Norton*, Secretary United States Department of Interior, Appellee
5. *Marshall P. Jones*, Director, United States Fish & Wildlife Service, Appellee
6. *Paul M. Terrill III*, Hazen & Terrill, P.C.
   Attorney of Record for Appellants
7. *Vincent L. Hazen*, Hazen & Terrill, P.C.
   Attorney for Appellants
8. *R. James George, Jr.*, George & Donaldson, L.L.P.
   Attorney for the Appellants
9. *Mark A. Brown and David J. Lazerwitz*, U.S. Department of Justice
   Attorney for Appellees Gale Norton and Marshall P. Jones

_____

Paul M. Terrill III
Attorney of Record for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P., state that oral argument would aid the Court in its disposition of this case. This case involves a challenge to the constitutionality of the "take" provision of the Endangered Species Act, 16 U.S.C. §1538(a)(1)(B), pursuant to the principles set forth in the landmark Commerce Clause decision, *U.S. v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), as re-affirmed and expanded in the Supreme Court's recent decision in *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). This challenge to Congress' authority to regulate pursuant to the Commerce Clause involves complex legal issues which have been the subject of conflicting decisions and considerable legal and academic debate. Oral argument would help clarify the parties' respective positions on these difficult issues. Therefore, Appellants respectfully request oral argument in this cause.

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Appellants also include a volume of Record Excerpts filed along with this Brief. References to the Record Excerpts are in the form: "RX ___", which means Record Excerpts Tab letter ___. Some references to the Record Excerpts are in the form: "RX ___:___-___", which means Record Excerpts Tab letter ___: pages ___ through ___.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal because the Judgment on appeal constitutes a "final decision" of the District Court in this matter pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUE

I. Whether the Endangered Species Act "take" provision exceeds Congress' Commerce Clause authority when the activity regulated by the take provision is neither commercial nor part of a scheme of commercial regulation and the species at issue are purely intrastate and non-commercial?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

Article I, §8, cl. 3, of the United States Constitution states: "The Congress shall have power ... [t]o regulate Commerce ... among the several States ..."

Section 9(a)(1) of the Endangered Species Act, 16 U.S.C. §1538(a)(1), states: "[W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to ... (B) take any such species within the United States or the territorial sea of the United States; ..."

Section 3(19) of the Endangered Species Act, 16 U.S.C. §1532(19), states: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Section 11(a)(1) of the Endangered Species Act, 16 U.S.C. §1540(a)(1), states: "Any person who knowingly violates, ... any provision of this chapter, ... or of any regulation issued in order to implement subsection (a)(1) ... (B), ... may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. ... Each violation shall be a separate offense. ..."

Section 11(b)(1) of the Endangered Species Act, 16 U.S.C. §1540(b)(1), states: "Any person who knowingly violates any provision of this chapter, ..., or of any regulation issued in order to implement subsection (a)(1) ... (B), ... of section 1528 of this title, shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both."

Harm in the definition of "take" in the Endangered Species Act has been administratively defined by the United States Fish & Wildlife Service to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3

STATEMENT OF THE CASE

I. Nature of the Case.

The issue in this case is whether Congress possesses the authority to regulate purely intrastate, non-commercial activity pursuant to the Commerce Clause. In the case below, Plaintiffs/Appellants GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P., filed suit seeking a declaration that the "take" provision of the Endangered Species Act ("ESA"), 16 U.S.C. §1538(a)(1)(B), as-applied to six species of invertebrate, subterranean insects (the "Cave Bugs"), is unconstitutional. As applied to the Cave Bugs, the take provision is unconstitutional because it plainly flunks the test announced in the Supreme Court's landmark Commerce Clause opinion in *U.S. v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), and as re-affirmed and expanded in the Supreme Court's recent decision in *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

II. Course of Proceedings and Disposition in the Court Below.

On June 15, 2000, Plaintiffs filed this suit against Defendants-Appellees Bruce Babbitt ("Babbitt"), Secretary of the U.S. Department of the Interior and Jamie Rappaport Clark ("Clark"), Director, United States Fish and Wildlife Service ("FWS")

("collectively referred to as "Federal Defendants").[1] (R. 1:1-16). The Federal Defendants moved to dismiss Plaintiffs' suit under Fed. R. Civ. P. 12(b). (R. 1:27-41). District Judge Sam Sparks of the Austin Division of the Western District of Texas issued an Order on March 28, 2001, denying the Federal Defendants' Motion to Dismiss. (R. 2:260-275).

Agreeing that this case presents no material fact disputes, the parties submitted the case to the court on cross motions for summary judgment. (R. 3:279- 8:1787; R. 9:1810-1960). On August 30, 2001, without hearing argument, Judge Sparks entered an Order and Judgment granting the Federal Defendants' Motion for Summary Judgment and denying the Plaintiffs' Motion for Summary Judgment and rendered Judgment for the Federal Defendants. (RX C;RX D). *GDF Realty Invs., Ltd. v. Norton*, 169 F.Supp.2d 648 (W.D. Tex. 2001). The District Court's Order held that the ESA take provision is a valid Congressional regulation under the "substantial effect on interstate commerce" category of Congressional authority (RX C:10:2084-2093). 169 F.Supp.2d at 657-663.

On October 26, 2001, Plaintiffs timely filed a Notice of Appeal challenging the District Court's Judgment and the Order Granting Summary Judgment. (RX B:2132-2133).

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[1] Gale Norton and Marshall P. Jones, in their respective capacities as Secretary of the Interior and Director of the Fish & Wildlife service, have been "automatically substituted" as defendants in their official capacities. *See* FED. R. CIV. P. 25(d)(1).

STATEMENT OF FACTS

The Hart Triangle Property owned by the Plaintiffs.

The Plaintiffs in this case[2] — GDF Realty Investments, Ltd., Parke Properties I, L.P. and Parke Properties II, L.P. — are the owners of approximately 216 acres of undeveloped land located at the northwest corner of the intersection of RR 620 and RR 2222 in western Travis County ("the Property"). The Property, which consists of seven adjoining tracts, is sometimes referred to as the Hart Triangle Property.[3] (RX E:334).

The Plaintiffs' ownership of the Hart Triangle Property[4] traces to 1983, when Dr. Fred Purcell and his brother, Judge Gary Purcell, first acquired an interest in the Property. Although various other persons and entities have had an interest in the Property since 1983, the Purcells are the only constant throughout the period. From 1983 through the present, the Purcells have owned the Property (either individually or through limited partnerships) and sought to develop it. (RX E:319).

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[2] Fred and Gary Purcell are the sole limited partners of Parke Properties I, L.P. and Parke Properties II, L.P., the owners of an undivided 70% interest in the Hart Triangle Property. Fred Purcell is the sole shareholder of FP Properties, Inc., the General Partner of Parke I and Parke II. Gary Purcell is a Federal Magistrate Judge in Oklahoma City, Oklahoma. The remaining 30% interest in the Property is owned by Plaintiff GDF Realty Investments, Ltd. (RX E:318-319).

[3] The location and acreage of each of the seven tracts of the Hart Triangle Property (which includes nine separate parcels) and the relationship of the Property to the major roads in the area is shown on Exhibit 1. (RX E:318-319, 334).

[4] The Hart Triangle Property was part of a much larger tract of land owned by the Purcells and others, known as "The Parke." (RX E:319).

The Hart Triangle Property is located outside of Austin's city limits, but within the City of Austin's extraterritorial jurisdiction. Located at the intersection of two major highways in one of the most rapidly growing areas of Texas, the Property is an extremely valuable piece of real estate. Without the unconstitutional restrictions placed on the Property by the Defendants, the current fair market value of the Property is at least $60,000,000. (RX E:319).

Over the past 18 years, the Purcells have invested substantial time and money developing the Property, spending millions of dollars constructing water lines, wastewater gravity lines, force mains, lift stations and other utilities. The Purcells dedicated these utilities to the City of Austin and dedicated a right of way adjoining the highway to Travis County. Portions of the Property have been final platted, and initial approval for development was granted by the City of Austin in 1984, nearly 20 years ago. (RX E:320).

