IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AMERICAN STEWARDS OF LIBERTY, *et al*.	§	
Plaintiff,	§	
	§	CIVIL ACTION NO. 15-cv-1174-LY
v.	§	
	§	
UNITED STATES FISH & WILDLIFE SERVICE, *et al*.	§	
Defendants.	§	

INTERVENOR-PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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To the Honorable Lee Yeakel, United States District Judge:

COME NOW, Intervenor-Plaintiffs John Yearwood and Williamson County, Texas, to file this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Intervenor-Plaintiffs respectfully move this Court for an order granting summary judgment. There is no triable issue of material fact regarding the issue of whether the Defendants United States Fish & Wildlife Service, et al. has the authority to regulate takes of the Bone Cave Harvestman "("BCH"), a subterranean arachnid. Defendant does not have authority to regulate BCH takes because the BCH is not bought or traded in interstate commerce and does not otherwise affect interstate commerce. Regulating takes of a wholly intrastate species exceeds Congress's authority pursuant to both the Commerce Clause and the Necessary and Proper Clause of the Constitution. On these bases, Intervenor-Plaintiffs are entitled to judgment as a matter of law. Intervenor-Plaintiffs' Motion for Summary Judgment is based on the pleadings and papers filed in this action and this motion, as well as the accompanying memorandum, declarations, and any additional response, evidence, or argument that counsel will make at or before the hearing.

MEMORANDUM IN SUPPORT OF INTERVENOR-PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The issue before this Court is whether the United States Constitution authorizes the federal government, pursuant to the Endangered Species Act ("ESA"), to regulate the Bone Cave Harvestman ("BCH")—a tiny subterranean arachnid that only exists in two central Texas counties, is not bought or traded in interstate commerce, and does not otherwise affect interstate commerce. This Court and the U.S. Court of Appeals for the Fifth Circuit previously found such regulation to be Constitutional under the Commerce Clause in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003). However, *GDF Realty* was decided prior to the Supreme Court's decisions in *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), as well as the Fifth Circuit's decision in *United States v. Whaley*, 577 F.3d 254 (5th Cir. 2009). This trio of cases altered the applicable test for evaluating regulations of non-commercial intrastate activity from a traditional Commerce Clause analysis to an analysis where the regulation must be justified under the Necessary and Proper Clause.[1]

Because regulations justified under the Necessary and Proper Clause require a higher level of judicial scrutiny than those justified under the Commerce Clause, a

[1] Several other circuits also now recognize *Raich* and *Sebelius* as Necessary and Proper Clause cases. *See, e.g., United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010) (adopting the reasoning of Justice Scalia's concurrence, interpreting *Raich* as a Necessary and Proper Clause case.) *United States v. Sullivan*, 451 F.3d 884, 888-90 (D.C. Cir. 2006)(same); *United States v. Anderson*, 771 F.3d 1064, 1068-71 (8th Cir. 2014)(interpreting *Raich* and *Sebelius* as Necessary and Proper Clause cases.)

reexamination by this Court of the government's regulation of BCH takes under the ESA is proper.

At the time that *GDF Realty* was decided, the Fifth Circuit still applied very deferential version of rational basis scrutiny to Commerce Clause claims. *See GDF Realty*, 326 F.3d at 627. Under that deferential version of rational basis scrutiny, [2] a court need not determine whether the regulations actually affect interstate commerce in fact, but only whether a hypothetical "rational basis" exists for so concluding. *Id.*

Applying that deferential, no-evidence, standard of review, the court found that regulating BCH takes was rationally related to the regulation of interstate commerce because all species are "interdependent." *Id*. at 640. In other words, without any evidence, the Court unilaterally concluded that extinction of the BCH *could* affect all species and, therefore, *could* substantially affect interstate commerce. *See id.* This purely hypothetical justification was deemed sufficient to uphold the regulation. *Id.*

Even if the *GDF Realty* panel's decision could have been maintained under the lenient version of rational basis scrutiny applied to Commerce Clause challenges at the time—a notion fiercely rejected, even then, by 6 members of the Fifth Circuit[3]—it is unsustainable under the more rigorous Necessary and Proper Clause standard that must be applied now. The Necessary and Proper Clause requires that regulations be (1) "narrow in

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[2] The Fifth Circuit has since rejected this no-evidence approach to rational basis scrutiny in other contexts, *see e.g. St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013)("Our analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts.").

[3] *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (dissenting from the denial of a petition for rehearing en banc) ("[f]or the sake of species of 1/8-inch-long cave bugs, which lack any known value in commerce, much less interstate commerce, the panel crafted a constitutionally limitless theory of federal protection.")

scope," (2) "incidental" to the regulation of commerce, and (3) cannot "work a substantial expansion of federal authority." *Sebelius*, 132 S. Ct. at 2592, 2627.

At a minimum, this standard requires some evidence of an actual connection between the activity regulated and interstate commerce, and some consideration of the effect that allowing such regulations will have on the balance of federal vs state authority. *Reid v. Covert*, 354 U.S. 1, 66 (1957) (Harlan, J., concurring) ("[T]he constitutionality of the statute . . . must be tested, not by abstract notions of what is reasonable 'in the large,' so to speak, but by whether the statute, as applied in these instances, is a reasonably necessary and proper means of implementing a power granted to Congress by the Constitution."); *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause.")

