No. 19-50321

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN YEARWOOD; WILLIAMSON COUNTY, TEXAS,
Intervenor Plaintiffs-Appellants-Cross Appellees,

v.

DEPARTMENT OF INTERIOR, ET AL.,
Intervenor Defendants-Appellees-Cross Appellants,

CENTER FOR BIOLOGICAL DIVERSITY; TRAVIS AUDUBON;
DEFENDERS OF WILDLIFE,
Intervenor Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas
No. 1:15-CV-1174 (Hon. Lee Yeakel)

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND THE TEXAS FARM BUREAU IN SUPPORT OF INTERVENOR PLAINTIFFS-APPELLANTS-CROSS APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

No. 19-50321

John Yearwood, et al. v. Department of Interior, et al.

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Appellants' Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 of the Rules of this Court have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Amici Curiae

The American Farm Bureau Federation; the Chamber of Commerce of the United States; the National Association of Home Builders of the United States; the National Federation of Independent Business Small Business Legal Center; and the Texas Farm Bureau. None of the aforementioned amici has a parent corporation, and no publicly held company has any ownership interest in any of them.

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DATED: September 20, 2019

s/ *Paul J. Beard II*
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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

Amici curiae, listed below, are a group of unrelated business and trade associations whose members are regularly affected by enforcement of the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq*. They regularly participate, as parties or amici, in cases of interest to their members. This brief focuses on two aspects of Appellants' claim that the federal regulation of the "take" of a purely intrastate, non-commercial species, such as the Bone Cave Harvestman ("BCH"), is unconstitutional.[2]

First, the BCH regulation finds no support in the Commerce Clause, or the Necessary and Proper Clause, of the United States Constitution. U.S. Const. art. I, § 8, cl. 3, 18. The take of a harvestman does not constitute, and has no substantial effect on, "commerce." Further, it is a wholly intrastate activity, the regulation of which invades an area traditionally left to state and local governments—namely, land use and development.

Second, regulation of the take of a purely intrastate species imposes economic costs on businesses, farmers, developers, and other property owners. Requiring the federal government to respect the limits of the Commerce Clause, and the Necessary

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] The parties have consented to the filing of this amicus brief.

and Proper Clause, would go a long way to relieving that unnecessary and unfair burden on property owners.

Amici are:

1. American Farm Bureau Federation ("Farm Bureau"). The Farm Bureau is a voluntary national membership organization with nearly six million member families in all 50 states and Puerto Rico. Established in 1919, the Farm Bureau's primary purpose is to advance and promote the interests and betterment of farming and ranching; the farming, ranching, and rural community; and the individual families engaged in farming and ranching. This effort involves protecting, promoting, and representing the business, economic, social, and educational interests of American farmers and ranchers.

2. Chamber of Commerce of the United States ("Chamber"). The Chamber is the largest business federation in the world. It represents approximately 300,000 members directly, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases raising issues concerning the business community.

3. National Association of Home Builders of the United States ("NAHB"). NAHB is a trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding

opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of its approximately 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

4. National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center"). NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

5. Texas Farm Bureau ("TFB"). TFB is a Texas non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas. Founded in 1933, TFB has over 526,877 member families across the state and is associated with 206 organized county Farm Bureau organizations in Texas. TFB believes the protection of property rights against unconstitutional encroachment by the

federal government is of critical importance to its members and the State of Texas as a whole.

ARGUMENT

I. Federal Regulation of the BCH Exceeds Congress's Power Under the Commerce Clause, and the Necessary and Proper Clause

The only possible constitutional support for the BCH regulation that the Service can point to is the Commerce Clause, supplemented by the Necessary and Proper Clause. But neither Clause supports the regulation.

Under its modern jurisprudence, the United States Supreme Court has identified three categories of activity that Congress can regulate under the Commerce Clause: (1) "the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, and persons or things in interstate commerce," and (3) "activities that substantially affect interstate commerce" (commonly referred to as the "substantial effects" test). *Gonzalez v. Raich*, 545 U.S. 1, 16 (2005); *see also* U.S. Const. art. I, § 8, cl. 3 (Commerce Clause). The first two categories cannot support the BCH regulation. It does not regulate the channels or instrumentalities of interstate commerce, or persons or things in interstate commerce. The harvestman is "an elusive spider known to inhabit only Travis and Williamson Counties, Texas and does not often reveal itself to even the most skilled observer." *Am. Stewards of Liberty v. Dep't of Interior*, 370 F.Supp.3d 711 (W.D. Tex. 2019). Further, there is no finding or evidence in the record that the

harvestman is a commodity in interstate commerce, or a significant draw for interstate tourism or research.