The Cave Bugs found on the Hart Triangle Property.

The Hart Triangle Property is located on the southern margin of a geological area known as the Jollyville Plateau, which is part of the larger Edwards Plateau region of central Texas. The Property is characterized by karst topography, in which water percolating through limestone rock creates such geologic features as caves, sinkholes, and steep canyons. Thus, the Property contains numerous sinkholes and caves including: Tooth Cave, Kretschmarr Cave, Root Cave, Gallifer Cave, Amber

Cave and an assortment of karst features referred to as the Cave Cluster. (RX F:689).

Some of the caves and sinkholes on the Hart Triangle Property contain plant and animal life, including several species of cave invertebrates. Beginning in 1988 — several years after the development of the Property had begun — the United States Fish and Wildlife Service ("FWS") listed six species of insects that live in the caves and sinkholes on the Property as "endangered" under §4 of the ESA, 16 U.S.C. § 1533(a)(1). Those cave species are:

a. **Bee Creek Cave Harvestman** (*Texella reddelli*); a very small eyeless arachnid (body about 2 to 3 mm in length) that lives its entire life underground in a karst environment. (RX F:689).

b. **Bone Cave Harvestman** (*Texella reyesi*); a very small eyeless arachnid (body about 1.4 to 2.7 mm in length) that lives its entire life underground in a karst environment. (RX F:689).

c. **Tooth Cave Pseudoscorpion** (*Tartarocreagris texana*); a small eyeless arachnid (body about 4 mm in length) that lives its entire life underground in a karst environment. (RX F:689-690).

d. **Tooth Cave Spider** (*Neoleptoneta myopica*); a very small arachnid (body about 1.6 mm in length) with rudimentary eyes that lives its entire life underground in a karst environment. (RX F:690).

e. **Tooth Cave Ground Beetle** (*Rhadine persephone*); a small insect (body about 7 to 8 mm in length) with rudimentary eyes that lives its entire life underground in a karst environment. (RX F:690).

f. **Kretschmarr Cave Mold Beetle** (*Texamaurops reddelli*); a very small eyeless insect (body less than 3 mm in length) that lives its entire life underground in a karst environment. (RX F:690).

The final rule listing five of the six the Cave Bugs as "endangered" pursuant to §4 of the ESA was adopted on September 16, 1988. 53 Fed. Reg. 36029. Previously considered to be the same as the Bee Creek Cave Harvestman, the sixth Cave Bug — the Bone Cave Harvestman — was listed as a separate "endangered" species on August 18, 1993. 58 Fed. Reg. 43818-01.

The Cave Bugs are an intrastate, non-commercial species.

The Cave Bugs at issue in this suit are a wholly intrastate species. Not only are the Cave Bugs located entirely within the State of Texas, they are all found within just a few caves and sinkholes in Travis and Williamson Counties in Central Texas. Three of the Cave Bugs in particular — the Tooth Cave Pseudoscorpion, Tooth Cave Spider and Kretschmarr Cave Mold Beetle — have an even narrower distribution. These three species are only found in caves on parcels of land near the intersection of RR 620 and RR 2222, all of which is within Travis County. (RX F:691). The Cave Bugs are extremely small — almost microscopic — and live their entire lives underground. Because of their very small size and subterranean existence, there are no more than a handful of people who have ever seen these Cave Bugs. (RX F:690-691).

It is undisputed that the Cave Bugs are not now — and have never been — a commercial product. (RX F:691). They are not purchased, sold, or exchanged. No commercial activity exists in relation to the Cave Bugs. (RX F:691). In short, the Cave Bugs have no nexus whatsoever with interstate commerce.

Violation of the "take provision" of the Endangered Species Act carries stiff civil and criminal penalties including imprisonment.

After FWS listed the Cave Bugs as "endangered" in 1988, the numerous provisions of the ESA became applicable to the Cave Bugs. 16 U.S.C. §1531 *et seq*. The only ESA provision at issue in this case, the "take provision" — §9(a)(1)(B) of the ESA — makes it unlawful for any person to "take" any listed endangered species. 16 U.S.C. §1538(a)(1)(B). "Take" is defined by the ESA to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect." 16 U.S.C. §1532(19). "Harm" in the take definition has been administratively defined by FWS to mean: "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. §17.3.

The take provision does not contain a jurisdictional element. That is, it makes unlawful any activity that takes — i.e., kills or injures — a listed species *wherever it occurs* and without an explicit connection to interstate commerce. *Morrison*, 120 S.Ct. at 1749.

Violation of the take provision carries serious civil and criminal penalties. The ESA imposes civil penalties of up to $25,000 for each knowing violation of the take provision. 16 U.S.C. §1540(a)(1). Violation of the take provision also carries the

threat of imprisonment. The ESA assigns criminal penalties of up to $50,000 and imprisonment for up to one year for knowing violation of the take provision. 16 U.S.C. §1540(b)(1).

Dedication of Cave Bug Preserves.

In 1988, after the Cave Bugs were listed as "endangered," the Purcells learned that FWS claimed that development of the Property would cause takes of the Cave Bugs. To address FWS' concerns, the Purcells worked with FWS, Texas Systems of Natural Laboratories, Inc.("TSNL") (a non-profit organization dedicated to the research of environmental issues), and James Reddell (the scientist who discovered several of these species and is recognized as the leading expert on these cave species), to set aside preserves to protect the endangered Cave Bugs. (RX F:690; RX E:321-322).

FWS asked the Purcells to fund surveys to determine what steps would need to be taken in order to protect the endangered Cave Bugs. At substantial cost, the Purcells agreed to do so. In 1990, Reddell was hired to perform an extensive survey of the Cave Bugs on the Property and make recommendations for their protection. Following all of FWS' recommendations based on the surveys, the Purcells deeded Amber Cave, Tooth Cave, Root Cave, Gallifer Cave, and Kretschmarr Cave, along with several other sink holes and buffer zones surrounding the caves to TSNL. Since then, TSNL has been responsible for the protection of the species in the deeded Cave

Bug preserves. (RX F:692-693; RX E:321-322, 481-504).

The FWS' decade-long pattern of preventing the use of the Hart Triangle Property.

Even though the Purcells followed all of FWS' recommendations and dedicated very valuable portions of the Property to TSNL as Cave Bugs preserves, FWS has continued to use its criminal and civil enforcement authority under the take provision to thwart the reasonable and responsible development of the Property that the City of Austin approved nearly 20 years ago. (RX E:322).

After dedicating the Cave Bug preserves, the Purcells attempted to proceed with development and sale of various tracts of the Property. After satisfying FWS' concerns about the Cave Bugs, FWS changed its focus to two other listed endangered species on the Property — the golden-cheeked warbler and the black-capped vireo. FWS caused the Purcells to lose several sales of parcels of the Hart Triangle Property because of purported concerns that development would harm the endangered birds. (RX E:323-327).

In addition to preventing sales, FWS also directly threatened Dr. Purcell with criminal penalties for violating the take provision. In 1993, when Dr. Purcell cleared some brush and trash off of the Property, FWS threatened Dr. Purcell that he was under federal criminal investigation for violating the "take" provision of the ESA. FWS also told Dr. Purcell that any development activities on the Property were

prohibited without obtaining a §10(a) incidental take permit. (RX E:323).

In 1994, because of the lost sales contracts and FWS' threats of civil and criminal enforcement for violation of the ESA take provision, the owners of the Parke (the larger tract that includes the Hart Triangle Property) filed suit against FWS in *Four Points Utility Joint Venture, et al., v. United States of America, et al.*, Civil Action No. A 93 CA 655 SS ("the *Four Points* case"). The plaintiffs in the *Four Points* case (including the Hart Triangle Property owners) sought a declaratory judgment that development of the Parke (including the Hart Triangle Property) would not cause a "take" of any endangered species, and therefore did not require an ESA §10(a) "incidental take" permit under the ESA. 16 U.S.C. § 1539(a).

