No. 03-1619

In the Supreme Court of the United States

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

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether restrictions on commercial development activities that would result in the taking of endangered cave invertebrates, imposed pursuant to Section 9(a)(1)(B) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1)(B), are a permissible exercise of Congress's authority under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-43) is reported at 326 F.3d 622. The per curiam order of the court of appeals denying the petition for rehearing (Pet. App. 75-89) is reported at 362 F.3d 286. The opinion of the district court (Pet. App. 44-74) is reported at 169 F. Supp. 2d 648.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2003. A petition for rehearing was denied on February 27, 2004 (Pet. App. 75-89). The petition for a

writ of certiorari was filed on May 24, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge the application of Section 9 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1538, which prohibits the "taking" of any endangered species without a permit, to their proposed development activities in Travis County, Texas. The district court granted the government's motion for summary judgment and dismissed the case. Pet. App. 44-74. The court of appeals affirmed. *Id.* at 1-43.

1. Congress has long enacted laws to protect species of particular federal concern. Initially, individual species were protected through separate statutes, rather than under the umbrella of any single conservation law. See, *e.g.*, Black Bass Act, ch. 346, 44 Stat. 576 (1926) (repealed by Act of Nov. 16, 1981, Pub. L. No. 97-79, § 9(b)(2), 95 Stat. 1079 (1981)); Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (16 U.S.C. 668 *et seq.*); Frederico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. Colo. L. Rev. 109, 122-125 (1991). Congress's initial attempts to protect endangered species as a class focused on the acquisition and maintenance of federal land to serve as habitat for the species, see Act of Oct. 15, 1966, Pub. L. No. 89-669, 80 Stat. 926, and on restrictions on the importation into the United States of endangered fish and wildlife, see Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275.

The ESA, enacted in 1973, represents a comprehensive congressional effort to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b).

To accomplish that goal, Congress directed the Secretaries of the Interior and of Commerce to list threatened and endangered species, designate their critical habitats, and otherwise administer the Act. See 16 U.S.C. 1533. The Fish and Wildlife Service (FWS) implements the Act with respect to listed species within the jurisdiction of the Secretary of the Interior, see 50 C.F.R. 17.11, 402.01(b), including the species at issue in this case, while the National Marine Fisheries Service administers the ESA with respect to marine species within the jurisdiction of the Secretary of Commerce, see 50 C.F.R. 223.102, 224.101.

Section 9(a)(1)(B) of the Act, 16 U.S.C. 1538(a)(1)(B), makes it unlawful for any person to "take" an endangered species within the United States except with a permit or other authorization. That ban has been extended by regulation to threatened species. See 50 C.F.R. 17.21(c)(1), 17.31(a). The ESA defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). For purposes of the ESA's "take" prohibition, regulations promulgated by FWS define the term "harm" to mean "an act which actually kills or injures wildlife," including significant habitat "modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." 50 C.F.R. 17.3; see *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) (upholding regulatory definition). Pursuant to Section 10 of the ESA, the Secretary of the Interior or of Commerce may issue a permit for the "incidental take" of listed species under certain circumstances. 16 U.S.C. 1539(a)(2)(B)(i)-(v). Any taking of a listed species consistent with such an

"incidental take" permit does not violate Section 9. 16 U.S.C. 1539(a)(1)(B).

2. In 1983, petitioners acquired undeveloped land in Travis County, Texas. Pet. App. 45. Petitioners' land provides habitat for six species of cave invertebrates (collectively the Cave Species)—the Tooth Cave pseudoscorpion, the Tooth Cave spider, the Tooth Cave ground beetle, the Kretschmarr Cave mold beetle, the Bee Creek Cave harvestman, and the Bone Cave harvestman—that have been listed as endangered by FWS. *Id.* at 2-3, 45 & n.1. Outside of museum and research collections, those species can be found only within underground caves in Travis and Williamson Counties in central Texas. *Id.* at 45; 53 Fed. Reg. 36,030 (1988).

The Cave Species are a subject of substantial scholarly interest. As the district court observed, "scientists across the country have studied the Cave Species and transported them to/from the American Museum of Natural History in New York, the California Academy of Sciences, the Academy of Natural Sciences in Philadelphia, the Field Museum of Natural History in Chicago, and the Texas Memorial Museum." Pet. App. 65 n.16; see 53 Fed. Reg. at 36,030, 36,032 (FWS explains that five of the species have been studied and collected by scientists since the 1960s and 1970s, and that articles regarding the species have been published in national scientific publications and at least one international journal). In listing five of the species as endangered, FWS noted that "[t]he primary threat to the five species comes from potential loss of habitat owing to ongoing development activities," and that the species' caves "are in an area for which a major residential, commercial, and industrial development has been proposed." *Id.* at 36,031.