The *GDF Realty* court's no-evidence, ecosystem-equals-commerce approach to federal regulatory authority simply cannot survive this heightened standard of review. If the Commerce Clause authorizes Congress to regulate anything that *might* affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power. Such a broad notion of federal authority has repeatedly been rejected by the courts.

The Administrative Procedures Act ("APA") requires final agency actions (like the Service's continued assertion of jurisdiction over BCH takes and its continued failure to

delist the BCH[4]), to be declared invalid if they are (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (b) contrary to any constitutional right, power, privilege, or immunity, (c) inconsistent with any statute, (d) adopted without compliance with required procedures, (e) unsupported by substantial evidence, or (f) unwarranted by the facts (if reviewed de novo). 5 U.S.C. § 706. Intervenors challenge the Service's continued assertion of authority over BCH takes and its failure to delist the species as not in accordance with law and contrary to constitutional right, power, privilege, or immunity because it exceeds the federal government's authority under the Commerce and Necessary and Proper Clauses. For the reasons that follow, this Court should declare the continued listing of the species invalid under the APA and enjoin its enforcement.

In the alternative, the Court should declare the Service's continued assertion of authority over BCH takes and its failure to delist the species invalid under the Tenth Amendment. The Tenth Amendment protects both states and individuals from actions taken by the federal government in excess of its enumerated powers. *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). This Court should declare the Service's continued assertion of authority over BCH takes and its failure to delist the species invalid and enjoin its enforcement under the Tenth Amendment as exceeding the federal government's powers under the Commerce and Necessary and Proper Clauses.

II. LEGAL BACKGROUND

A. Endangered Species Act

[4] Both evidenced by the Service's most recent negative 90 day finding. *See* 80 Fed. Reg. 30,996.

The ESA was adopted in 1973 in an effort to protect species threatened with extinction. *See* H.R. Rep. No. 93-412, at 4-5 (1973). Through implementation of the ESA, Congress prohibited takes of certain endangered and threatened species. *See* 16 U.S.C. § 1538(a)(1)(B); *see also* 50 C.F.R. § 17.21(c) (2016) (discussing endangered species takes). A "take" is broadly defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct. *See* 16 U.S.C. § 1532(19).

The designation of a species as endangered or threatened forces property owners to seek permits from the United States Fish & Wildlife Service ("Service") for approval of activities that could potentially disturb the species. *See* 16 U.S.C. § 1539(a) (discussing permitting provisions). Consequences of an unauthorized take include civil and criminal penalties, including fines of up to $50,000 and imprisonment for up to one year. *See* 16 U.S.C. § 1540.

B. The Commerce Clause, the Necessary and Proper Clause, and the Tenth Amendment

The Constitution empowers Congress to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. "The commerce power 'is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.'" *Lopez*, 514 U.S. at 553 (citing *Gibbons v. Ogden,* 9 Wheat. 1, 189–190, 6 L.Ed. 23 (1824)).

The Necessary and Proper Clause authorizes Congress to "make all Laws . . . necessary and proper" to execute the powers enumerated in the Constitution. U.S. CONST. art. I, § 8, cl. 18. With respect to the nexus between the Commerce Clause and the Necessary and Proper Clause, the Supreme Court concluded in *Raich* that Congress has the

power to "make all Laws which shall be necessary and proper to regulate Commerce among the several States." *Raich*, 545 U.S. at 22 (internal quotation marks omitted).

The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

III. STATEMENT OF FACTS

A. Regulatory History of the BCH

In 1988, the Service listed the Bee Creek Cave Harvestman as endangered under 16 U.S.C. § 1533. *See* U.S. Fish and Wildlife Service; Endangered and Threatened Wildlife and Plants; Final Rule To Determine Five Texas Cave Invertebrates To Be Endangered Species, 53 Fed. Reg. 36,029 (Sept. 16, 1988). In 1993, the Service issued a correction, splitting the species into the Bee Creek Cave Harvestman and the Bone Cave Harvestman. *See* U.S. Fish and Wildlife Service; Endangered and Threatened Wildlife and Plants; Coffin Cave Mold Beetle (Batrisodes texanus) and the Bone Cave Harvestman (Texella reyesi) Determined to Be Endangered, 58 Fed. Reg. 43,818 (Aug. 18, 1993). However, the initial findings for the Bee Creek Cave Harvestman also apply to the BCH. *Id*. at 43,819. Since 1993 there have been multiple petitions to delist the BCH. None have been successful.

The BCH is a small eyeless arachnid (between 1.4 to 4 mm) that lives solely in caves and voids north of the Colorado River in Travis and Williamson counties, Texas. *See* 53 Fed. Reg. 36,029-30; *GDF Realty,* 326 F.3d at 625. The species has "little or no ability to move appreciable distances on the surface." 53 Fed. Reg. 36,032. Because the BCH is limited to isolated caves, BCH takes do not have a substantial effect on the

ecosystem as a whole. *See* 53 Fed. Reg. 36,030 ("This fragmentation of habitat has resulted in the isolation of groups of caves that have developed their own, highly localized faunas.").