Pursuant to a district court directive, FWS conducted an environmental review of the Parke property, including the Hart Triangle Property, indicating that certain tracts of the Property could indeed be developed without causing a "take" of an endangered species:

> In particular, we believe that portions of tracts 4-13[5] ... could be developed without causing a take if development, among other things, is scaled back from the canyons, and surface and subsurface drainage and nutrient exchange is provided for. In addition, your client may be able to develop portions of tracts 4-13 without causing a take to black-capped vireos if sufficient survey information is received to confirm the absence of black-capped vireos in

[5] Tracts 4-13 referenced in the FWS letter include the same land which comprises Tract A of the Hart Triangle Property. (RX E:324).

this area.

(RX E:323; R. 3:506, 507).

Even in those areas where a "take" might occur, FWS told the Court that accommodations for development would be made. FWS recommended that the Parke landowners submit §10(a) applications for such areas:

> For the remaining portions of the Parke, although we believe that the project as proposed would likely result in a take, the Service will work with your clients and consultants during the section 10(a) permit process to modify the proposal so that the amount of take is reduced or eliminated in some areas. The need for a 10(a) permit should not be equated with a denial of development activity. Incidental take permits under section 10(a) can be issued to allow take that is incidental to an otherwise lawful activity, assuming the action does not jeopardize the continued existence of the species to be taken and the take is adequately mitigated.

(RX E:324; R. 3:506, 517).

After the environmental review by FWS, Judge Sparks dismissed the *Four Points* case, noting FWS' representations that development could occur without further court intervention:

> The parties complied and the ultimate result was that, although much of the area could be developed without fear of a "take," some areas of land may involve "takes."

(RX E:324; R. 4:528, 530).

Following the representations that FWS made in the *Four Points* litigation, the

Hart Triangle landowners[6] approached FWS about obtaining §10(a) permits for the Property. FWS informed them that they should first attempt to obtain a §10(a) permit through the Balcones Canyonlands Conservation Plan ("BCCP").[7] Following FWS instructions, the Plaintiffs applied to participate in the BCCP. However, on June 17, 1997, the BCCP informed the Purcells that they officially refused to accept the applications because the Hart Triangle Property had been targeted for acquisition by the BCCP as a preserve. The BCCP informed the Plaintiffs that the Property was "not eligible for participation using the simplified approach under the BCCP since it is entirely within the proposed preserve area." (RX E:325; R. 4:538-539). However, the Plaintiffs were never contacted by FWS, City of Austin, Travis County — or anyone, for that matter — about whether they wanted the Hart Triangle Property to be included in the BCCP preserve areas.

Plaintiffs' ESA Section 10(a) permit applications and the FWS' bad faith refusal to act on those applications.

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[6] After the dismissal of the *Four Points* case, the properties of "The Parke" that were at issue were divided in ownership. The plaintiffs in this suit succeeded to ownership of the Hart Triangle Property. All of the seven tracts of the Hart Triangle Property had been at issue in the Four Points litigation. (RX E:324).

[7] The BCCP is a regional §10(a) incidental take permit covering western Travis County and is administered by Travis County and the City of Austin. The BCCP proposes to set aside large areas of western Travis County (substantial portions of which are now privately owned) as preserves — with no development allowed — for the two species of endangered birds and six species of endangered karst invertebrates found in the area. Landowners obtain permission to develop their land through the BCCP by paying "mitigation fees" based on the amount of endangered species habitat on their property. (RX E:325).

Having been turned down by the BCCP, the Plaintiffs then returned to the FWS to apply for §10(a) incidental take permits. On December 30, 1997, the Plaintiffs filed seven applications for §10(a) incidental take permits — one for each of the seven tracts comprising the Hart Triangle Property. The proposed development included a shopping center, a residential subdivision, and office buildings. (RX E:326).

While the §10(a) permit applications were pending at the FWS, the Plaintiffs and their representatives met repeatedly with FWS to discuss proposed development plans drafted by various parties interested in purchasing one or more of the Hart Triangle tracts. FWS, however, continually played cat and mouse games. FWS employed shifting and inconsistent rationales to disapprove of all the proposed development scenarios. For example, FWS switched the endangered species that were supposedly the focus of concern. Although the Cave Bugs were initially the focus before the Cave Bug preserves were set aside, the black-capped vireo and golden cheeked warbler had been the subject of FWS' attention in the *Four Points* litigation. (RX E:326). However, when the Plaintiffs modified their development plans to have no impact on the endangered bird species, FWS abruptly changed its concern **back** to the Cave Bugs. *Id.*

In addition to changing the "species of concern" from the black-capped vireo and golden-cheeked warbler back to the Cave Bugs, FWS began to take the new position that the existing preserves were not adequate to protect the Cave Bugs.

During 1997-1998, the Plaintiffs brought several development plans to FWS for its approval. Only then did the Plaintiffs discover that FWS had reversed its position regarding the adequacy of the Cave Bug preserves. FWS now raised objections to the plans for development on the Hart Triangle Property based on its claim that the development would "take" the Cave Bugs. (RX E:326-327).

As a result of FWS' repeated disapproval of development plans for the Hart Triangle Property, the Purcells lost several opportunities to sell tracts of the Property, including the following:

- In 1997, High End Systems, Inc. terminated a contract to purchase and develop 70 acres (comprising most of Tract C) because of FWS' assertion that no development could occur above certain contour elevation lines. (RX E:327).

- In March of 1998,Trilogy cancelled a project to develop part of Tract C because of FWS' inconsistent and conflicting demands. (RX E:327).

In June of 1998, after having lost two contracts for office development, the Plaintiffs then approached FWS with a new plan to use the Property for residential purposes. In a July 21, 1998, meeting with FWS official David Frederick, Frederick provided a map which indicated that development was prohibited on all but a few meager, isolated tracts of land.[8] (RX E:327-328). In that same meeting, Frederick

[8] Frederick's map prohibited *any development whatsoever* on Tracts A, B, F & G. Development was also prohibited on a 40-acre portion of Tract C (74 acres total), and a 37.3-acre portion of Tract D (47 acres total), which FWS labeled on its map as the "NON-DEVELOPMENT AREA." (RX E:327-328; R. 4:541). According to the FWS map, limited development could go forward only on Tract E, a parcel which consists of steep canyon and which is inaccessible by road

also announced that FWS would deny all of the §10(a) permits. (RX E:327-328; R. 4:543-544). Although it was now perfectly clear that FWS would not allow development (contrary to their June 1994 response to the District Court) by granting the §10(a) permits, FWS refused to formally deny the permit applications which would allow the Plaintiffs to seek judicial relief from the denial.

Despite Frederick's statements at the July 21, 1998, meeting, neither Frederick, nor anyone at FWS would issue a letter formalizing FWS' denial of the permit applications. Repeated attempts were made by the Plaintiffs and their attorneys to attempt to get the FWS to formally act on the permit applications. For over a year, the incidental take permit applications languished at FWS without **any action**.

With foreclosure looming, and FWS completely failing to act on their permit applications, the Hart Triangle Landowners were forced to take FWS to court to get them to act on the §10(a) incidental take permit applications.

The Plaintiffs filed a lawsuit seeking a declaration that the §10(a) permit applications had been de facto denied. *GDF Realty, Ltd., et al. v. United States, et al.*, Civ. Action No. A 98 CA 772 SS (W.D. Tex. 1998). After the District Court ordered the FWS to explain the status of Plaintiffs' permit applications, FWS filed a sworn Declaration by FWS' Regional Director, Nancy Kaufman, indicating that all of the

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from RR 620 or RR 2222. Ironically, this FWS proposal pushed the Plaintiffs to develop the very same canyon area FWS had urged the Plaintiffs to avoid in its Court-ordered environmental analysis of June 2, 1994 (R. 3:506).

permit applications were deficient and that the proposed use of the Property would constitute a prohibited "take" of Cave Bugs. (RX E:329; R. 4:547-567). The FWS Declaration stated that very substantial portions of the Property would have to be set aside in perpetuity as conservation areas left in their natural condition.[9]

On June 7, 1999, the District Court held that the Declaration by the FWS' Regional Director constituted a final agency action and declared that the §10(a) permit applications were de facto denied. The District Court condemned the FWS' activities in no uncertain terms:

> The evidence is overwhelming that FWS never intended to grant the plaintiffs' applications as presented and for some inexplicable reason has intentionally delayed ruling on them. **The government has acted totally irresponsibly in this matter.** To force the plaintiffs into economic damage by intentionally delaying a ruling on their applications, a ruling to which they are legally entitled, is **simply wrong**.

