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 the Interior;
STEVEN A. WILLIAMS, Director, United States Fish and Wildlife Services

DEFENDANTS - APPELLEES

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

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

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## ARGUMENT

## I. Introduction.

The Federal Government's answering brief defends the Endangered Species Act take provision's[1] application to the Cave Bugs[2] with two inconsistent rationales — both of which defy *Lopez*[3] and *Morrison*.[4]

The first, and primary, means by which the Government attempts to defend the take provision is by arguing that the Court must analyze whether takes of *all endangered species* substantially affect interstate commerce, rather than whether takes of *Cave Bugs* substantially affect interstate commerce. Fed.Br. at 26-28. The Government's analysis correctly focuses on whether the regulated activity ("take" under §9(a)(1)(B) of the ESA) substantially affects interstate commerce, but mistakenly urges the Court to aggregate the effect of takes of all endangered species rather than those species which are at issue in this case — the Cave Bugs.

The second rationale offered by the Government correctly shifts the analysis

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[1] 16 U.S.C. §1538(a)(1)(B).

[2] For some reason, the Government chides GDF for collectively referring to the Kretschmarr Cave Mold Beetle, Bee Creek Cave Harvestman, Bone Cave Harvestman, Tooth Cave Pseudoscorpion, Tooth Cave Spider, Tooth Cave Ground Beetle, as "Cave Bugs." As all their names reflect, the forgoing live their entire lives underground in caves. Webster's defines "bug" as, "an insect or other creeping or crawling invertebrate." That is exactly what these beetles, spiders, pseudoscorpions and harvestmen are — Cave Bugs.

[3] *United States v. Lopez,* 514 U.S. 549 (1995).

[4] *United States v. Morrison,* 529 U.S. 598 (2000).

from all endangered species to the Cave Bugs at issue in this case, but then incorrectly shifts the substantial effects analysis from the regulated activity — taking of the Cave Bugs — to attenuated connections with interstate commerce that are not regulated by the terms of the take provision (*e.g.*, development, tourism, travel, scientific study, etc.).

In addition to the rationales offered in support of the take provision, the Government's answering brief is also notable for what is not said. The Government's silence (or outright admission) is evident on both factual and legal issues. The Government either explicitly or implicitly concedes the following material facts:

- There is not now, nor has there ever been, commerce of any type in any of the Cave Bugs;
- Because the Cave Bugs are only found within a few caves in two counties in central Texas, all takes of the Cave Bugs are necessarily intrastate;
- There is no evidence that takes of the Cave Bugs have *any* effect on interstate commerce, much less a *substantial* effect.

Regarding legal issues, the Government makes no attempt to defend the take provision under either Category 1 ("channels of interstate commerce") or Category 2 ("instrumentalities or items of commerce") of Congress' Commerce Clause authority. Although the Government attempts to defend the take provision under Category 3 ("substantial effect on interstate commerce"), the Government does not —

and cannot — dispute that:

- The take provision lacks a jurisdictional element to tether its application to commercial activities;
- Neither the ESA, in general, nor the take provision, in specific, are supported by legislative findings of "substantial effect on interstate commerce";
- The regulated activity — takes of the Cave Bugs — is not *commercial* in nature.

## II. The take provision's application to the Cave Bugs cannot be upheld under the "substantial effect on interstate commerce" category of Congressional authority.

The proper framework for analyzing the third category of Congress' Commerce Clause authority — "substantial effect on interstate commerce" — was discussed at length in Appellants' opening brief at 26-34 and will not be repeated here. Applying that framework to this case, even the Government — whose defense of the take provision relies exclusively on the "substantial effect" category — implicitly concedes failure on two of the four areas of *Lopez* and *Morrison's* substantial effect analysis: (1) the take provision does not contain a jurisdictional element; and (2) the ESA and the take provision are not supported by congressional findings regarding "substantial effect on interstate commerce."

Neither the Government nor the District Court even acknowledge — much less assign significance to — these shortcomings, though. Instead, the Government attempts to defend the take provision by asserting that: 1) aggregation of *all takes of*

*all endangered species* is appropriate; and 2) collateral or attenuated activities supply the necessary nexus with interstate commerce. Neither approach shows fidelity to *Lopez* and *Morrison*. Each will be examined in turn.