There is no commercial market for the BCH. *See GDF Realty I*, 326 F.3d at 638 ("Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture."). The BCH has never been not bought or traded, nor does the species generate tourism. *Id*. at 638 ("[T]here is no historic trade in the Cave Species, nor do tourists come to Texas to view them."). Indeed, the Service has consistently held that commercial overutilization is not a threat to the BCH. *See* 53 Fed. Reg. 36,031.

The Service justifies regulation of BCH takes on the grounds that the BCH is easily affected by human activities in and around its habitat. *See* 53 Fed. Reg. 36,031. For example, the Service points to obvious threats such as human presence in the caves, vandalism, blocking of cave entrances, and construction or other activities near the caves that could lead to cave-ins. *Id*. at 36,032. The Service also points to less obvious threats, such as activities or development on the land around BCH habitat that could lead to altered drainage patterns into the habitat or cause runoff to enter the habitat carrying chemicals and pesticides. *Id.* at 36,031. Indeed, the Service claims that even affecting the level of humidity in BCH habitat could have harmful effects on the species. *Id*. at 36,032.

Under existing regulations, development within 345 feet of a known BCH cave requires a payment of $10,000 an acre. Ex. A, Declaration of Cynthia Long ¶ 21. This buffer begins at the outermost edge of the cave as it exists underground—not at the cave's entrance. *Id*. Development within 35 feet of a BCH cave requires a payment of $400,000. *Id*.

On June 2, 2014, Plaintiffs filed a petition to delist the BCH based on scientific research regarding whether the species remains threatened. *See* 80 Fed. Reg. 30,990. On June 1, 2015, a full year after Plaintiffs submitted a Delisting Petition, the Service announced a negative finding, refusing, once again, to remove the BCH from the Endangered Species List. *Id.* at 30,996.

Once this lawsuit was filed, the Service stayed proceedings in order to reconsider its negative finding. On May 24, 2017, the service reissued the same negative 90-day finding.

B. Injuries Sustained by Intervenors Due to the Continued Listing of the BCH

a. John Yearwood

John Yearwood owns approximately 865 acres of ranch-land in Williamson County, Texas. Ex. B, Declaration of John Yearwood ¶ 2. The land has been in his family since 1871. *Id.* at ¶ 3. He lives on the property with his wife and son, who recently returned from serving in Afghanistan. *Id.* at ¶ 5. Mr. Yearwood has three BCH occupied sites on his property. *Id.* at ¶ 7. Because the ESA prohibits Mr. Yearwood from engaging in any activities that could potentially harm any endangered species, the BCH listing significantly affects the ways in which Mr. Yearwood can use and enjoy his property in and around those BCH sites. *Id.* at ¶ 16.

Prior to the discovery of BCH on his property, Mr. Yearwood made the areas around the caves available to the local 4-H club, church groups, and members of the military for camping, horseback riding, and other recreation. *Id.* at ¶ 8. He also built a shooting range on the property for the local 4-H club to practice gun-sports. *Id.* at ¶ 10. Mr. Yearwood does not charge these groups for the use of his property. *Id.* at ¶ 9. But for

the federal regulations on BCH takes, Mr. Yearwood would continue to make the property available for recreation. *Id.* at ¶ 11.

Mr. Yearwood is less likely to use or allow others to use the land around the BCH caves to the fullest extent possible due to the risk of prosecution for accidentally violating the ESA provisions prohibiting disturbing or harming BCH. *Id.* at ¶ 12. He is also less likely to develop or maintain the land around the BCH caves due to the risk of prosecution for accidentally violating the ESA provisions that prohibit harm to or disturbance of BCH. *Id.* at ¶ 15.

Mr. Yearwood is informed and believes that using his property around the BCH caves for hunting, camping, gun sports, horseback riding, or other recreation or even clearing brush to reduce the risk of snakes and fires around BCH habitat is likely to cause a BCH take. *Id.* at ¶¶ 13-14. Risk of prosecution for BCH takes therefore limits his ability to use and maintain his property as he sees fit. *Id.* at ¶ 16.

b. Williamson County, Texas

Williamson County is located in Central Texas and there are approximately one hundred caves containing BCH in Williamson County. Ex. A at ¶ 4. Under Williamson County's Regional Habitat Conservation Plan ("Plan") and the County's 10(a) incidental take permit as approved by the Service, the County must acquire and maintain at least three perpetual BCH preserves (karst fauna areas ("KFA")) in each of three designated karst fauna regions ("KFR") for a total of nine preserves. *Id.* at ¶ 5.

In the North Williamson KFR, the County holds these Service-recognized KFAs: Pricilla's Well, Cobb Cavern, Twin Springs, Karankawa. *Id.* at ¶ 6. The County is in process of acquiring Shaman KFA in addition to other preserve areas under the Williamson

County's Plan umbrella. *Id.* at ¶ 6. In the central KFR, the County has two KFAs under Service and peer review: Millennium and Wilco KFAs. *Id.* at ¶ 6. In the south KFR, the county maintains two substantial permanent preserves, Beck and Chaos Cave, which have not been addressed as KFAs yet, and other minor preserves, including Beck Commons and Big Oak Preserve. *Id.* at ¶ 6. Privately controlled preserves include perpetual habitat areas inside Sun City providing over 100 acres of additional permanent preserves. *Id.* at ¶ 6.