(RX E:329-330; R. 4:569, 575) (emphasis added).

Because FWS has denied the Plaintiffs' applications for §10(a) permits and indicated that development of the Property would constitute a take of the Cave Bugs under Section 9, the Plaintiffs have been prevented from any use of their property

[9] FWS established benchmarks prohibiting any development of the Property above certain elevation contour lines. FWS asserted that, because of the Cave Bugs, no development could occur above the 1030 contour line on one portion of the Property and no development above the 1010 contour line on another tract. The practical effect of FWS' dictates was to prohibit development on practically all of the Hart Triangle Property. The upland area was rendered undevelopable because of FWS' claim that such development would harm the Cave Bugs, while the canyon area was undevelopable because of endangered golden-cheeked warbler habitat, steep slopes and greenbelt. (RX E:329).

without the threat of civil and/or criminal penalties for taking endangered species. The resulting restrictions on the Plaintiffs' use and enjoyment of the Property have caused severe economic harm. For more than a decade, the Plaintiffs have been wholly prevented from making any economic use of the Property. In addition to losing numerous contracts for sale and the inability to develop the Property, the Plaintiffs have been unable to make any economic use of the Property. Thus, they have not been able to generate income to pay the substantial property taxes and debt service on the Property. Consequently, they stand to lose some or perhaps all of the Property through foreclosure or liquidation.[10]

To avoid losing the Property to foreclosure, Parke Properties I, L.P., and GDF Realty Investments, Ltd. filed for bankruptcy under Chapter 11 of the Bankruptcy Code. Case No. 00-12587FM and Case No. 00-12588FM are currently pending in the United States Bankruptcy Court for the Western District of Texas, Austin Division.[11] (RX E:330-331).

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[10] The Plaintiffs currently owe approximately $34,000.00 in delinquent property taxes on the Property. In addition, the majority of the Property is subject to indebtedness to secured notes. One note, held by Tomen America, Inc., the American affiliate of a Japanese trading company, has a balance of approximately $3.8 million. The second note, held by Service Life Insurance Co., has a balance of approximately $1.5 million. (RX E:330).

[11] The Plaintiffs have also filed a takings claim for "just compensation" under the Fifth Amendment to the U.S. Constitution based on FWS' position that the property is undevelopable because of the various endangered species on the Hart Triangle Property. That case, *GDF Realty Investments, Ltd., et al. v. United States of America, et al.*, Case No. 99-513 L, is currently pending in the U.S. Court of Claims, but is not active because of the necessity of resolving this litigation first. (RX E:331).

On June 2, 2000 — after the Plaintiffs filed suit against the U.S. for taking the Hart Triangle Property without paying just compensation under the Fifth Amendment — the Fish & Wildlife Service officially changed its position on the §10(a) incidental take permit applications yet again. The July 21, 1998, FWS map that had indicated that all of the Property above the 1010' and 1030 contour lines was undevelopable was revised to include a few additional acres of the Hart Triangle Property for development.[12] (RX E:331). Nevertheless, the practical effect is to prevent development of almost the entire 216 acres.

[12] Given the timing of FWS' reversal, this reversal is likely a litigation tactic to prevent the Plaintiffs from showing a *complete* deprivation of all economically viable use, which is a *per se* taking. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2909-2910 (1992). In any event, FWS is still demanding that the vast majority of the Property be dedicated as preserves for the endangered Cave Bugs. FWS claims that development in these proposed preserve areas will cause "take" of the Cave Bugs in violation of §9 of the ESA. (RX E:331; R. 4:578-686).

SUMMARY OF ARGUMENT

Summary of Facts

Although the history of FWS' actions regarding the Hart Triangle Property involves several twists and turns, the material facts at issue in this case are neither complicated nor disputed. The six species of Cave Bugs at issue here are wholly intrastate species. In fact, the Cave Bugs are found only within a few caves and sinkholes on the Plaintiffs' property and a few other locations within Travis County and Williamson County, Texas. (RX F:691). These small, eyeless creatures live their entire lives underground in caves and sinkholes, they have no commercial value and have never been bought, sold or traded in commerce in any form or fashion. (RX F:690-691; RX E:320-321).

Despite the entirely non-commercial, intrastate nature of the Cave Bugs, the FWS has consistently asserted regulatory jurisdiction over the development activities on the Plaintiffs' property. (RX E:321-329). FWS asserts that the Plaintiffs' proposed development plans will cause "take" of the Cave Bugs in violation of §9(a)(1)(B) of the ESA. *Id.* Although Plaintiffs complied with FWS' requirements in effect at the time and permanently dedicated over 10 acres of prime commercial real estate as preserves for the Cave Bugs (RX E:321-322), FWS has repeatedly changed the rules regarding protection of the endangered species found on the Property and placed increasingly onerous demands on Plaintiffs. (RX E:322-331). In addition to

creating preserves for the Cave Bugs, the Plaintiffs on several occasions have gone back to the drawing board and reduced the size and scope of the proposed development in an effort to satisfy FWS. (RX E:326-328). Each successive plan has been met with additional requirements from FWS. *Id.* The amorphous, ever-changing and unreasonable nature of the demands by FWS has led to several lost development opportunities. (RX E:322-328). Moreover, FWS' bad-faith failure to act on Plaintiffs' §10(a) "incidental take" permit applications — characterized by Judge Sparks as "totally irresponsibl[e]" and "simply wrong" — has put the Plaintiffs in imminent danger of losing an extremely valuable parcel of property through foreclosure or liquidation. (RX E:325-331).

Summary of Legal Argument

The landmark case *United States v. Lopez*, 115 S.Ct. 1624 (1995), and its recent affirmation and expansion in *United States v. Morrison*, 120 S.Ct. 1740 (2000), are watershed decisions in constitutional jurisprudence. Collectively, those decisions make clear that the Constitution's enumeration of powers — which establishes and divides authority through a system of dual sovereignty between the Federal Government and the States — cannot be emasculated through expansive uses of the Commerce Clause. By straightforward application of the principles for analyzing the limits of Congress' Commerce Clause authority, the regulation at issue in this case — §9(a)(1)(B) of the ESA and its prohibition against taking the Cave Bugs — cannot

be sustained on Commerce Clause grounds.

The District Court below held otherwise, stating that the take provision can be upheld under the "substantial effects" category of the Commerce power. 169 F.Supp.2d at 658-663. Appellants respectfully submit that because the District Court's decision shows no fidelity to the letter and spirit of the Supreme Court's holdings in *Lopez* and *Morrison*, it must be reversed.

Under *Lopez* and *Morrison's* "substantial effects" analysis, the provision in question here cannot be upheld as a valid exercise of the Commerce power. Following the analytical framework established by *Lopez* and expanded in *Morrison*, four resulting points compel a finding that Congress lacks constitutional authority:

1. The regulated activity in this case is not in any sense a *commercial* activity, nor is it an integral part of a commercial regulatory scheme. Thus, aggregation cannot be used to sustain the regulation.

2. The take provision does not contain a jurisdictional element.

3. Congress did not make findings establishing a link between the take provision, in specific, and the ESA, in general, and a substantial effect on interstate commerce.

4. The isolated snippets of legislative history as well as the rationale offered in support of the take provision's application are both irrelevant to the proper inquiry and utterly without a logical stopping point because the link to commerce is hyper-attenuated.

To evade the conclusion *Lopez* and *Morrison* compel, the District Court below made two fundamental legal errors. First, the District Court improperly expanded the

"substantial effects" inquiry to encompass the effect of takes of *all endangered species*, rather than just the intrastate, non-commercial Cave Bugs at issue in this case. 169 F.Supp.2d at 661-663. After *Lopez* and *Morrison*, aggregation cannot be used to sustain regulation of non-commercial activity.