### A. Aggregation cannot be used to sustain the take provision's application to the Cave Bugs.

The first — and primary — way in which the Government attempts to defend the take provision is through "aggregation" of the effect of *all* takes of *all* endangered species. Significantly, neither the Government nor the District Court make *any* attempt to argue that takes of the Cave Bugs themselves substantially affect interstate commerce. The Government's understandable reluctance to do so is supported by both the record and common sense. The undisputed evidence in this case is that there is not now, nor has there ever been *any commerce* of any nature in any of the Cave Bugs. (RX F:690-92; RX E:320-21). The evidence is similarly undisputed that takes of these non-commercial species do not exert a substantial effect on our $9,000,000,000,000 economy. *Id*. Instead, the Government tries to dodge this "bad fact" by relying on "aggregation" to show substantial effect. In other words, without the crutch that aggregation provides, the Government's defense of the take provision fails as a matter of law.

#### 1. The regulated activity — takes of the Cave Bugs — is neither a commercial activity nor an essential part of a commercial regulatory scheme.

Aggregation is inappropriate in this case for the simple reason that the challenged regulation — the take provision — does not regulate commercial activity or a commercial market.

Determining whether the regulated activity in this case is "commercial" (versus "non-commercial") is not a difficult process.[5] Under *Lopez* and *Morrison's* analysis, the Court should look to the *express terms* of the regulatory provision in question. *Morrison*, 529 U.S. at 610. Just as the harm to women addressed in §13981 of the Violence Against Women Act is "not, in any sense of the phrase, economic activity," *Morrison*, 529 U.S. at 610, neither is the harm to wildlife at issue in this case, in any sense of the phrase, economic activity.

By its terms, the take provision makes no mention of "commerce" or "economic activity," nor is it part of a scheme of commercial regulation. The purpose or nature of the take (e.g., whether it occurred in connection with a commercial activity) is wholly irrelevant to §9(a)(1)(B)'s liability scheme. In other words, Congress did not require the taking of an endangered species to have a nexus with interstate commerce. Simply put, the take provision prohibits harming endangered species, without regard to a nexus with interstate commerce.

Every post-*Lopez* court that has followed *Lopez* and *Morrison's* teaching by

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[5] The Supreme Court has used both "commercial" and "economic" apparently interchangeably to describe the type of activity that may be aggregated for the purposes of a substantial effects analysis. *See, Morrison*, 529 U.S. at 610.

analyzing the *express terms* of the take provision has held that the provision does not regulate commercial activity. In *National Ass'n of Home Builders v. Babbitt*,[6] the three D.C. Circuit judges disagreed on practically every issue before them except for whether the take provision regulates commercial activity. Judge Sentelle's dissent accurately states that the "regulation does not control a commercial activity, or an activity necessary to the regulation of some commercial activity. Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense." 130 F.3d at 1064. But even Judge Wald's overreaching opinion in *Home Builders*, accurately concedes that the regulated activity is, "local and is not regarded as commerce." *Home Builders,* 130 F.3d at 1049, fn.7 (internal citation omitted).

Similarly, in *Schuehle v. Babbitt,* District Judge Lucius Bunton found the regulated activity not commercial in nature: "The ESA regulates activities — destruction of endangered species and destruction of the natural landscape — that are carried out entirely within a State and which are not themselves commercial in character."[7] Slip Op. at 28.

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[6] 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998).

[7] Despite holding that the regulated activity is not commercial, the District Court relied on a rote application of the aggregation principle in *Wickard v. Filburn,* 317 U.S. 111 (1942) to sustain the take provision. This Court recently vacated Judge Bunton's decision upholding the constitutionality of the take provision as applied to several endangered species found in springs fed by the Edwards Aquifer. *Shields v. Norton*, ___ F.3d ___, 2002 WL 742275 (5th Cir. 2002).

Although the Government cites *Gibbs v. Babbitt*[8] for what appears (at first blush) to be the contrary position — that the regulated activity is "economic" — on closer inspection, *Gibbs* simply did not purport to analyze whether the regulation in question, by its terms, regulates commercial activity. Instead, the *Gibbs* majority improperly looked elsewhere to find connections with interstate commerce. It looked to potential effects on tourism, agriculture and historic trade in pelts — none of which were the subject of the challenged regulation. This astonishingly broad definition of "economic activity" adopted by the *Gibbs* majority led the *Gibbs* dissent to conclude that the analysis is so far out of step with *Lopez* and *Morrison* that it is "not even arguably sustainable." 214 F.3d at 507.

Because *Gibbs* is one of only two post-*Lopez* Circuit Court cases to analyze Commerce Clause challenges to ESA provisions (*Home Builders* is the other), it merits a close look. In the strictest sense, *Gibbs* is distinguishable. *Gibbs* did not involve the ESA take provision. *Gibbs* involved a FWS regulation, 50 C.F.R. §17.84, prohibiting direct harm[9] (intentional shooting, wounding, killing, trapping, etc.) to

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[8] 214 F.3d 483 (4th Cir. 2000) *cert. denied* 531 U.S. 1145 (2001).