The County also holds and manages eleven BCH habitat preserves totaling over 800 acres. *Id.* at ¶ 7. The County is in the process of acquiring an additional 70 acres of BCH preserve, bringing the total County-owned preserve land owned by the County to more than 900 acres. *Id.* at ¶ 8. The County estimates that it will have to acquire an additional 400 acres of BCH preserve to comply with the Plan. *Id.* at ¶ 9.

Maintenance of these preserves is expensive, time consuming, and results in the diversion of funds that would otherwise be expended to provide for the health, safety, and welfare services provided by the County to its residents. *Id.* at ¶ 10. The County must install and maintain metal grate coverings and take other actions to protect cave entrances. *Id.* at ¶ 11. County personnel are required to monitor the caves for fire ants and other hazards to the BCH. *Id.* at ¶ 12.

If fire ants are present in or around a BCH cave, County personnel must eliminate the ants. *Id.* at ¶ 13. The County currently uses steam to eliminate the ants, because pesticides could prove deadly to BCH. *Id.* at ¶ 14. The County's BCH fire ant service costs approximately $19,000 annually. *Id.* at ¶ 15.

Additionally, the Plan requires the County to maintain a perpetual $20,000,000 conservation fund to cover any BCH conservation efforts including maintenance,

monitoring and protection in perpetuity of established KFAs and preserve areas. *Id.* at ¶ 16. The conservation fund is funded, in part, by tax dollars that would otherwise flow into the County's general fund to be used by the County to provide services to residents. *Id.* at ¶ 17.

County buildings and facilities, parks, infrastructure and other County services have been adversely affected by the prohibition on BCH takes and the required incidental take permit. *Id.* at ¶ 18. The County anticipates the placement and cost of county buildings, facilities, parks, sports fields, water lines, and other County services will be impacted by the continued listing of the BCH . *Id.* at ¶ 19.

IV. JURISDICTION AND STANDARD OF REVIEW

In order to prevail on its APA claim, Intervenor-Plaintiffs must establish that the Service's continued assertion of authority over BCH takes or its failure to delist the species is not in accordance with law, 5 U.S.C. § 706(2)(A), or contrary to any constitutional right, power, privilege, or immunity, 5 U.S.C. § 706(2)(B). To establish entitlement to judgment on either of these grounds, Intervenor-Plaintiffs must show that the Service's regulation of the BCH exceeds Congress's authority under the Commerce Clause or the Necessary and Proper Clause.

V. THE LEGAL FRAMEWORK HAS CHANGED SINCE *GDF REALTY*

This is not the first time that application of the ESA's take provision to the BCH has been at the center of a constitutional challenge. The Fifth Circuit considered this very issue thirteen years ago in *GDF Realty*, concluding that application of the ESA's take provision to the BCH is a constitutional exercise of the Commerce Clause power. *See GDF Realty*, 326 F.3d at 640–41.

GDF Realty is controlling on most issues in this case. But subsequent decisions by the Supreme Court and Fifth Circuit, holding that the regulation of intrastate non-commercial activities should be subject to review under the Necessary and Proper Clause, renders the conclusion of the *GDF Realty* panel invalid.

At the time *GDF Realty* was decided, it was assumed that such activities were regulated under the Commerce Clause. The *GDF Realty* panel thus applied rational basis scrutiny to uphold the ESA regulation of BCH takes, despite the fact that there is no evidence that BCH takes affect interstate commerce. As explained below, the original panel's hypothetical justification for regulating BCH takes cannot survive under the heightened scrutiny required by the Necessary and Proper Clause. Indeed, even if rational basis scrutiny were still required, the panel's no-evidence approach to rational-basis scrutiny has since been rejected by the Fifth Circuit.

A. At the Time *GDF Realty* Was Decided, the Interplay Between the Commerce Clause and the Necessary and Proper Clause Was Unclear

The Commerce Clause grants Congress the authority to regulate commerce between the several states, foreign nations, and the Indian Tribes. U.S. Const. art. I, § 8, cl. 3. The Necessary and Proper Clause implies that Congress can regulate non-commercial, intrastate activities when the regulation is "necessary and proper" to exercise Congress' power to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 18.

This interplay sets up a two-step analysis. First, the court must determine whether the law at issue is a regulation of "interstate commerce," as that term is defined under the Commerce Clause. If it is, then the Necessary and Proper Clause does not come in to play. However, if the law is not a regulation of interstate commerce, then as a second step, the court must address whether the law is justified under the Necessary and Proper Clause.