Nor does the harvestman fall within the third category of local activities substantially affecting commerce, because the "take" of a harvestman is neither commercial nor economic. Recent Supreme Court precedents have altered the Commerce Clause landscape by clarifying that (1) only a regulation that governs *commercial* (or economic) activity can be sustained under the Commerce Clause itself, and (2) regulation of noneconomic, local activity (like take of the harvestman) may be sustained only on a showing that the regulation is "necessary and proper for carrying into Execution" the Commerce Clause power. *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 567 U.S. 519, 550 (2012) (Roberts, C.J.) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated."); *id.* at 552 (Roberts C.J.) (stating that the individual mandate is unconstitutional under the Commerce Clause, not because it does not regulate *any* activity (commercial or noncommercial), but because it "does not regulate existing *commercial* activity" (emphasis added)); *id.* at 649 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (emphasizing that, to be valid under the Commerce Clause, the regulation must, at a minimum, regulate "Commerce"); *see also United States v. Whaley*, 577 F.3d 254, 260-61 (5th Cir. 2009) (holding that the regulation of "noneconomic, local activity" may be sustained only under the Necessary and Proper Clause (quoting and adopting the standard set forth in Justice Scalia's concurrence in *Raich*, 545 U.S. at 35-37 (Scalia, J., concurring)).

Importantly, in a 2016 decision, the United States Supreme Court made an important observation about the third category—the "substantial effects" test—under the Commerce Clause.[3] In *Taylor v. U.S.*, 136 S.Ct. 2074 (2016), the Court held that "activities in this third category—those that 'substantially affect' commerce—may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal." *Id.* at 2079-80. But the Court explicitly confirmed that "cases have upheld Commerce Clause regulation of

[3] The third category, if not totally "rootless and malleable" and "at odds with the constitutional design," is more naturally understood as invoking Congress's Necessary and Proper Clause power—especially when, as here, the challenged regulation targets intrastate, non-economic activity. *Raich*, 545 U.S. at 67 (Thomas, J., dissenting); *see also id.* at 5 ("The question presented in this case is whether the power vested in Congress . . . '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law."); *id.* at 34 (Scalia, J., concurring in the judgment) ("[U]nlike 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 . . ., 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."); *id.* at 58 (Thomas, J., dissenting) ("The majority supports [its] conclusion by invoking, without explanation, the Necessary and Proper Clause," and positing that the "substantial effects" category finds no textual or historic basis in either the Commerce Clause or the Necessary and Proper Clause); *see also NFIB*, 567 U.S. at 561 (Roberts, C.J.) ("[W]e recognized [in *Raich*] that 'Congress was acting well within its authority' under the Necessary and Proper Clause even though its 'regulation ensnare[d] some purely intrastate activity.'").

intrastate activity *only where that activity is economic in nature*." *Id.* (emphasis added) (internal citation and quotation marks omitted).

In light of these recent cases, the district court was wrong to hold that the BCH regulation constitutes a valid exercise of the Commerce Clause power under the third category—the "substantial effects" test—based on this Court's prior decision in *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003). In *GDF Realty*, this Court rejected a Commerce Clause challenge to the BCH regulation on the ground that there was a rational basis for concluding that take of the harvestman substantially affects interstate commerce. But as Appellants argue in their opening brief, the district court's reliance on *GDF Realty* ignores the subsequent precedents of this Court and of the United States Supreme Court discussed above, including *NFIB* and *Whaley*. *See* App. Op. Br. at 31-45. *GDF Realty* has been implicitly overruled. As a result, this Court should hold that the BCH regulation fits none of the three Commerce Clause categories described above, because the regulation does not actually regulate commercial or economic activity as such.

The remaining question before the Court, then, is whether the regulation of a wholly intrastate, noneconomic activity falling outside the purview of the Commerce Clause—like take of the harvestman—nevertheless finds constitutional support in the Necessary and Proper Clause. "Although the [Necessary and Proper] Clause gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution,' it does not license the exercise of any 'great substantive

and independent powers' beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (Roberts, C.J.) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 411, 421 (1819)) (brackets omitted). Whether or not the BCH regulation is "necessary" to Congress's exercise of its commerce power, the regulation surely is not "proper." As explained below, because the BCH regulation reflects an attempt to exercise "great substantive and independent powers beyond those specifically enumerated"—in a way that invades the sovereignty of state and local governments—the regulation is improper and unconstitutional.