[9] Unlike the take provision at issue here, 50 C.F.R. §17.84 is a substantially less stringent regulation than the take provision. *Gibbs*, 214 F.3d at 488-89. The most significant difference is that §17.84 does not prohibit "indirect" harm to the species, whereas the take provision, through the "harm" regulation, 50 C.F.R. 17.3, does so through actions such as habitat modification caused by land clearing. It is GDF's proposed development land clearing activities, and the runoff associated with that development, that FWS asserts will cause harm to the Cave Bugs.

reintroduced populations of an interstate species[10] with commercial applications[11] — the red wolf.

Distinctions aside, though, *Gibbs* was wrongly decided. The *Gibbs* majority held that §17.84 regulates economic activity, but only arrived at that conclusion by diverting its analysis from the actual terms of the regulation (harm to red wolves) to collateral activity (e.g., tourism, agriculture, scientific research) not regulated by §17.84. The *Gibbs* majority did not hold that §17.84, by its express terms, regulates commercial activity. Plainly, it does not. As Judge Luttig's dissent in *Gibbs* accurately points out, the *Gibbs* majority arrived at its unsupportable conclusion by adopting a mode of analysis rejected by *Lopez* and *Morrison*, instead employing the discredited methods of attenuated reasoning urged by the dissents in *Lopez* and *Morrison*. *Gibbs*, 214 F.3d at 508. (Luttig, J, dissenting) ("In a word, the expansive view of the Commerce power expressed by the majority today is closely akin to that separately expressed by Justice Breyer in his dissent in *Lopez* and Justice Souter in his

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[10] Unlike the Cave Bugs at issue in this case, the red wolf is currently found in at least two states — North Carolina and Tennessee — and has an even larger historical range throughout the Southeastern United States. *Gibbs,* 214 F.3d at 488.

[11] Unlike the Cave Bugs at issue in this case, the red wolf is a species with historical commercial value. Red wolf pelts have been sold and traded commercially. *Gibbs*, 214 F.3d at 495. Moreover, although 50 C.F.R. §17.84 does not regulate tourism (thus tourism cannot be used to show that the regulated activity is commercial in nature), the red wolf generates millions of dollars in tourism. 214 F.3d at 493-94. Thus, even if the Court were to view takes of the Cave Bugs as "economic" in the same extraordinarily broad sense used by the *Gibbs* majority, such takes would not exert a substantial effect on interstate commerce because the Cave Bugs have never been bought, sold or traded in commerce, have no commercial application, and do not generate any tourism.

dissent in *Morrison*, and certainly more akin to those dissenting Justices' views than it is to the view of the *Lopez* majority in *Lopez* and *Morrison.*")

As in *Gibbs*, the Government here tries to skirt the patently non-commercial character of the take provision by looking beyond the express terms of the regulated activity to other attenuated connections to interstate commerce. The Government points to the potential for future commerce in endangered species, tourism and interstate travel in support of the claim that the take provision is a commercial regulation.

This approach is fundamentally at odds with *Lopez* and *Morrison*. Rather than focusing on the actual terms of the regulation, the approach urged by the Government improperly shifts the focus away from the taking to collateral or attenuated activities to establish a commercial nexus. In so doing, the Government ignores the fact that the take provision does not have a jurisdictional element. In other words, the take provision prohibits take without regard to a nexus with interstate commerce. On this point, the take provision — §9(a)(1)(B) — stands in sharp contrast to other provisions of ESA §9(a)(1) which contain a jurisdictional element to tether their application to commercial activities.[12]

The government's attempt to rely on similar attenuated connections to commerce outside the express statutory terms was rebuffed in *Solid Waste Agency of*

[12] 16 U.S.C. §§1538(a)(1)(E) & (F).

*Northern Cook County (SWANCC) v. United States Army Corps of Engineers,* 531 U.S. 159 (2001). In *SWANCC*, the Supreme Court held that the Corps' "Migratory Bird Rule," which extended the definition of "navigable waters" under the Clean Waters Act ("CWA") to include intrastate waters used as habitat by migratory birds, exceeded the authority granted to the Corps by the CWA. *Id.* at 165-69. The petitioner challenged the rule on both statutory and Commerce Clause grounds. *Id.* at 164. The Court held on the narrower statutory grounds, but did so to avoid what it saw as the troubling constitutional and federalism issues raised by a regulation that "invoke[d] the outer limits of Congress' power" and altered the federal–state balance by impinging on states' traditional power over land and water use. *Id.* at 168-69.