Second, the District Court improperly shifted the focus of the "substantial effects" inquiry from the express terms of the regulation — *i.e.* taking endangered species — to attenuated activity that is not the target of the regulation — the Plaintiffs' proposed commercial development. 169 F.Supp.2d at 658-659. After *Lopez* and *Morrison*, a regulation cannot be sustained by relying on attenuated connections to commerce. Instead, the "substantial effects" inquiry must focus directly on the effect of the regulated activity. To put this in proper perspective — no reasonable person could possibly conclude that takes of the Cave Bugs exert a substantial effect on interstate commerce. Only by improperly shifting the focus to the Plaintiffs' proposed commercial development was the District Court able to establish a nexus with interstate commerce. *Lopez* and *Morrison* make clear that such a shift is impermissible because it allows the government 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." *Lopez*, 115 S.Ct. at 1634.

ARGUMENT

I. Congress lacks authority under the Commerce Clause to regulate takes of the Cave Bugs because the regulated activity is neither commercial nor an essential part of a commercial regulatory scheme and the regulated species are wholly intrastate and non-commercial.

The central question in this case is whether Congress possesses the authority to regulate a non-commercial activity — harm to subterranean insects found solely within a very small area of Central Texas — pursuant to the Commerce Clause. The seminal case analyzing limits of congressional authority to legislate pursuant to the Commerce Clause is the Supreme Court's landmark decision in *United States v. Lopez*, 115 S.Ct. 624 (1995). By striking down the Gun-Free School Zones Act ("GFSZA"), *Lopez* rejuvenated the constitutional doctrine of Enumerated Powers and, in the process, returned Congress' authority under the Commerce Clause to its commercial origins. *Lopez's* holding has since been re-affirmed and expanded in *United States v. Morrison*, 120 S.Ct. 1740 (2000).

In the present case, the District Court upheld Congress' Commerce Clause authority to regulate takes of the Cave Bugs. 169 F.Supp.2d at 657. Oddly, though, the District Court's decision rarely gives serious consideration to *Lopez* and *Morrison*. Indeed, the District Court questioned whether the four *Lopez/Morrison* factors apply to this case. 169 F.Supp.2d at 657-658. What little mention is made shows no fidelity whatsoever to either the letter or the spirit of those rulings. An analysis of *Lopez* and

Morrison and the application of the clear standards for analyzing Congress' Commerce Clause authority plainly demonstrates that Congress does not possess the authority to regulate a fundamentally non-commercial activity — takes of the Cave Bugs — that is wholly intrastate.

A. Federalism and the *Lopez/Morrison* framework for analyzing Congress' Commerce Clause authority.

The Constitution's Commerce Clause provides Congress with the authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. In both *Lopez* and *Morrison*, the Supreme Court's most recent cases examining the scope of Congress' Commerce power, the Court made clear that the Commerce power is limited and fundamentally rooted in the Constitution's federal structure.

As Chief Justice Rehnquist's opinion in *Lopez* plainly states, the starting point for any analysis of Congress' authority under the Commerce Clause is with "first principles." *Lopez*, 115 S.Ct. at 1626. The Constitution creates a Federal Government of limited, enumerated powers, which withholds from the Federal Government a general police power of the sort only retained by the States. *Id.* at 1626, 1634. "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" *Id.* at 1626, *(citing Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). "Just as the separation and independence of the coordinate

branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.*

Lopez identified three broad categories of activity that Congress has the authority to regulate pursuant to the Commerce power. Congress may regulate:

1. The use of the channels of interstate commerce;

2. The instrumentalities of interstate commerce, or persons or things in interstate commerce; and

3. Those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 115 S.Ct. at 1629-30; *Morrison*, 120 S.Ct. at1749.

Because the District Court did not uphold the take provision under category one[13] or category two,[14] the focus of this analysis will be on category three.

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[13] The take provision cannot be upheld under category one — the "channels of interstate commerce" — because the take provision applies to takes of endangered species wherever they may occur, rather than focusing on the channels of interstate commerce. This Court has plainly stated that the "channels of interstate commerce" refers to, inter alia, "navigable rivers, lakes and canals of the United States; the interstate railroad track system; the interstate highway system; ... interstate telephone and telegraph lines; air traffic routes; television and radio broadcast frequencies." *United States v. Miles*, 122 F.3d 235, 245 (5th Cir. 1997). Here, the take provision regulates harm to wildlife wherever it occurs, *Morrison*, 120 S.Ct. at 1749, and therefore cannot be sustained as a regulation of the channels of interstate commerce. Neither of the two post-*Lopez* cases addressing the limits of Congress' Commerce Clause authority with respect to endangered species have held otherwise. In *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), two of the three panel judges held that the channels of commerce category cannot be used to sustain the take provision. *Id.* at 1057-58 (Judge Henderson) and 1062-63 (Judge Sentelle); *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2000)(holding that a FWS regulation analogous to the take regulation cannot be sustained under the channels of interstate commerce category).

In a footnote purporting not to analyze whether categories one and two support the take provision, the District Court nevertheless "does note" the proximity of the Property to state

In analyzing the limits of Congress' Commerce Clause authority under category three — activity that substantially affects interstate commerce — the Supreme Court has emphasized four key issues:

1. Whether the statutory provision, by its terms, regulates commercial or economic activity? *Morrison*, 120 S.Ct. at 1749-50; *Lopez*, 115 S.Ct. at 1630-31;

2. Whether the statutory provision contains a jurisdictional element which ensures that the regulated activity has an explicit connection with or effect on interstate commerce? *Morrison*, 120 S.Ct. at 1750-51; *Lopez*, 115 S.Ct. at 1631;

3. Whether the statutory provision is supported by express Congressional findings regarding the effects the regulated activity has upon interstate commerce? *Morrison*, 120 S.Ct. at 1751*; Lopez*, 115 S.Ct. at 1631-32;

4. Whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated — which attenuation, if allowed, would cede to Congress a general police power expressly withheld by the Constitution? *Morrison*, 120 S.Ct. at 1751; *Lopez*, 115 S.Ct. at 1632-33.

By applying the "substantial effects" principles set forth above to §922(q) of GFSZA and §13981 of the Violence Against Women Act ("VAWA"), the Supreme

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highways that "are both directly connected to" an interstate highway. The Court seems to suggest that the mere proximity of the Property to state roads that "are both directly connected to" an interstate highway has some bearing on whether the first category applies. Given the disclaimer and the off-handed nature of the remark, the Court was presumably not serious about this odd suggestion.

[14] Category two — the instrumentalities of interstate commerce or persons or things in interstate commerce — cannot be used to sustain the take provision's application in this case. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d at 1046 (category two cannot sustain the take provision's application to the Delhi Sands Flower-loving Fly); *Gibbs v. Babbitt*, 214 F.3d at 484 (same conclusion with regard to the red wolf, notwithstanding that red wolves had been transported interstate for the purposes of study and reintroduction programs.)

Court held that Congress did not possess the requisite authority under the Commerce Clause to enact the regulations.

1. Regulation of non-commercial activity.

Lopez and *Morrison* both emphasized the critical importance of this factor. In *Lopez*, the Court observed that the regulated activity was neither commercial in nature, nor part of a larger regulation of economic activity in which the regulatory scheme could be undercut, unless the intrastate activity were regulated. "Section 922(q) 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*, 115 S.Ct. at 1630-31. *Morrison* re-emphasized the importance of this factor in deciding the case: "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." *Morrison*, 120 S.Ct. at 1750.[15]

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[15] Citing extensively from *Lopez*, the *Morrison* Court emphasized the central importance of the non-commercial nature of the regulated activity:

> "The Act [does not] regulat[e] a commercial activity[.]" "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not[.]" "Section 922(q) is not an essential part of a larger regulation of economic activity[.]" "Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty'[.]" "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce[.]"; *see also* Kennedy, J., concurring, stating that *Lopez* did not alter our "practical conception of

The importance of this factor cannot be overstated. If the regulated activity is neither commercial or economic in nature, nor an essential part of a commercial regulatory scheme, then aggregation cannot be used to sustain the regulation under the substantial effects rationale. *Lopez*, 115 S.Ct. at 1630-31. In other words, trivial effects of a non-commercial activity cannot be aggregated — the regulated activity must substantially affect interstate commerce on its own.