To be "proper" within the meaning of the Necessary and Proper Clause, the means used to carry out a law regulating interstate commerce "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution." *Raich* 545 U.S. at 39 (Scalia, J., concurring); *see also NFIB*, 567 U.S. at 559 (Roberts, C.J.) (explaining that "laws that undermine the structure of government established by the Constitution . . . are not 'consist[ent] with the letter and spirit of the constitution' [and] are not 'proper [means] for carrying into Execution' Congress's enumerated powers"). A "proper" law is "consistent with principles of separation of powers, principles of federalism, and individual rights." Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297 (1993); *see also* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 217 (2003) (same).

"[A] law is not proper for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional] principle of state sovereignty." *Raich*, 545 U.S. at 39 (Scalia,

J., concurring) (internal citations and quotation marks omitted); *see also id.* at 52 (O'Connor, Rehnquist, & Thomas, JJ., dissenting) ("Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment."); Lawson & Granger, *supra*, at 297 (concluding, based on comprehensive researching concerning its original meaning, that "the word 'proper' was often used during the founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity"). As the Supreme Court explained in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 586 (1985), "state autonomy is a relevant factor in assessing the means by which Congress exercises its powers" under the Commerce Clause.

The benefits of protecting state sovereignty against federal encroachment cannot be overstated. As the Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) explained:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id. at 458. "Perhaps the principal benefit of the federalist system is a check on abuses of government." *Id.* "[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.*

Regulation of the take of a wholly intrastate, noncommercial species like the harvestman plainly violates the principle of state sovereignty, and is therefore improper,

because it invades two areas of traditional state and local concern: management of a state's wildlife and local land-use decision-making. The BCH regulation therefore represents an attempt to exercise a "great substantive and independent power[]" that cannot fairly be considered "incidental" under the Necessary and Proper Clause. *NFIB*, 567 U.S. at 559 (Roberts, C.J.) (internal quotation marks omitted).

First, states have had a long tradition of preserving wildlife within their borders. John Copeland Nagle, *The Original Role of the States in the Endangered Species Act*, 53 Idaho L. Rev. 385, 386 (2017) ("Historically, states were responsible for the wildlife within their borders."); Dale Bish, Note, *The Unfounded Fears of Environmental Balkanization: The Ninth Circuit's Dangerous Expansion of the Commerce Clause*, 37 U.C. Davis L. Rev. 605, 608 (2003) ("Throughout the eighteenth and nineteenth centuries, states exercised exclusive control over all wildlife within their borders."). Even with the passage of federal conservation laws, like the federal ESA, states retained their traditional concern for wildlife protection and conservation. That is evidenced in part by the fact that "[a]ll fifty states have adopted some form of endangered species protection legislation"—some of which "may be more restrictive than the federal statute." 2 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 21:47 (4th ed. 2017); Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 12 n.56 (1993) (same). As the Court acknowledged in *Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979), "the legitimate state concerns for conservation and protection of wild animals" within a state can and should be "preserv[ed]." *See also*

43 C.F.R. § 24.3(a) ("In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State."); *Wyo. v .United States*, 279 F.3d 1214, 1226 (10th Cir. 2002) (same). The states' concern for wildlife protection and conservation is particularly acute where, as here, it involves a purely intrastate species.

Second, "regulation of land use is perhaps the quintessential state activity." *FERC v. Miss.*, 456 U.S. 742, 768 n.30 (1982); *see also Knick v. Township of Scott*, 139 S.Ct. 2162, 2187 (2019) (Kagan, Ginsburg, Breyer, Sotomayor, JJ., dissenting) (remarking, approvingly, that "[t]he regulation of land use . . . is 'perhaps the quintessential state activity'" (quoting *FERC*, 456 U.S. at 768 n.30)). How land can and should be used has been—and continues to be—the primary responsibility of state and local governments. Indeed, in case after case, the United States Supreme Court uniformly has recognized the importance of preserving state and local sovereignty over land use and development. For example, as the Court stated in *Hess v. Port. Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994), "regulation of land use [is] a function traditionally performed by local governments." *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61. 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad . . . . [C]ourts generally have emphasized the breadth of municipal power to control land use[.]"); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 628, 635-36 (2013) (Kagan, Breyer, Ginsburg, Sotomayor, JJ., dissenting) (underscoring the importance of not "intru[ding] into local affairs" and "localities' land-use authority," and allowing

"state and local governments . . . the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development").