3. After purchasing the Travis County property, petitioners sought to develop it. Pet. App. 2, 45. In March 1989, FWS informed petitioners that their intended development activities might effect a take of the endangered Cave Species. *Id.* at 47-48. Discussions between the FWS and petitioner concerning the likely effect of their proposed development on the listed species, and the possibility that an incidental take permit could be issued, continued for several years. See *id.* at 4-6, 48-50. Petitioners ultimately filed the instant suit in federal district court, alleging that the application of ESA Section 9 to their development activities exceeded Congress's authority under the Commerce Clause. See *id.* at 6, 50. The district court granted the government's motion for summary judgment. *Id.* at 44-74.

The district court explained that

> the regulated activity in this case is [petitioners'] alleged take of the Cave Species by their planned development of the Property. This development includes plans to build a shopping center, a residential subdivision, and office buildings on the Property. It also includes [petitioners'] proposal to build a Wal-Mart and an apartment complex on the Property.

Pet. App. 61 (citation and internal quotation marks omitted). The court held that FWS's "application of the take provision in this case is a constitutional exercise of the Commerce Clause power, because the activity being regulated, both standing alone or under the aggregation principle, would easily be classified as substantially affecting interstate commerce." *Id.* at 65. The court found it "obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." *Id.* at 64.

4. The court of appeals affirmed. Pet. App. 1-43.

a. The court of appeals stated that, in its view, petitioners' challenge to the application of ESA Section 9 in this case could not be rejected solely on the ground that petitioners' own proposed development activities are commercial in nature. Pet. App. 20-27. Rather, the court held that, in determining whether Section 9 is a permissible exercise of congressional power under the Commerce Clause, it is appropriate to consider the aggregate economic effects of takes of *all* listed species, not simply of the Cave Species. *Id.* at 30-36. In support of its conclusion that aggregation at that level was appropriate, the court explained that the "ESA's protection of endangered species is economic in nature," *id.* at 32, both because the "ESA's drafters were concerned by the 'incalculable' value of the genetic heritage that might be lost absent regulation," *ibid.*, and because "it is obvious that the majority of takes would result from economic activity," *id.* at 33. Because petitioners had conceded that takes of all listed species, considered in the aggregate, substantially affect interstate commerce, the court rejected petitioners' constitutional challenge. See *id.* at 31-36.

b. Judge Dennis filed a concurring opinion. Pet. App. 37-43. Judge Dennis concluded that "[t]he interrelationship of commercial and non-commercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species from extinction or harm." *Id.* at 42. He also noted that, "as the Congress recognized, some of the presently covered non-commercial species will prove to be of 'incalculable' future value to the nation and its economy because they are sources of genetic, scientific, and biomedical research and development that will likely facilitate the

production of commercial goods, services, and techniques." *Id.* at 43. He concluded that application of ESA Section 9 to prohibit takes of the Cave Species is constitutional "because such regulation is essential to the efficacy of—that is, the regulation is necessary and proper to—the ESA's comprehensive scheme." *Ibid.*

c. The court of appeals denied petitioners' petition for rehearing and rehearing en banc, with six judges dissenting. Pet. App. 75-89.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The courts of appeals that have considered the question have uniformly sustained the constitutionality of ESA Section 9's prohibition on takings of listed species. See *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1506 (2004); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001); *National Ass'n of Home Builders (NAHB)* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998).[1] Indeed, to our knowledge no court—either before or after this Court's decision in *Lopez*—has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause. Affirmation of federal authority to act in this sphere is particularly appropriate because systemic obstacles exist to the

[1] See also, *e.g.*, *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the constitutionality of the Bald Eagle Protection Act); *Palila* v. *Hawaii Dep't of Land & Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979) (upholding the application of ESA Section 9 to Hawaiian bird species), aff'd, 639 F.2d 495 (9th Cir. 1981).

adoption and enforcement of effective state wildlife-protection measures. See *Rancho Viejo*, 323 F.3d at 1079; *Gibbs*, 214 F.3d at 501 (Congress may act to "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment"). This Court has recognized the validity of that basis for an Act of Congress under the Commerce Clause. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281-282 (1981); *United States* v. *Darby*, 312 U.S. 100, 115 (1941); see also *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1000 (2004).

In recent years, moreover, this Court has repeatedly denied petitions for certiorari that have presented Commerce Clause challenges to Section 9 of the ESA. See *Rancho Viejo*, *supra* (No. 03-761); *Building Indus. Ass'n* v. *Norton*, 534 U.S. 1108 (2002) (No. 01-620); *Gibbs*, *supra* (No. 00-844); *NAHB*, *supra* (No. 97-1451). There is no reason for a different result here.[2]

2. Petitioners contend (Pet. 13-22) that the court of appeals erred in considering the aggregate effects on interstate commerce of takings of *all* listed species. Petitioners argue that, under this Court's decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), aggregation analysis is appropriate only when the regulated conduct

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[2] In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), decided shortly after *Lopez*, this Court held that the Secretary of the Interior had reasonably construed the term "harm," as used in the ESA's definition of "take," to include habitat modification that would kill or injure members of a listed species. No member of the Court suggested that the ESA, so construed, might exceed Congress's power under the Commerce Clause.

is economic in character; and they assert that Section 9 of the ESA regulates non-economic activities. Those arguments lack merit.