In *United States v. Lopez*, the Court condensed its Commerce Clause jurisprudence into a three-category test. *See Lopez*, 514 U.S. 549, 558–59 (1995). These are commonly referred to as the *Lopez* categories. Under *Lopez*, Congress has authority to regulate (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce." *Id.* at 558-59. While the first two categories were well established extensions of the commerce power. The Court had, to that point, sent mixed signals as to whether the third *Lopez* category was derived from the Commerce Clause directly, or through the Necessary and Proper Clause. *See, Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 585-586 (1985) (O'CONNOR, J., dissenting) (explaining that *United States v. Darby*, 312 U.S. 100 (1941), *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), and *Wickard v. Filburn*, 317 U.S. 111 (1942) based their expansion of the commerce power on the Necessary and Proper Clause, and that "the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce").

Five years later, in *United States v. Morrison,* 529 U.S. 598 (2000), the Court articulated four factors that courts should look at to determine whether or not a regulation targets activities that substantially affect interstate commerce and therefore satisfies the third *Lopez* category. Under *Morrison*, these factors include (1) the economic nature of the intrastate activity; (2) the presence of a jurisdictional element in the statute, which limits its application to matters affecting interstate commerce; (3) any congressional findings in the statute or its legislative history concerning the effect the regulated activity has on

interstate commerce; and (4) the attenuation of the link between the intrastate activity and its effect on interstate commerce. *Morrison*, 529 U.S. at 610-612.

Additionally, both *Lopez* and *Morrison* agreed that a regulation of intrastate activity could also be found to have a substantial effect on interstate commerce if it was an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. *GDF Realty* was decided solely on the basis of this additional factor. *GDF Realty*, 326 F.3d at 628-29.

B. The *GDF Realty* Court Applied an Outdated View of the Commerce Clause by Holding that Regulations Justified Under the Third *Lopez* Category Are Subject to a No-Evidence Version of Rational Basis Review

In *GDF Realty*, the Fifth Circuit determined that neither of the first two *Lopez* categories were at issue, i.e., regulation of the BCH did not involve (1) "the use of the channels of interstate commerce"; or (2) "the instrumentalities of interstate commerce." *GDF Realty I*, 326 F.3d at 628.[5] Instead, the Fifth Circuit focused its analysis on the third *Lopez* category and evaluated whether regulation of BCH takes under the ESA was the type of activity "that substantially affects interstate commerce." *Id*

Looking to *Morrison*, the court considered, (1) the economic nature of the intrastate activity—i.e., BCH takes; (2) the presence of any jurisdictional element in the ESA, which limits its application to matters affecting interstate commerce; (3) any congressional findings in the statute or its legislative history concerning the effect the regulated activity has on interstate commerce; and (4) the attenuation of the link between BCH takes and

[5] This portion of the court's analysis is not surprising. After all, a tiny cave dwelling arachnid is neither akin to a river (a channel of interstate commerce) nor a boat (an instrumentality of interstate commerce).

their effect on interstate commerce. *See GDF Realty*, 326 F.3d at 628-29. The Court issued findings effectively negating each of these factors.[6]

The Court then turned to the final test, namely, whether regulating BCH takes was "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." In a surprise turn, the Fifth Circuit upheld the ESA's application to the BCH.

Applying a no-evidence form of rational basis scrutiny, the court concluded that (1) the ESA is a larger regulation of economic activity because its prohibitions are often "directed at activity that is economic in nature," and (2) the regulation of BCH takes an "essential part of the economic regulatory scheme" because of the "interdependence of species." *GDF Realty I*, 326 F.3d at 640. Put another way, the court held, without evidence, that protecting the BCH is necessary to the ESA because the extinction of an intrastate species might affect interstate species, which might affect interstate commerce.

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[6] First, the court concluded that BCH takes are non-economic. *See GDF Realty*, 326 F.3d at 638 ("Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be."). Second, the panel held that "ESA's take provision has no jurisdictional requirement that might otherwise limit its application to species bearing some relationship to interstate commerce." *Id.* at 632–33. Finally, the court noted that the connection between BCH takes and interstate commerce, alone, was attenuated. *Id.* at 637-38 ("The possibility of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster."). The court explained, Cave Species takes cannot be aggregated with takes of other endangered species in order to convert the take of BCH to a commercial activity. *Id.* at 638 ("To accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation."). A non-economic activity cannot be aggregated "based solely on the fact that, post-aggregation, the sum of the activities will have a substantial effect on commerce." *Id.* As the Supreme Court noted in *Morrison*, "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

As explained below, this purely hypothetical, ecosystem-equals-commerce approach to the Commerce Clause cannot survive review under the Necessary and Proper Clause.

C. The Supreme Court Decided Post-*GDF Realty* that the Third *Lopez* Category Should Be Interpreted Under the Necessary and Proper Clause and, Therefore, Not Subject to Rational Basis Review

Since the Fifth Circuit decision in *GDF Realty* in 2003, two Supreme Court opinions, *Raich* and *Sebelius*, have changed the constitutional basis to evaluate the Commerce Clause under the third *Lopez* category from a pure Commerce Clause analysis to an analysis viewed through the Necessary and Proper Clause.

In *Raich*, Justice Scalia explained that the third *Lopez* Category—under which *GDF Realty* was decided—is not properly interpreted under the Commerce Clause, but instead falls under the Necessary and Proper Clause. As Scalia explained, "unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72 (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Raich*, 545 U.S. at 34.