Concerns for protecting state and local control over wildlife and land-use decision-making are well-placed. At stake is nothing less than participatory democracy, and the choice is stark: Either an unelected and unaccountable federal bureaucracy will decide whether and how landowners can use their land, or the decision will remain in the hands of the elected and accountable officials in state and local governments. In the former case, the landowner has little to no say in creating and implementing the rules that will affect his way of life and his livelihood; in the latter case, he does. Indeed, local land-use planning and decision-making typically entail (often multiple) public hearings, the opportunity for affected parties to be heard, and local officials being held to account for their decisions. It is participatory democracy at work. And it is this cherished American tradition that local land-use decision-making protects—and that the district court's decision in this case erodes. *See, e.g.*, Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 Wash. U. J.L. & Pol'y 445, 452-53 (2000) ("Another explanation of the absence of national land-use planning is the preference many individuals appear to express for local control over their lives. Some observers argue that smaller, i.e., local governments, are inherently more responsive to citizens than larger, far-away governments.").

II. Federal Regulation of Wholly Intrastate, Non-Commercial Activity—Such As "Take" of the Harvestman—Causes Significant Harm to Landowners

Amici represent an array of members across the country who operate businesses and farms, and seek to build homes, on properties that may host wholly-intrastate, non-commercial species. If, in addition to state and local governments, the *federal* government can regulate or even prohibit land uses on as tenuous a basis as the protection of a wholly intrastate, non-commercial species, those individuals and businesses will continue to face ever-increasing red-tape, permitting delays, and costs. The broader economy suffers, too—including from the loss of jobs in some of the most vulnerable communities in the country. *See, e.g.*, Richard T. Melstrom, et al., *Do Regulations to Protect Endangered Species on Private Lands Affect Local Employment? Evidence from the Listing of the Lesser Prairie Chicken*, J. of Ag. & Res. Econ. 43(3):346–363 (2018)[4] (concluding that "ESA regulations negatively affect employment in areas with listed species" and that, in the case of the Less Prairie Chicken listing which caused "between 5 and 6 thousand [lost] jobs," "it is a real economic cost to lose thousands of jobs, especially when those jobs are located in areas with a dearth of local alternatives").

Examples of the real economic harm that ESA regulation produces include:

[4] http://www.waeaonline.org/UserFiles/file/JARE43.3September20183Melstrom346-363.pdf (last visited on September 19, 2019).

- When the Service proposed designating over 1500 acres of privately owned land in Louisiana as unoccupied critical habitat for the dusky gopher frog—a species found only in *Mississippi*[5]—the Service estimated the designation would result in economic losses of up to $33.9 million in residential and commercial development opportunities. 77 Fed. Reg. 35,118; 35,141.

- Critical habitat for the green sturgeon was estimated to cost up to $578 million per year (*in addition* to the economic impacts associated with the mere listing of the sturgeon).[6]

- Efforts to protect the three-inch delta smelt, a wholly intrastate species found in California, resulted in water pumping restrictions that devastated agricultural production in Northern California even before the drought, to the tune of an estimated $500 million annually. The same study concluded that economic impacts could "exceed $3 billion in a prolonged dry period."[7]

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[5] The Service acknowledges that "the dusky gopher frog is currently known to occur only within the State of Mississippi." 77 Fed. Reg. 35,118; 35,120. Indeed, until recently, the Service appropriately referred to the species as the "Mississippi gopher frog." *Id.*

[6] https://www.westcoast.fisheries.noaa.gov/publications/protected_species/other/green_sturgeon/g_s_critical_habitat/gschd_finaleconomicrpt.pdf (page ES3-ES5) (last visited on September 19, 2019).

[7] David L. Sunding, et al., *Economic Impacts of Reduced Delta Exports Resulting from the Wanger Interim Order for Delta Smelt* (U.C. Berkeley 2009), *available at:*

- Efforts to protect the northern spotted owl in the Pacific Northwest led to logging restrictions on hundreds of thousands of acres of private land. The restrictions resulted in a massive decline in the region's logging industry, along with the loss of tens of thousands of jobs and millions of dollars.[8] Despite the restrictions, the spotted owl now faces significant competition from other species, prompting—among other things—proposals by the Service to kill thousands of owls each year.[9]
- The listing of the Golden-cheeked Warbler—a wholly intrastate species in Texas—led the value of one landowner's 15 acres to decline from $991,862 to $30,360, due to significant land-use restrictions and permitting requirements associated with that listing.[10]

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https://escholarship.org/content/qt1dp6r5mg/qt1dp6r5mg.pdf (last visited on September 19, 2019).