The government's arguments in *SWANCC* present illustrative parallels to this case. Although the Corps had originally claimed jurisdiction over the land at issue because it was habitat for migratory birds, in litigation, the Corps attempted to justify its jurisdiction based on the notion that the regulated activity was petitioner's municipal landfill, which was "plainly of a commercial nature." *Id.* at 168. The Court was skeptical of the Corps' attempt to re-define the regulated activity from "water areas used as habitat by migratory birds" to the commercial landfill, stating: "But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends." *Id.* Consistent with *Lopez* and *Morrison, SWANCC* confirms that a reviewing court must look only to the terms of the statute,

not the Government's post-hoc rationalizations, to determine whether the regulated activity is commercial.

By its express terms, the activity regulated by the take provision is not commercial in nature. Accordingly, aggregation cannot be used to sustain the take provision.

### 2. Aggregation cannot be sustained under the Government's "class of activities" argument.

The Government's assertion that aggregation is appropriate is largely based on a misreading of the Supreme Court's "class of activities" jurisprudence. The Government claims that Congress has the authority to regulate the taking of all endangered species because the aggregate effect of taking all endangered species "as a class" substantially affects interstate commerce and, thus, if the class as a whole may be regulated, then the effect of taking individual species may not considered separately from the larger class of all endangered species. Fed.Br. At 26-46. The Government's aggregation argument fails because it ignores *Lopez* and *Morrison's* teaching on this critical issue.

The "class of activities" rationale can only be understood in the context of regulation of a congressionally-defined commercial market. In each instance in which the Supreme Court has sustained the regulation of some class of activity under the Commerce Clause, it has *always* been attributable to the existence of a commercial

market. *Lopez* noted several such examples. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc*., 452 U.S. 264 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (inns and hotels). See *Lopez*, 514 U.S. at 559-60. Even *Wickard v. Filburn,* which *Lopez* characterized as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," involved economic activity in that Congress was attempting to regulate the wheat market. 514 U.S. at 560.

Here, there is *no commercial market*. Regulation of the take of Cave Bugs is not part of an attempt to regulate a commercial market in Cave Bugs because there simply is no such thing, nor has one ever existed. Instead, the Government seeks to shift the focus from the Cave Bugs at issue in this case to the "takes of all species listed as endangered. That is the appropriate class for analysis, not takes of individual species listed as endangered." Fed. Br. at 28. The Government's argument is flawed because the "class of activities" is divorced from the Supreme Court's guiding principle: Congress' regulation of an intrastate activity must be part of a larger attempt to regulate an interstate commercial market. As *Lopez* explains, *Wickard, Perez, Heart of Atlanta, Hodel, et al* were sustained under the Commerce Clause because Congress was regulating an interstate market. The Government does not — and cannot — show that regulation of takes of all endangered species is part of

regulation of an interstate market.

In *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999), this Court sitting *en banc* affirmed the Hobbs Act convictions of local robberies by reason of an equally divided court. The Government claims that its view of aggregation is even supported by Judge Higginbotham's dissent, which represents the view of the eight dissenting justices. That claim does not withstand scrutiny. Judge Higginbotham's thorough analysis in *Hickman*, which pre-dates the Supreme Court's opinion in *Morrison*, sets out the standard for aggregation: "We would hold that activities may be aggregated where the interactive play of their effects is such that regulation requires the ability to reach individual instances of the activity to be effective." 179 F.3d at 233. Explaining further, Judge Higginbotham stated that:

> [I]ndividual acts cannot be aggregated if their effects on commerce are causally independent of one another. That is, if the effect on interstate commerce directly attributable to one instance of an activity does not depend in substantial part on how many other instances of the activity occur, there is an insufficient connection--in other words, an interactive effect--and the effect of different instances cannot be added. If, on the other hand, the occurrence of one instance of the activity makes it substantially more or less likely that other instances will occur, then there is an interactive effect and the effects of different instances can be added. It is this principle that we believe is meant when the Supreme Court speaks of a "class of activities."

*Id.* at 233.

Under this standard, to aggregate the effect of takes of *all* endangered species,

as the Government seeks, there is must be an interactive effect. Yet no such interactive effect is present here. It is undisputed that the Cave Bugs live their entire lives underground in isolation. (RX F:689-91). The take of a Cave Bug does not depend on whether an endangered fish, for instance, is taken in the Pacific Northwest or whether an endangered bird or bug is taken in Colorado or *vice versa*. In other words, the occurrence of a take of a Cave Bug does not make it "substantially more or less likely" that a take of some other listed species will occur. Thus, the Government's claim that the *Hickman* dissent supports its view of aggregation is wholly unfounded. To the contrary, the aggregation analysis by the *Hickman* dissent both supports GDF's position in this case and foreshadowed the Supreme Court's aggregation analysis in *Morrison*.