The Fifth Circuit adopted his approach four years later in *Whaley*, 577 F.3d. at 260, and the Supreme Court affirmed Scalia's approach in *Sebelius*, 132 S.Ct at 2593 (characterizing *Raich* as a Necessary and Proper Clause decision and finding, "Accordingly, we recognized that Congress was acting well within its authority under the Necessary and Proper Clause . . . ") (internal quotation marks omitted). Several appellate

courts likewise now recognize *Raich* as applying the Necessary and Proper Clause. *See, e.g., United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010) (adopting the reasoning of Justice Scalia's concurrence, interpreting *Raich* as a Necessary and Proper Clause case.) *United States v. Sullivan*, 451 F.3d 884, 888-90 (D.C. Cir. 2006) (same); *United States v. Anderson*, 771 F.3d 1064, 1068-71 (8th Cir. 2014)(interpreting *Raich* and *Sebelius* as Necessary and Proper Clause cases.)

As explained below, this switch is significant because the Necessary and Proper clause requires a higher level of scrutiny than the rational basis scrutiny applied to Commerce Clause claims.

D. The Necessary and Proper Clause Requires More Rigorous Review of Regulations than the Commerce Clause

The Necessary and Proper Clause differs from rational basis scrutiny in two key ways. First, unlike the rational relationship required by rational basis scrutiny, regulations subject to review under the Necessary and Proper Clause must be necessary—i.e., "plainly adapted"—to an enumerated power. To be "plainly adapted," a regulation must be (1) "narrow in scope," and (2) "incidental" to the regulation of commerce. *Sebelius*, 132 S. Ct. at 2592. Second, the Necessary and Proper Clause adds an additional level of protection, by requiring that regulations also must be "proper"—i.e., within the "letter and spirit of the constitution" and in accord with the traditional balance of power between the federal government and the states. *Sebelius*, 132 S. Ct. at 2579.

That these two requirements require more than the "means-ends" hypothetical rationality of the Commerce Clause rational basis test is evident from the text and history of the Necessary and Proper Clause. First, the term "Necessary" implicitly requires more than hypothetical rationality. Indeed, it was hotly debated amongst the Founding Fathers

whether that term required "absolute physical necessity" *M'Culloch v. Maryland*, 17 U.S. 316, 413 (1819). Justice Marshall settled the debate in *M'Culloch*, by holding that absolute necessity was not required. Instead, regulations must be "appropriate" and "plainly adapted" to an enumerated power and consistent "with the letter and spirit of the constitution." *M'Culloch*, 17 U.S. at 421.

But even this compromise is still a far cry from rational basis scrutiny. As Justice Thomas recently explained: "'Appropriate' and 'plainly adapted' are hardly synonymous with 'means-end rationality . . . . [a] statute can have a 'rational' connection to an enumerated power without being obviously or clearly tied to that enumerated power. To show that a statute is 'plainly adapted' to a legitimate end, then, one must seemingly show more than that a particular statute is a 'rational means,' to safeguard that end; rather, it would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power." *Sabri v. United States*, 541 U.S. 600, 612-13 (2004) (Thomas, J., concurring) (internal citation omitted).

Second, the Necessary and Proper Clause places an additional layer of protection not afforded under rational basis scrutiny by requiring that the regulation be proper—i.e. that it be within the letter and spirit of the Constitution and not upset the traditional balance of power between the federal government and the states. *Sebelius*, 132 S. Ct. at 2579. To the Founding generation, this second level of protection was of the utmost importance. As Thomas Jefferson explained, merely requiring a necessary connection to an enumerated power would quickly turn a government of enumerated powers into one of unlimited authority. "Congress is authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines necessary for copper; a company necessary to work

mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built?'" Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), *in* 10 *The Writings of Thomas Jefferson* 165 (Albert Ellery Bergh ed., 1903).

In *Sebelius*, 132 S.Ct. 2566 (2012), the Court examined more fully what that heightened scrutiny would look like. In that case, the Court examined Congress's authority to force people to buy health insurance as part of the larger Affordable Care Act. *Id.* at 2571. Although the Court ultimately upheld the scheme as a tax, it found that the regulation could not be justified under the Commerce Clause when viewed through the Necessary and Proper Clause. *Id.* at 2592. Drawing on a line of cases dating back to *M'Culloch*, 17 U.S. at 421, the court noted that to survive review under the Necessary and Proper Clause a regulation must be "plainly adapted" to serve an enumerated power and "consistent with the letter and spirit of the Constitution." *Sebelius*, 132 S. Ct. at 2579. To meet that standard a regulation must be (1) "narrow in scope," (2) "incidental" to the regulation of commerce, and (3) cannot "work a substantial expansion of federal authority." *Sebelius*, 132 S. Ct. at 2592.

It was this third prong that the Court found the most important in *Sebelius*. In evaluating the individual mandate to purchase health insurance the Court assumed, for the sake of argument, that the ACA was a general economic regulation and assumed that the mandate was "necessary" to the ACA. Nonetheless, the Court held that the mandate was not justified by the Necessary and Proper Clause because it expanded federal authority in a way that was not "proper." *Id*. at 2592 ("Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective."). The Court noted that while the scope of the

Commerce Clause and Necessary and Proper Clause is "uncertain," "[t]he proposition that the Federal Government cannot do everything is a fundamental precept." *Id.* at 2647.