2. Absence of a jurisdictional element.

In both *Lopez* and *Morrison*, the statutory provisions in question lacked a jurisdictional element. "Section 922(q) contains no jurisdictional element which would ensure through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Lopez*, 115 S.Ct. at 1631. Similarly, in *Morrison*, the Court stated: "Like the Gun-Free School Zones Act at issue in *Lopez*, §13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that

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> commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy[.]" "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur[.]" "[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far[.]"

Morrison, 120 S.Ct. at 1750 (internal citations and punctuation omitted).

such a jurisdictional element would lend support to the argument that §13981 is sufficiently tied to interstate commerce, Congress elected to cast §13981's remedy over a wider, and more purely intrastate, body of violent crime." *Morrison*, 120 S.Ct. at 1751-52.

3. Absence of express Congressional findings.

Under this factor, *Lopez* and *Morrison* present an illuminating contrast. The GFSZA at issue in *Lopez* lacked congressional findings indicating the substantial effect that gun possession in a school zone may have on interstate commerce. While the Court acknowledged that formal findings by Congress are not required, they nevertheless may aid the court when the connection to interstate commerce is not "visible to the naked eye." 115 S.Ct. at 1631-32.

In *Morrison*, by contrast, Congress attempted to support VAWA with "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." 120 S.Ct. at 1752; *See also*, 120 S.Ct. at 1760 ("One obvious difference from *United States v. Lopez* is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce") (Souter, J., dissenting). Congress found that gender-motivated violence affects interstate commerce:

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in

> interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Id. at 1752.

Lopez and *Morrison* both make clear that the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. 120 S.Ct. at 1752. Instead, whether a regulated activity substantially affects interstate commerce is ultimately a "judicial rather than legislative question, and can be settled finally only by this Court." *Id.*

With that backdrop, the *Morrison* Court found that Congress' findings were "substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.* The "but-for causal chain" of reasoning employed by Congress — which follows the regulated activity's effect out to distantly attenuated effects on interstate commerce — would allow Congress to "use the Commerce Clause to obliterate the Constitution's distinction between national and local authority," thereby effectively ceding to Congress the police power that was expressly withheld. *Id.* Thus, given the Court's rejection of the numerous congressional findings in VAWA, *Morrison*'s holding is a substantial extension of *Lopez*'s restriction of the Commerce power.

4. Attenuated links between the regulated activity and interstate commerce.

Lopez and *Morrison* focused on the rationale linking the regulated activity and the purported "substantial effect on interstate commerce." *Lopez,* 115 S.Ct. at 1631-34; *Morrison*, 120 S.Ct. at 1751. To properly support Commerce Clause authority, the *Lopez* Court made plain that the rationale must have some logical stopping point. 115 S.Ct. at 1632-33. Absent such, the rationale would empower Congress with a general police power of the sort retained only by the States. *Id.* at 1634. *Lopez* and *Morrison* both provide examples of attenuated links that cannot be used to sustain a Commerce Clause authority.

In *Lopez*, the government sought to uphold the GFSZA by arguing that gun possession in school zones affects interstate commerce. Two arguments were advanced. First, gun possession may result in violent crime, which inhibits travel and imposes substantial costs which are spread nationwide through insurance. *Lopez,* 115 S.Ct. at 1632. Second, gun possession threatens the learning environment, which results in a less-productive citizenry. *Id.* The Court rejected both the "costs of crime" and the "national productivity" rationales because they lacked any logical stopping point and provided no real limits on the Commerce power.

Similarly, in *Morrison*, the government advanced theories based on "interstate travel," "national productivity," "interference with interstate business" and various other rationales. *Morrison*, 120 S.Ct. at 1752-53. Common to all of these rationales

is an attenuated link between the regulated activity — gender-motivated violence — and the purported effect on interstate commerce. In other words, Congress is not regulating "interstate travel" or "interstate business" in the VAWA. Only through an attenuated chain of causation could the government show an effect on "interstate travel," etc. As in *Lopez*, the *Morrison* Court rejected these rationales because acceptance would lead to destruction of the Constitution's enumeration of powers. *Id.* at 1752-53.

B. Takes of the Cave Bugs do not substantially affect interstate commerce.

Straightforward application of the *Lopez/Morrison* principles outlined above yields the following points:

1. Because the activity regulated by the take provision is not commercial in nature, aggregation cannot be used to sustain the take provision's application to the Cave Bugs.

2. The take provision does not contain a jurisdictional element to ensure that the regulated activity is sufficiently connected to interstate commerce.

3. The Endangered Species Act, in general, and the take provision, in specific, are not supported by findings regarding "substantial effect on interstate commerce."

4. The rationale offered in support of the take provision's application relies on the type of attenuated link to interstate commerce expressly rejected by the Supreme Court.

Taken together, these points lead to only one conclusion: the take provision's

application to the Cave Bugs cannot be sustained on Commerce Clause grounds. Each of these issues — and the District Court's failure to give them proper weight or even consideration — is considered in turn.

1. Because the activity regulated by the take provision is not commercial in nature, aggregation cannot be used to sustain the take provision's application to the Cave Bugs.

The first — and most important — inquiry for analyzing the limits on the "substantial effect" category is whether the statute at issue regulates commercial activity. The importance of this issue is directly tied to the issue of whether "aggregation" can be used to uphold the regulation. Aggregation — the legal rule first announced in *Wickard v. Filburn,* 317 U.S. 111 (1942) — allows trivial instances of local economic activity to be regulated because of their aggregate economic effect. How this Court decides the aggregation issue is likely the key to the outcome of this case. If the Court finds that aggregation of *all takes* of *all endangered species* is allowed (*i.e.*, takes of other endangered species that plainly have commercial impacts — *e.g.*, grizzly bears, salmon, alligators, etc.), then the regulation passes Commerce Clause muster.

On the other hand, if aggregation is not allowed, then the take provision's application to the Cave Bugs is clearly unsupportable. The reason is plain. Assuming for the sake of argument that takes of the Cave Bugs are occurring or will occur with

development,[16] it is highly unlikely that those takes have *any effect* on interstate commerce. (RX E:320-321; RX F:689-692). But in any event, no reasonable person could conclude that those takes exert a *substantial effect* on interstate commerce, *i.e.*, "commerce between the States."[17] Const. Art. I, §8, cl. 3.

In deciding this case-dispositive issue, the District Court offered no analysis of aggregation whatsoever, instead stating, almost as an afterthought: "Moreover, because the regulated activity in this case is economic in nature, the Court may aggregate the effects of similar activity for the purpose of determining the effect on interstate commerce. . . [citing *Wickard* among others] Under this principle, it is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." 169 F.Supp.2d at 659-660.

The District Court's misapplication of the aggregation principle defies the Supreme Court's teaching in *Lopez* and *Morrison*. When the regulated activity "has nothing to do with 'commerce' or any sort of economic enterprise..." and "is not an essential part of a larger regulation of economic activity, in which the regulatory

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[16] Although Plaintiffs have gone to great lengths to prevent harm to the Cave Bugs by dedicating over ten acres of prime real estate to preserve and protect these species, (RX E:321-322), FWS has asserted that the Plaintiffs' proposed development will cause "take" of the Cave Bugs and has designated substantial portions of the Hart Triangle Property as a "Non-Development Area." (RX E:325-329).

[17] Neither the District Court nor the Federal Defendants attempt to uphold the take regulation in this manner.

scheme would be undercut unless the intrastate activity were regulated," the regulation cannot be sustained through aggregation.[18] *Lopez*, 115 S.Ct. at 1630-31. Addressing the civil enforcement provision of the Violence Against Women Act, the *Morrison* Court reiterated this central point. "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, ***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***." *Morrison*, 120 S.Ct. at 1750 (emphasis added).