[8] Randy T. Simmons & Kimberly Frost, *Accounting for Species: The True Costs of the Endangered Species Act* (Property and Environment Research Center), *available at:* https://www.perc.org/wp-content/uploads/old/esa_costs.pdf (last visited on September 19, 2019).

[9] Craig Welch, *The Spotted Owl's New Nemesis*, Smithsonian Magazine (January 2009), *available at*: https://www.smithsonianmag.com/science-nature/the-spotted-owls-new-nemesis-131610387/ (last visited on September 20, 2019).

[10] Brian Seasholes, *Bad for Species, Bad for People: What's Wrong with the Endangered Species Act and How to Fix It*, NCPA Policy Report No. 303, at 6 (National Center for Policy Analysis 2007), *available at*: http://www.ncpathinktank.org/pub/st303 (last visited on September 19, 2019).

- The appearance of the Delhi Sands flower-loving fly—a wholly intrastate species in California—led to federal requirements that stalled for years a wide variety of economic development projects, including a 218-acre retail and residential development, a recycling plant, and more than a dozen other projects.[11] A local paper described the painful impact of the federal restrictions on one family. As Lori Pierson Cripe told the paper, "My dad acquired this piece of property [14 acres of land] in 1975, and it was always his dream that this property would be sold to fund his and my mom's retirement. They were married over 50 years." But the federal restrictions on behalf of the fly "tied up [the family's land] for more than 20 years." When the decision was made to lift those federal restrictions, Ms. Cripe recounted, it "came 13 years too late for her father's dream. He died at age 79."[12]

The examples above illustrate how severe the economic impacts of ESA regulation can be on businesses, farmers, developers, property owners, and the larger community.

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[11] *Endangered Fly Stalls Some California Projects*, N.Y. Times, Dec. 1, 2002, available at: https://www.nytimes.com/2002/12/01/us/endangered-fly-stalls-some-california-projects.html (last visited on September 19, 2019).

[12] Leslie Parrilla, *Colton to Finally Develop on Land on Hold Due to Endangered Fly*, The Sun, Feb. 5, 2015, *available at*: https://www.sbsun.com/2015/02/05/colton-to-finally-develop-on-land-on-hold-due-to-endangered-fly/ (last visited on September 19, 2019).

The plight of landowners under the ESA cries out for a decision that limits the Service to the confines of the Commerce Clause, and the Necessary and Proper Clause. Such a decision would not only alleviate some of the economic impacts and regulatory burdens that private property owners and their communities face, but it would also help the Service to better defend against the constant stream of petitions to list (or up-list) species, many of which are wholly intrastate and have no commercial value.

Consider that, in 2011, the Service entered into a settlement with several environmental groups committing the Service to review 757 candidate species for listing as endangered or threatened.[13] By 2016, the Service had reduced its backlog of petitions from 251 candidate species to 60. But that same year, environmental groups *again* sued the Service for failing to act on petitions concerning *another 417 animals and plants*.[14] Limiting the Service to listing only those species, the "take" of which actually implicates the Commerce Clause, or the Necessary and Proper Clause, would relieve the Service's overburdened docket and help the agency better prioritize its listing efforts.

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[13] William L. Kovacs, Statement of U.S. Chamber of Commerce, Submission for the Record on Hearing "Examining the Endangered Species Act" by the House Committee on Oversight and Government Reform (February 27, 2014), available at: https://www.uschamber.com/sites/default/files/documents/files/2.27.14-%20Testimony%20to%20House%20Oversight%20on%20ESA%20Hearing.pdf.

[14] Center for Biological Diversity, *Lawsuit Launched to Speed Endangered Species Act Protection for 417 Species* (August 23, 2016), *available at*: https://www.biologicaldiversity.org/news/press_releases/2016/417-species-08-23-2016.html (last visited on September 19, 2019).

In sum, the constitutional issue presented in this case is not just an academic one; it is an *economic* one as well, affecting potentially every nonfederal property owner in the country. Limiting ESA regulation to the strict confines of the Constitution is all the more important in light of the devastating economic impacts associated with the listing of species and the designation of their critical habitats.

CONCLUSION

For all these reasons, and those stated in Appellants' opening brief, Amici urge the Court to hold that the BCH regulation exceeds Congress's constitutional authority.

September 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Paul J. Beard*
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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d) and Fed. R. App. 32, because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 4,392 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

I further certify that any required privacy redactions have been made, the electronic submission is an exact copy of the paper document, and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Dated September 20, 2019