As explained below, this statement directly contradicts *GDF Realty*'s holding that anything that affects the ecosystem affects interstate commerce and therefore subject to federal regulation. *See GDF Realty*, 326 F.3d at 640.

VI. REGULATION OF BCH IS NOT PERMITTED UNDER THE NECESSARY AND PROPER CLAUSE

A. The Regulation of BCH Takes Is Not "Plainly Adapted" to the Regulation of Interstate Commerce

The Necessary and Proper Clause requires that regulations be "plainly adapted" to the regulation of interstate commerce. To meet this burden, a regulation must be: (1) "narrow in scope," and (2) "incidental" to the regulation of commerce. *Sebelius*, 132 S. Ct. at 2592. The application of the ESA to a purely intrastate species that is not bought, sold, or traded in interstate commerce cannot survive review under this standard.

First, the broad regulation of BCH takes is not narrow in scope. The regulation is a blanket prohibition on activities that include harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct. *See* 16 U.S.C. § 1532(19). The ESA take prohibition is not limited to activities that are economic or interstate in nature. The man who disturbs an endangered species by watering his lawn is just as liable to prosecution as the man who disturbs an endangered species by building a Walmart.

Second, the regulation of BCH takes is not incidental to the regulation of interstate commerce. The ESA's take provisions were passed by Congress to protect biodiversity, the interdependence of species, and the value of endangered species' genetic heritage. *See*

H.R. Rep. No. 93-412, at 4 (1973). There is no indication that Congress passed the ESA take provisions with the intent of regulating "economic activities" or that the ESA involves "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 3.

The ESA take provisions may have an incidental effect on commerce by incidentally restricting commercial activities, but that gets the relationship precisely backwards. A regulation is permissible if it is incidental to a broader regulation of *commerce*, not if it is part of a broader regulation of non-commercial activity that happens to affect commerce. *See GDF Realty II*, 362 F.3d at 291 ("It is undeniable that many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under *Lopez* and *Morrison* because they involve commercial or commercially-related activities like hunting, tourism and scientific research . . . . [b]ut in this case, there is no link—as the panel concedes—between Cave Species takes and *any* sort of commerce . . .") (emphasis in original).

Historically, the regulations of intrastate non-commercial activities that the Supreme Court has deemed incidental to the regulation of commerce are those that are an "essential part of a larger regulation of *economic activity*, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *See Wickard* and *Raich*. In both of those cases, the Court was dealing with the regulation of a "fungible commodit[y]" – wheat or marijuana — and therefore recognized that the regulation of intrastate production of that commodity was necessary to regulate interstate trade in that commodity *Id.* at 40.

Other appellate courts to look at this issue have likewise limited the scope of *Raich* and *Wickard* to the regulation of commodities. *See, e.g.*, *United States v. Rene E.*, 583 F.3d 8, 18 (1st Cir. 2009) (""[W]here a regulatory scheme is designed to 'control the supply and demand' of a commodity in the interstate market, a component regulation targeting intrastate conduct will be upheld if it is 'an essential part of the larger regulatory scheme[.]'"); *United States v. Hosford*, 843 F.3d 161, 171-72 (4th Cir. 2016) (upholding a federal firearms regulation because firearms are "a fungible commodity for which there is an established interstate market.")

The Sixth Circuit is in accord, describing "[t]he question under Raich" as "whether Congress had a rational basis for concluding that leaving [some activity] outside federal control would affect price and market conditions of the larger interstate market that Congress was authorized to regulate." *United States v. Bowers*, 594 F.3d 522, 528 (6th Cir. 2010). "Raich indicates that Congress has the ability to regulate wholly intrastate manufacture and possession of [a commodity] . . . that it rationally believes, if left unregulated in the aggregate, could work to undermine Congress' ability to regulate the larger interstate commercial activity." *Id.* at 529; *see United States v. Rose*, 522 F.3d 710, 717 (6th Cir. 2008) ("In Raich . . . the Court held that an activity involving a commodity for which there is an interstate market has a substantial relation to interstate commerce if Congress had a rational basis to conclude that 'failure to regulate that class of activity would undercut the regulation of the interstate market in the commodity.'").

Here, the Court is considering the BCH, which is not a commodity at all, much less a fungible commodity. There is therefore no basis to extend the Supreme Court's holdings in *Raich* or *Wickard* to justify the regulation of BCH takes.