### 3. Aggregation cannot be used to sustain regulation of non-commercial activity.

In addition to claiming that aggregation is appropriate because the regulated activity is purportedly "economic," the Government makes an alternative, fall-back argument that, even if the regulated activity is "non-economic," such activity can still be aggregated. The Government states two reasons in support of its claim that "non-economic" activity can be aggregated. First, the Government claims that the *Morrison* court "explicitly refused" to adopt a categorical rule against aggregating the effect of any non-economic activity. Fed.Br. at 24. The Court said nothing of the

sort. The *Morrison* court did not "explicitly refuse" to adopt a categorical rule — it merely said it "need not" adopt such a rule "in order to decide this case." What the court said next — and what the Government left out of its recitation — is far more telling: "[T]hus 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,* 529 U.S. at 613 (emphasis added). In other words, the Supreme Court has *never* sustained aggregation of intrastate, non-economic activity.

The second basis the Government cites in support of its claim that non-economic activity can be aggregated rests on three post-*Lopez*, but pre-*Morrison*, Fifth Circuit cases — *U.S. v. Bird,* 124 F.3d 667 (1997);[13] *United States v. Robinson,* 119 F.3d 1205 (5th Cir. 1997); *U.S. v. Hickman,* 179 F.3d 230 (5th Cir. 1999)(*en banc; per curiam*)(affirming decision below by reason of equally divided court). In light of *Morrison's* recent holding and the perceptible shift in the Supreme Court's Commerce Clause jurisprudence, the Government's reliance on these cases is misplaced.

Some perspective on the development of the Supreme Court's recent Commerce Clause jurisprudence is instructive. *Lopez* is a landmark decision. Prior to *Lopez*, one would have to search back to the New Deal Era to find a case in which the Supreme

[13] *Bird* is also distinguishable because it involved regulation of a commercial market — provision of abortion services — in a way not present here. 124 F.3d at 677-678.

Court held that Congress exceeded its authority under the Commerce Clause. *See A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). Following the Court's watershed decision in *N.L.R.B. v. Jones & Laughlin Steel, Corp.,* 301 U.S. 1 (1937), the Court upheld Congress' Commerce Clause authority *without exception*. This lead most judges and academics to conclude that the Court had abandoned its role in policing this aspect of Federalism. This conclusion is reflected in the following observation: "Before *U.S. v. Lopez,* Congress's commerce powers were unlimited. '[One] wonder[s] why anyone would make the mistake of calling it the Commerce Clause instead of the "Hey, you-can-do -whatever-you-feel-like Clause."'" *U.S. v. Wall,* 92 F.3d 1444, 1454 (6th Cir. 1996)(Boggs, J., dissenting).

*Lopez's* bare holding — that Congress exceeded its Commerce Clause authority — thus marked a watershed. Even more significant, though, was the *reasoning* employed by the Court. Without question, the most significant aspect of that reasoning was the Court's focus on the nature of the regulated activity and its relationship to the aggregation principle. *Lopez*, 514 U.S. at 599-601. *Lopez* held that aggregation could not be used to sustain the Gun-Free School Zones Act because the regulated activity was not commercial in nature, nor an essential part of a scheme of economic regulation. *Id.* Although *Lopez's* language on this point is clear, lower courts and academics differed on *Lopez's* "true" meaning. Some contended that it was merely an aberration, while others saw *Lopez* as a rejuvenation of Federalism. Given

the pre-*Lopez* "galactic growth" of the Commerce Clause's application, this uncertainty and debate was perhaps understandable. *Home Builders,* 130 F.3d at 1061.[14] *Morrison* foreclosed any lingering debate, though.

*Morrison* reaffirmed *Lopez* in substantially stronger fashion and re-emphasized the centrality of the commercial v. non-commercial nature of the regulated activity in the Court's analysis, stating: "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison,* 529 U.S. at 610. Having determined that the regulated activity was not economic in nature, the Court expressly rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison,* 529 U.S. at 617.

Simply put, after *Morrison,* aggregation of intrastate, non-commercial activity is not tenable. In this sense, it is the dissent in *Hickman* that properly stated the rule prohibiting aggregation of intrastate, non-commercial activity. Post-*Morrison* Fifth Circuit law confirms that view. *U.S. v. Johnson,* 194 F.3d 657, 665-66 (5th Cir. 1999) (Garwood, J., concurring), *cert. granted,* 120 S.Ct. 2193 (2000), *aff'd on remand*, 246 F.3d 749, 752 n.5 (5th Cir. 2001) (per curiam)(concurring opinion of Judge Garwood, holding that aggregation of non-economic activity is inappropriate, is controlling upon

[14] *Home Builders* is illustrative of this point because of the wide-ranging disagreement between all three judges about how to interpret and apply *Lopez*.

remand).[15]

### B. The Government and the District Court's purported "as-applied" analysis fundamentally mischaracterizes the nature of this case and improperly relies on collateral and attenuated activities to establish a link with interstate commerce.