Applying these principles to this case, aggregation cannot be used to sustain the take provision. Just as the harm to women addressed in §13981 of the VAWA is "not, in any sense of the phrase, economic activity," *Morrison,* 120 S.Ct. at 1750, neither is the harm to wildlife at issue in this case, in any sense of the phrase, economic activity. By its terms, §9(a)(1)(B) does not regulate a commercial activity, nor does it regulate activity that is an essential part of a larger regulation of economic activity. Simply put, the take provision is a wildlife regulation. It prohibits harming listed species, without regard to a commercial nexus. The purpose or nature of the take

[18] Even *Wickard*, which is "perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity" in that it was a part of a scheme of economic regulation — the commodity price support system employed in the Agricultural Adjustment Act. *Lopez*, 115 S.Ct. at 1630.

(*e.g.*, whether it occurred in connection with a commercial activity) is wholly irrelevant to §9(a)(1)(B)'s liability scheme. Just as the take provision does not regulate commercial activity, neither is it "an essential part of a larger regulation of economic activity." *Lopez*, 115 S.Ct. at 1631. The Endangered Species Act is plainly not economic regulation; the purpose of its statutory scheme is wildlife regulation. *See, e.g., Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1237 (10th Cir. 2000).

The District Court simply ignored *Lopez* and *Morrison's* focus on *the regulated activity* and, instead, shifted the focus from the regulated activity to Plaintiff's proposed development on adjacent property. "Plaintiffs mistakenly focus only on the commercial aspects (or, in their view, the complete lack thereof) of the Cave Species. However, the activity regulated in this case is not simply the Cave Species. It is an alleged take of the Cave Species through plaintiffs' development of the Property. Plaintiffs cannot simply ignore the commercial nature of their activity." 169 F.Supp.2d at 658.

The District Court's error here is fundamental. The ESA take provision does not regulate commercial development. It regulates harm to endangered species. Nor is the ESA, in general, a regulatory scheme aimed at commercial development. It is a wildlife protection statute. The District Court's simple — but fundamental — legal error in shifting the focus away from the regulated activity to other attenuated

connections to interstate commerce was case dispositive.

2. The take provision does not contain a jurisdictional element.

The second principle for evaluating Congress' Commerce Clause authority under the "substantial effects" test is whether the statutory provision has a jurisdictional nexus to "insure, through case by case inquiry, that the [regulated activity] affects interstate commerce." *Lopez*, 115 S.Ct. at 1631. Here, too, the take provision is found lacking. By its terms, the take provision makes absolutely no reference to interstate commerce. 16 U.S.C. §1538(a)(1)(B).

The absence of a jurisdictional nexus in §9(a)(1)(B) stands in contrast to other provisions of the very same subsection of the ESA. For instance, §9(a)(1)(E) of the ESA makes it unlawful to "deliver, receive, carry, transport, or ship in *interstate or foreign commerce*, by any means whatsoever and in the course of a *commercial activity*" any listed fish or wildlife species. 16 U.S.C. §1538(a)(1)(E) (emphasis added). Similarly, §9(a)(1)(F) makes it unlawful to "sell or offer for sale *in interstate or foreign commerce*" any listed fish or wildlife species. 16 U.S.C. §1538(a)(1)(F) (emphasis added). *See also* §§9(a)(2)(C) & (D) (same prohibitions regarding plant species in interstate commerce).

Obviously, Congress was well aware of the means by which it could ensure a sufficient connection with interstate commerce. For instance, Congress could have included a jurisdictional element in the take provision by making it unlawful to "take

in *interstate or foreign commerce*" any listed fish or wildlife species. *Compare* to 16 U.S.C. §1538(a)(1)(E). But it did not do so. The District Court gave no weight to this failure to include a jurisdictional element, saying that it was "not relevant." 169 F.Supp.2d at 661.

3. The Endangered Species Act, in general, and the take provision, in specific, are not supported by findings regarding "substantial effect on interstate commerce."

When Congress enacted the ESA in 1973, it made no express findings regarding the effect (substantial or otherwise) that takes of endangered species have on interstate commerce, nor did it make any such findings for the ESA in general. *See* 16 U.S.C. §1531(a) (setting forth the specific findings made by Congress when it enacted the ESA, none of which address substantial effect on interstate commerce). *Compare* Surface Mining Control and Reclamation Act, 30 U.S.C. §1201, upheld in *Hodel v. Virginia Surface Mining & Reclam. Assn.*, 101 S.Ct. 2352, 2360-62 (1981). Similarly, the ESA's legislative history provides no evidence regarding the substantial effect that takes of endangered species have on interstate commerce. *See* 1973 U.S.C.C.A.N. 2989.

The District Court simply ignored the lack of Congressional findings on interstate commerce and instead cobbled together several snippets of legislative history that do not bear on the issue of whether takes of endangered species substantially affect interstate commerce. 169 F.Supp.2d at 661-662. The legislative

history cited by the District Court, which was also cited *Home Builders* and *Gibbs*, focuses on the potential for future commerce related to genetic diversity and the future availability of endangered species with commercial value for exploitation. 169 F.Supp.2d at 662. The District Court's analysis of ESA legislative history is flawed in several regards.

First, *Morrison* makes clear that Congressional findings or legislative history that rely on a flawed method of reasoning will not survive judicial scrutiny. Congress made "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." *Morrison*, 120 S.Ct. at 1752. The Supreme Court did not reject those findings because they lacked a rational basis. The Court rejected the findings because they "rely so heavily on a method of reasoning that we have already rejected if we are to maintain the Constitution's enumeration of powers." *Id.*

> The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce.

Id.

The District Court disregarded *Morrison's* prohibition on supporting rationales using "but-for causation." The legislative history cited by the District Court relies on an even more exaggerated version of discredited but-for causation. Whereas the

findings reviewed in *Morrison* at least identified arguable facts related to violent crime to support the attenuated link to interstate commerce, the legislative history cited by the District Court makes wholly speculative guesses about what may occur in the future. 169 F.Supp.2d at 662.

Second, in addition to relying on discredited "but for causation," the legislative history cited in *Gibbs* has no application to the facts of this case. Unlike those instances where certain species with commercial value have been hunted or commercially exploited to the point of extinction, no such thing can be said of the Cave Bugs. There is not now, nor has there ever been, any commerce of any nature in any of the Cave Bugs. The Kretschmarr Cave Mold Beetle and the other Cave Bugs have never been bought, sold or traded in commerce at any time. (RX E:320-321; RX F:689-692).

This point is confirmed by the FWS' own statements in listing the Cave Bugs. Under §4(a)(1) of the ESA, when proposing a species for listing, FWS is required to state the factors justifying listing. 16 U.S.C. §1533(a)(1). A species is evaluated under five factors described in section 4(a)(1). One such factor which must be specifically addressed is whether "overutilization for commercial, recreational, scientific, or educational purposes" has led to the species' decline. 16 U.S.C. §1533(a)(1)(B). With regard to the Cave Bugs, not only is commercial exploitation not given as a reason for its listing, the FWS' analysis under this factor states, "No

threat from overutilization [for commercial purposes] of these species is known to exist at this time." 53 Fed. Reg. 36,029, 36,031 (1988). Thus, any reliance on "future commercial exploitation" is not just speculative; it has no basis whatsoever in fact.

A third and final flaw in the District Court's reliance on the snippets of legislative history is that they are simply broadbrush truisms that do not address the take provision. The general statements about species preservation being a good idea, for instance, are not in dispute. However, they are not relevant to the proper constitutional inquiry, which is: do takes of endangered species substantially affect interstate commerce.