B. Regulation of BCH, a Noneconomic, Intrastate Species, Is Not A Proper Means for Executing the ESA Because it Substantially Expands Federal Authority

To the extent the court disagrees and concludes that regulation of intrastate, noneconomic species such as the BCH is essential or "necessary" to the ESA as a comprehensive economic regulatory scheme, such a broad expansion of federal power should not be upheld as it violates the Necessary and Proper Clause as a regulation not "proper," as it upsets the traditional balance of power between the federal government and the states. *See Sebelius* 132 S. Ct. at 2592.[7] In *Sebelius*, Justice Roberts explained that even a "necessary" regulation could still not be "proper" if it "would work a substantial expansion of federal authority." *Id.* Congress may not reach "beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." *Id.* "[I]t is hardly 'necessary' to regulate every form of local activity in order to regulate the three heads of commerce over which Congress has power. And it is surely not 'proper' to do so." *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

There is no question in this forum as to the federal government's ability to regulate the take of commercially valuable species, species within the channels of commerce, or intrastate species on federal land under the ESA. However, extending the federal government's authority to regulate a species such as the BCH, which is located entirely

[7] *See also Whaley*, 577 F.3d at 260 ("As Justice Scalia has explained in the context of the third *Lopez* category, the Necessary and Proper Clause gives Congress the power to 'regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power.'").

intrastate and has no economic value or meaningful connection to the wide ecosystem is beyond the limits of the Constitution.

The Supreme Court recognized in *Lopez* that determining the outer limits of the federal government's authority under the Commerce Clause requires evaluating whether or not an activity is economic. *See generally Lopez*, 514 U.S. at 561. Migrating away from this view is a slippery slope because, as the Supreme Court recognized in *Lopez*, "depending on the level of generality, any activity can be looked upon as commercial." *Id.* at 565.

Here, it is clear that regulation of the BCH is not an economic regulation; therefore, allowing regulation of the take of the BCH would vastly increase the power of the federal government. Extending the ESA's regulation of take to the BCH would blur the line between "what is truly national and what is truly local" regulation and impermissibly convert Congress's authority under the Commerce Clause to a "general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. The government may not "pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States." *Id.*

VII. THE TENTH CIRCUIT'S RULING IN *PETPO* IS NOT CONTROLLING OR PERSUASIVE IN THIS CASE

Defendants will point to *People for Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990, 1002 (10th Cir. 2017) (*PETPO*) because it is the only challenge to the ESA to be heard since *Raich* and *Sebelius* were decided. As in this case, the plaintiffs in *PETPO* challenged Congress' authority to regulate a purely intrastate species—the Utah prairie dog—under the ESA. Relying in part of *GDF Realty*,

the Tenth Circuit held that federal regulation of Utah Prairie Dogs under the ESA was permissible under the Commerce Clause, because the ESA's regulation of intra-state species is an "essential part of a broader regulatory scheme that, as a whole, substantially affects interstate commerce." *Id.*

The ruling is not controlling or persuasive here for several reasons. First, the parties in *PETPO* did not brief or argue the Necessary and Proper Clause issue presented in this case. A case is not precedent for an issue not before the court.

Second, even if the parties in *PETPO* had briefed the Necessary and Proper Clause issue, the 10th Circuit's ruling would not be persuasive in this Court because it is contrary to the Fifth Circuit's holding in *Whaley*. To the extent that the *PETPO* court addressed the Necessary and Proper clause at all, it held that Scalia and Roberts' discussions of the Necessary and Proper Clause in *Raich* and *Sebelius* were either dicta or not controlling and therefore did not apply in the Tenth Circuit. *Id*. at 1005 n. 9, n. 10. However, that option is not available for this Court. In *Whaley*, 577 F.3d. at 260, the Fifth Circuit expressly adopted Scalia's opinion in *Raich* as controlling for the Fifth Circuit.

Third, even if this Court rejects Plaintiffs' Necessary and Proper Clause arguments, the *PETPO* holding is still not persuasive, because the *PETPO* court applied a hyper-deferential, no-evidence version of rational basis scrutiny in interpreting the Commerce Clause that has been rejected by the 5th Circuit. In *PETPO*, the court held that "to determine whether a regulated activity substantially affects interstate commerce, we ask whether Congress had a *rational basis* to find that the regulated activity, taken in the aggregate, would substantially affect interstate commerce… we need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in

fact, but only whether a 'rational basis' exists for so concluding." *Id*. at 1001. Yet, the Fifth Circuit rejected this hypothetical approach to rational basis scrutiny in *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013), noting that "our analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts."

Finally, even if this court rejects Plaintiffs' Necessary and Proper Clause arguments, *PETPO* and *GDF Realty* were simply wrongly decided under *Lopez*. In *Lopez*, the court made clear that even under that test, "the proper test requires an analysis of whether the regulated activity substantially affects interstate commerce." *Lopez*, 514 U.S. at 559. BCH takes have no impact on commerce at all. *GDF Realty II*, 362 F.3d at 291 ("in this case, there is no link—as the panel concedes—between Cave Species takes and *any* sort of commerce . . .") (emphasis in original).

VIII. CONCLUSION

For the foregoing reasons, the listing of the BCH under the ESA and prohibition on its take exceeds Congress's authority under the Commerce Clause. Furthermore, should the court conclude that regulation of the take of the BCH has a substantial effect on interstate commerce, that application of the ESA take provisions to the BCH as a wholly intrastate, noneconomic species results in a limitless expansion of federal authority, which is impermissible under the Necessary and Proper Clause.

Dated: October 6, 2017

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 6, 2017, a true and correct copy of the foregoing was served via electronic means to all parties entitled to receive notice in this case through the Court's ECF system.

/s/ Chad Ennis
Chad Ennis