Without question, the Government's primary defense of the take provision is premised on a broad, essentially pre-*Lopez/Morrison* aggregation claim. Nevertheless, the Government also offers a half-hearted defense of the take provision "as-applied."

The first flaw in the Government's (and the District Court's) purported "as-applied" analysis is that it badly mischaracterizes the nature of the GDF's complaint in this case. GDF clearly and unequivocally challenged the Government's authority to regulate take of Cave Bugs. In other words, the challenge is to the take provision *as-applied to all Cave Bugs* because Congress fundamentally lacks the authority to regulate this type on intrastate, non-commercial activity. The Government mischaracterizes GDF's complaint and attempts to re-frame the issue to its liking, stating: "GDF ... alleges only an "as-applied" challenge to the Act. ... The single issue presented, therefore, is whether the take provision is constitutionally as applied to the development of GDF's property." Fed. Br. at 49. The purpose of the

[15] A Hobbs Act case, *United States v. McFarland,* 281 F.3d 506 (5th Cir. 2002), currently under consideration by this Court *en banc* may further delineate the full extent to which aggregation may be used to sustain regulation of intrastate *activity*.

mischaracterization in clear: the Government seeks to use GDF's proposed development on GDF's land adjacent to the Cave Bug Preserves as a basis for establishing a nexus with interstate commerce.

The fundamental flaw in the Government's approach here is the insistence upon looking at activities other than what the take provision *actually regulates* to establish a nexus with commerce — *e.g.,* GDF's proposed development or travel by scientists. Obviously, the take provision does not regulate development or travel related to scientific research. It bears repeating that the take provision only regulates harm to wildlife, regardless of motive or means.

In *Lopez*, the government similarly attempted to defend the regulation in question by linking the regulated activity (gun possession near schools) to a substantial effect on interstate commerce through an attenuated chain of causation. Two arguments were advanced. Gun possession near schools, the government argued, 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.* Similarly, in *Morrison*, the government attempted to defend the regulation in question by linking the regulated activity (gender-motivated harm to humans) to a substantial effect on interstate commerce through an attenuated chain of causation premised on "interstate travel," "national productivity," "interference with

interstate business" and various other rationales. *Morrison*, 120 S.Ct. at 1752-53. Unlike *Lopez*, the government's position was bolstered by extensive congressional findings supporting these attenuated connections.

The Supreme Court rejected the "costs of crime" and "national productivity" rationales in *Lopez* and the "interstate travel," "national productivity," and "interference with interstate business" rationales in *Morrison.* *Lopez,* 115 S.Ct. at 1631-34; *Morrison,* 120 S.Ct. at 1751. Significantly, though, the Court did not reject those rationales on an empirical basis. In other words, the Court did not cast doubt on the assertion, for instance, that guns near schools hamper education, which ultimately reduces national productivity. Instead, the Court rejected the attenuated rationales to protect Federalism. Because the rationales lack any logical stopping point, their acceptance would provide no real limits on the Commerce power, thereby "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 115 S.Ct. at 1634.

Here, the Government attempts to defend the take provision's application to Cave Bugs by linking the regulated activity to a substantial effect on interstate commerce through a chain of causation far more attenuated than those rejected in *Lopez* and *Morrison*. The Government posits that the take provision can be upheld by looking to the effect that takes of Cave Bugs have on scientific research, travel and future commerce.

Not only do these rationales lack any logical stopping point, the attenuation needed to bridge the gap between the regulated activity and the effect on interstate commerce is far more exaggerated than that at issue in *Lopez* and *Morrison*. Here, the attenuation is *two way*. That is, ***both the activity causing the take***[16] (land clearing and runoff from the proposed development of the Plaintiffs' property which, according to FWS, causes take of the Cave Bugs in the Cave Bug preserves) and ***the activity which supplies the nexus with interstate commerce*** (scientific research and associated travel of scientists) are *very* distantly removed from the actual take of the species.

Although the Government contends that "scientific research"[17] provides a link to interstate commerce that is "shorter, more certain, and more direct" than *Lopez* and *Morrison,* in actuality, the following hyper-attenuated chain of causation is necessary to connect the Plaintiffs with a take of the Cave Bugs and to connect the take of Cave Bugs with a substantial effect on interstate commerce. FWS claims that development of the Hart Triangle Property above the 1010' and 1030' contour lines will cause take

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[16] This illustration assumes for the sake of argument that takes of the Cave Bugs will in fact occur if development takes place on the Hart Triangle Property. In actuality, when the Purcells dedicated the ten-acre Cave Bug preserves to TSNL in perpetuity, they were regarded by FWS and renowned expert James Reddell as adequately protecting the Cave Bugs from development activities.