It is proper at this point to make clear that this suit does not challenge the Federal Government's wide-ranging authority to undertake species preservation by numerous other means in the ESA. For instance, the Federal Government can continue to protect species habitat by purchasing land for preserves using the spending power. 16 U.S.C. §1534. The Federal Government can continue to use other provisions of §9 to prohibit interstate sale, transportation, and distribution of endangered species. *See*, 16 U.S.C. §1538(a)(1)(E)-(F). The Federal Government can continue to provide funding for research into species protection on its own, or in cooperation with the States. 16 U.S.C. §1535. The Federal Government can continue to require that its agencies consult with FWS under §7 to determine whether an agency action will "jeopardize the continued existence of any endangered species ...

or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. §1536. *See also Tennessee Valley Authority v. Hill*, 98 S.Ct. 2279 (1978).[19] The Federal Government can provide refugiums for protection, research and captive breeding of endangered and threatened species. What the Federal Government cannot do, however, is use speculative guesswork about future benefits to justify Commerce Clause jurisdiction.

4. The rationales offered in support of the take provision's application rely on the type of attenuated links to interstate commerce expressly rejected by the Supreme Court.

The rationale offered by the District Court in support of the take provision — that the Plaintiffs' proposed development activities on adjacent land is commercial in nature — is a classic example of the type of attenuated link to interstate commerce expressly rejected in *Lopez* and *Morrison.* "While the regulated activities in *Lopez* (mere possession of a gun near a school) and *Morrison* (committing a violent crime against a woman) required several logical links to connect the activities to some effect on interstate commerce, here the link is direct. Indeed the Court is hard-pressed to

[19] The District Court's analysis of *Tennessee Valley Authority v. Hill* is way off the mark. The District Court claims that, "accepting plaintiffs' argument — that the Court should examine only the intrastate, non-economic nature of the Cave Species — likely would nullify the take provision as-applied in *TVA*, the primary Supreme Court decision on the ESA." 169 F.Supp.2d at 659-660 & n.14. The District Court is simply wrong in its analysis. *TVA* is not a §9 case involving the application of the take provision on private property. *TVA* is a §7 case involving one federal agency's failure to consult with the FWS before constructing a federal dam project. Not only is *TVA* inapposite to this case, it actually reinforces the narrowness of this challenge to the take provision as applied to the Cave Bugs.

find a more direct link to interstate commerce than a Wal-Mart." 169 F.Supp.2d at 662.

The District Court's analysis here is seriously flawed and does not withstand scrutiny. As previously noted, the take provision does not regulate commercial development. It regulates harm to endangered species. If harm to women in the Violence Against Women Act cannot be sustained under the Commerce Clause — despite the myriad congressional findings and the obvious economic impact that harming women (as opposed to insects) has on commerce — then it is inconceivable that harming isolated, subterranean insects with no known commercial value can be sustained under the Commerce Clause.[20]

Ultimately, the rationale cited by the District Court (as well as those cited in *Home Builders* and *Gibbs)* fails for the same reason the "costs of crime" and "national

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[20] The rationales offered in *Home Builders* and *Gibbs* are no more persuasive. In *Home Builders* and *Gibbs*, the closely-divided majorities of those courts asserted, over vigorous dissents, other rationales linking the take provision to interstate commerce. The "tourism," "scientific research" and "potential commerce" rationales cited by those courts rely on the same but-for causation and attenuated links to commerce rejected in *Morrison* and *Lopez* and, therefore, do not withstand scrutiny. In each case, these rationales fail because each asks the wrong "substantial effects" inquiry and in the process of "answering" the wrong question, supplies a super-attenuated link to interstate commerce which, if accepted, would cede to Congress the police power withheld by the Constitution. These rationales ask the wrong question because they do not focus the inquiry on the regulated activity – takes of the listed species. Instead, the focus is shifted from the regulated activity to ancillary matters such as tourism, research and the like. For instance, the tourism rationale relies on interstate travel of tourists to view the listed species. *See, e.g., Home Builders,* 130 F.3d at 1053 n.11; *Gibbs,* 214 F.3d at 493-494. Ultimately, the rationale proves too much. If an activity such as harm to a purely intrastate endangered species can be regulated simply because of a collateral and attenuated effect it may have on tourism, then it is difficult to conceive of any limits on the Commerce power.

productivity" rationales failed in *Lopez* and the "interstate travel," "national productivity" and various other attenuated rationales failed in *Morrison*: if accepted, such rationales would effectively cede a general police power to Congress because they have no logical stopping point. These rationales "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." *Id.* at 1634.

5. The regulated activity substantially intrudes into an area of traditional State authority.

One additional area of concern addressed in both *Lopez* and *Morrison* was the use of the Commerce power to intrude into areas of traditional State concern. *Lopez*, 115 S.Ct. at 1631.

> Were the Federal Government to take over the regulation of entire areas of traditional State concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of Federal and State authority would blur and political responsibility would become illusory.

Lopez, 115 S.Ct. at 1638 (Kennedy, J., concurring).

Accordingly, when Congress uses the Commerce Clause as a basis for intruding into areas of traditional state authority, the Court should apply greater scrutiny to the encroaching federal statute.

> The statute before us upsets the Federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our

> intervention is required. . . In a sense, any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern. An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the State.

Id. at 1640 (Kennedy, J., concurring) (emphasis added).

The Court's concern for Congressional intrusion into areas of traditional state authority was recently reiterated in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. 121 S.Ct. 675, 683-84 (2001). In holding that the Migratory Bird Rule exceeded Congress' authority, the Court noted that Congress had made no clear statement that it intended the statute to reach intrastate waters, and because allowing federal control over these waters "would result in a significant impingement of the States' traditional and primary power over land and water use," the Court read the statute to avoid the constitutional issues and held that the regulation exceeded the agency's authority under the statute. *Id.* at 684.

The Federal Defendants' use of the ESA to assert jurisdiction over takes of the Cave Bugs effects a far greater federal incursion into areas of traditional state authority (land use planning and wildlife regulation) than that caused by the GFSZA and VAWA. The intrusion by the ESA take provision does not merely forbid an act (possession of a firearm in a school zone) already forbidden by most States. Instead, it creates potential civil and criminal liability for ordinary development activities that

are already stringently regulated at the local and state level. The ESA take provision thus displaces well-settled bodies of Texas water law and runs roughshod over the local regulatory authorities.

It is beyond debate that land use planning has traditionally been a function of local government. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (*citing Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). The Federal Government has never played a role, much less a significant role in local land use planning. It is similarly well-settled that wildlife regulation and management has always been a traditional state concern. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978). As applied to the Cave Bugs, the ESA take provision displaces local land use planning policy choices reflected in the City of Austin Development Code and Travis County Ordinances and State wildlife regulatory choices embodied in the Texas Endangered Species Act. Those local and state policy decisions, which reflect the considered judgements of local and state governments, are precisely the type of interests embodied in "Our Federalism" and protected by the Tenth Amendment.

CONCLUSION

The Federal Defendant's regulation of the Cave Bugs at issue in this case is similar to the fly addressed by Judge Sentelle in *Home Builders*:

> The proposition that the federal government can, under the Interstate Commerce Clause, regulate an activity which is neither interstate nor commerce, reminds me of the old chestnut: If we had some ham, we

> could fix some ham and eggs, if we had some eggs. With neither ham nor eggs, the chances of fixing a recognizable meal requiring both amount to nil. Similarly, the chances of validly regulating something which is neither commerce nor interstate under the heading of the interstate commerce power must likewise be an empty recitation.

Home Builders, 130 F.3d at 1061 (Sentelle, J., dissenting).

The Cave Bugs at issue in this case are neither interstate nor commerce. Under faithful application of the principles set forth in *Lopez* and *Morrison*, the Federal Defendants' regulation of the Cave Bugs cannot be sustained.

In light of the foregoing, Appellants GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P., respectfully request this Court to reverse the District Court's Judgment and render judgment declaring the take provision of the Endangered Species Act unconstitutional as applied to the Cave Bugs because it exceeds Congress' Commerce Clause Authority. Appellants further seek a permanent injunction restraining the Federal Defendants from applying the take provision to the Cave Bugs. Finally, should the Appellants prevail on appeal, remand to the District Court for a determination of the Appellants' attorneys fees is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 15th day of February, 2002, a true and correct copy of the foregoing *Brief of Appellants GDF Realty Investments, Ltd.; Parke Properties I, LP, and Parke Properties II, LP* was served upon all counsel of record by regular U.S. first class mail as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

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