[17] Reliance on scientific research as "commerce" is misplaced because the ESA expressly states that such activities are not "commercial." 16 U.S.C. §1532 (definition of "commercial activity").

of the Cave Bugs, primarily through runoff from the developed area.[18] That runoff, FWS claims, filters down into the karst limestone on the Hart Triangle Property and then migrates through unknown (but assumed by FWS) subterranean connections into the caves and sinkholes on the adjacent TSNL Cave Bug preserves in which the Cave Bugs live. The runoff which has made its way through the assumed subsurface interconnections to the TSNL Cave Bug preserves will, according to FWS, adversely modify the habitat of the Cave Bugs, which habitat modification constitutes "harm" as that term has been administratively defined by the FWS, 50 C.F.R. §17.3, and is therefore a prohibited "take" of listed species prohibited by §9(a)(1)(B) of the ESA, 16 U.S.C. §1538(a)(1)(B). That take of a Cave Bug would then have to exert a *substantial* effect on interstate commerce through reduced Cave Bug populations, whose reduction would lead to reduced scientific research by a single out-of-state scientist (see Affidavit of Ubick), who will be (presumably) less likely to travel to Central Texas to study the Cave Bugs because of this supposed harm.[19]

After *Lopez* and *Morrison*, it is inconceivable that this scenario — with its

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[18] (RX E:325-331; RX F:691-693)

[19] This scenario even assumes, for the sake of argument, that the Government met its burden of proof to show that takes of the Cave Bugs cause a reduction in scientific research or travel. The record comes nowhere near supporting that assumption. The Government relied on one barebones affidavit from Darrell Ubick, which is objectionable because it relies on hearsay, is based on speculation, and is utterly without foundation. Even putting aside those objections for the sake of argument, the affidavit simply does not support the proposition that takes of the Cave Bugs have reduced or will reduce scientific study or the travel of scientists to study the Cave Bugs.

two-way hyper-attenuated chain of causation — is the sort of close and direct connection to commerce sufficient to allow congressional regulation. If Congress can regulate (or even *criminalize*)[20] a traditionally local function (land clearing activities on private property), merely because runoff from that developed property is postulated to percolate through the substrata to adjacent property inhabited by Cave Bugs — which in and of themselves have no commercial value or application whatsoever — simply because it is postulated that a scientist might make the unilateral decision to cease study of those Cave Bugs or might make the unilateral decision not to hop on a plane to come to Central Texas to study those Cave Bugs, then it is impossible to conceive of any limits to Congress' Commerce Power.

## III. The Treaty Power cannot be used to sustain the regulation of local, non-migratory species.

In addition to upholding the take regulation's application to the Cave Bugs under the Commerce Clause, the Government suggests — but never clearly articulates — that the take regulation might be supported by the Treaty Power as well. Fed. Br. at 47-48. The District Court did not hold that the take provision is supported by the Treaty Power. Nevertheless, to the extent that the Government is claiming that take of the Cave Bugs — a purely local species — can be supported by the Treaty Power,

[20] Fred Purcell, the principle of Plaintiff Parke Properties I, L.P. & Parke Properties II, L.P., has been criminally threatened by FWS for ESA take violations caused by land cleaning. (RX E:323).

that suggestion is misplaced.

The flaw in the Government's argument is fundamental. The Treaty power cannot be used to trump constitutional rights — including the right to a Federal Government of limited, enumerated powers. In other words, our constitutionally-mandated federal structure, which is designed to protect our basic liberties, cannot be evaded through negotiation of a treaty with a foreign nation. This point was clearly stated by the Supreme Court in *Reid v. Covert*, 354 U.S. 1, 17 (1957):

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights ) let alone alien to our entire Constitutional history and traditional ) to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing Constitutional prohibitions.

*Reid v. Covert*, 354 U.S. 1, 17 (1957).

The Supreme Court expanded upon *Reid*'s holding — that Congress' Treaty power cannot be used to make an end-run around constitutional limits — in *Boos v. Barry*, 485 U.S. 312, 324 (1988)("It is well-established that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.")

Thus, under *Reid* and *Barry*, if Congress lacks the authority to regulate takes of the Cave Bugs under Article I, §8, the Treaty power cannot confer an independent basis of federal authority. This rule makes particular sense in this case because the

species in question here are undeniably local and do not traverse state boundaries, much less international boundaries.[21] As such they are not the proper subject of an international treaty, particularly if the "implementation" of that treaty would eviscerate the Constitution's enumeration of powers.

## IV. Irrelevant or erroneous facts or issues raised by the Government.

The Government attempts to cloud the otherwise clear issues in this case by raising several irrelevant or erroneous legal and factual claims. Those claims serve no other purpose but to divert the Court's attention from straightforward application of the Commerce Clause analysis set forth in *Lopez* and *Morrison*.

Future Commerce

Probably the most significant canard raised by the Government is the claim that potential "future commerce" in the Cave Bugs justifies upholding the take provision's application here. This claim ignores the fact that there has never been any commerce of any nature whatsoever in the Cave Bugs. (RX E:320-21; RX F:690-92). This point

[21] The local, non-migratory nature of the Cave Bugs distinguishes this case from *Missouri v. Holland*, 252 U.S. 416 (1920)(upholding the Migratory Bird Treaty Act based on a treaty covering migratory birds that cross international boundaries). The other case that bears on this point — *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F.Supp. 985 (D. Hawaii 1979) *aff'd*, 639 F.2d 495 (9th Cir. 1981) — is a pre-*Lopez* case whose reasoning does not survive *Lopez* and *Morrison.* Even *Palila's* expansive holding cannot be stretched far enough to encompass the species in question here. The Palila bird was listed in the annexes to the Migratory and Endangered Treaty with Japan and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. The Cave Bugs are not listed in the annexes to the Convention ratified by the Senate. Obviously, the Treaty power cannot be used to justify the regulation of local, non-migratory species not the subject of the treaty.

is confirmed by the FWS' own statements in listing the Cave Bugs. When FWS listed the Cave Bugs, commercial exploitation was not given as a reason for its listing: "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 rank speculation and has no basis whatsoever in fact.

Presumption of Constitutionality

The Government spills a lot of ink trying to defend the take provision's application to the Cave Bugs by reference to the presumption that congressional acts are presumed to be constitutional. Fed. Br. at 19-26. Two quick responses are in order. First, this is not a facial challenge to the take provision; thus, the constitutionality of Congress' act is not at issue. This case presents the substantially more narrow question of whether the take provision can be constitutionally applied to the Cave Bugs. Second, simply because a congressional action starts with the presumption of constitutionality does not mean that it ends up with that presumption. *Lopez* and *Morrison* clearly show that.

Moreover, simply because the ESA has been in existence for almost three decades does not justify the Government's unconstitutional actions in this case. *Marsh v. Chambers*, 103 S.Ct. 3330, 3335-36 (1983) ("[H]istorical patterns cannot justify contemporaneous violations of [the Constitution]."); *Walz v. Tax Comm'n*, 90 S.Ct. 1409, 1416 (1970).

Destructive Interstate Competition

Relying on the Wald opinion from *Home Builders*, the Government asserts that the take provision is necessary to prevent "destructive interstate competition." This assertion stands Federalism and the Tenth Amendment on its head. Without question, land use regulation is a traditional function of state and local government, not the federal government. *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394, 402 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 99 S.Ct. 1171, 1177 (1979). Similarly, the regulation of wildlife[22] within the boundaries of a state has historically been the primary responsibility of the state. *See Douglas v. Seacoast Products, Inc.*, 97 S.Ct. 1740, 1751 (1977) (discussing state's "power to preserve and regulate the exploitation of an important resource"); *Lacoste v. Department of Conservation*, 44 S.Ct. 186, 189 (1924) ("Protection of the wild life of the state is peculiarly within the police power, and the state has great latitude in determining what means are appropriate for its protection."); *Baldwin v. Fish and Game Commission of Montana*, 98 S.Ct. 1852, 1861-62 (1978).

Allowing states to develop competing policies is not "destructive" but is the

[22] Regulation of the species at issue in this case as well as the caves are a matter of state and local concern. TEX. PARKS AND WILDLIFE CODE § 1.011(a): *Nicholson v. Smith*, 986 S.W.2d 54 (Tex. App.—San Antonio 1999, no pet.) (holding fire ants are wild animals); TEX. NAT. RES. CODE § 201.001.

very essence of Federalism. "Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Leibmann*, 52 S.Ct. 371, 386-87 (1932) (Brandeis, J., dissenting).

## CONCLUSION

This is not a complicated case. 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 Government's regulation of take of the Cave Bugs cannot be sustained.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

On the 3rd day of June, 2002, a true and correct copy of the foregoing *Reply Brief of Appellants GDF Realty Investments, Ltd.; Parke Properties I, LP, and Parke Properties II, LP* was served upon all counsel of record as indicated below:

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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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