This Court in *Morrison* expressly declined to "adopt a categorical rule against aggregating the effect of any noneconomic activity." 529 U.S. at 613. In any event, the conduct regulated by Section 9 of the ESA is principally of an economic nature. The ESA contains a congressional finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1). And, as an empirical matter, it appears to be undisputed that "the majority of takes would result from economic activity." Pet. App. 33; see *Rancho Viejo*, 323 F.3d at 1078 (endorsing the government's representation that "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities"); see also 53 Fed. Reg. at 36,031 (FWS explains that "[t]he primary threat to the [Cave Species] comes from potential loss of habitat owing to ongoing development activities"). Indeed, petitioners identify *no* litigated case in which ESA Section 9 has *ever* been applied to conduct undertaken for wholly noneconomic purposes. The instant case is thus quite different from *Lopez* and *Morrison*, in which there was no reason to suppose that violations of the challenged statutes would typically be committed for economic reasons or by commercial actors.

Petitioners' demand for proof of the commercial importance of the Cave Species in isolation is also inconsistent with two central (and related) premises of the ESA: that individual species are part of an interdependent web, and that the significance of a particular

species cannot always be easily determined at a given point in time. Section 9 of the ESA regulates takings of all species that have met the strict criteria for listing by FWS or NMFS as endangered or threatened. "In the aggregate, * * * we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *NAHB*, 130 F.3d at 1053-1054 (opinion of Wald, J.). A focus on the aggregate commercial significance of all listed species is particularly appropriate in light of (1) the difficulty of identifying *ex ante* the commercial potential of a particular species, and (2) the fact that extirpation of a species eliminates for all time the possibility of future commercial uses.[3]

In resolving questions concerning the proper construction of the ESA, this Court has recognized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978). The Court in *TVA* v. *Hill* relied on the Act's legislative history, which emphasized the "*incalculable*" value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 4-5 (1973)). Pre-

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[3] While the court of appeals properly considered the aggregate economic effects of takings of *all* listed species, extirpation of the Cave Species standing alone could be expected to have a meaningful impact on interstate commerce. Although "[t]here is no commercial market for the Cave Species," the species have been the subject of widespread scholarly interest, some of it by scholars who "have visited Texas in order to study the Cave Species." Pet. App. 4. In addition, "members of the Cave Species have been transported to and from museums in New York, California, Pennsylvania, Illinois, and Kentucky." *Ibid.*

cisely because extinction of an endangered species may have irremediable consequences that cannot readily be foreseen, the few remaining members of the species are appropriately regarded as a valuable national resource subject to protection by Congress. As the Fourth Circuit has observed, "[i]t would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power." *Gibbs*, 214 F.3d at 498.[4]

3. In any event, Congress clearly possesses constitutional authority to regulate the sort of large-scale commercial development activities in which petitioners wish to engage. That power may appropriately be

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[4] Contrary to petitioner's suggestion (Pet. 18-19), the absence of an express jurisdictional element does not render ESA Section 9 unconstitutional. Although this Court in both *Lopez* (see 514 U.S. at 562) and *Morrison* (see 529 U.S. at 611-612) found the absence of an express jurisdictional element to be relevant to the constitutional analysis, neither decision suggests that such an element is a prerequisite to valid Commerce Clause legislation. As the D.C. Circuit pointed out in *Rancho Viejo*, "all of the circuits that have addressed the question since *Lopez* (as well as those that have considered the matter since *Morrison*) have concluded that the absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." 323 F.3d at 1068; see, *e.g.*, *Groome Res. Ltd., L.L.C.* v. *Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000) (upholding provision of Fair Housing Amendments Act despite lack of express jurisdictional element); *United States* v. *Moghadam*, 175 F.3d 1269, 1276-1277 (11th Cir. 1999) (noting that a jurisdictional element "is helpful" but that its absence "does not necessarily mean the Commerce Clause cannot serve as authority"), cert. denied, 529 U.S. 1036 (2000); *United States* v. *Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997) (Comprehensive Environmental Recovery, Compensation, and Liability Act valid as applied despite lack of jurisdictional element).

exercised to achieve both economic and noneconomic objectives. See, *e.g.*, *Rancho Viejo*, 323 F.3d at 1074 (explaining that this Court "has long held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity"). As the D.C. Circuit correctly held in *Rancho Viejo*, Section 9 of the ESA is therefore constitutional as applied to petitioners' own conduct, whether or not it would be constitutional as applied to "a hiker's casual walk in the woods." *Id.* at 1077 (internal quotation marks omitted).[5]

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). This

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[5] In rejecting petitioners' constitutional challenge to Section 9 of the ESA, the district court emphasized the commercial character of petitioners' proposed development activities. See Pet. App. 56-57, 61-65. In rejecting that mode of analysis, the court of appeals expressed the view that, under the district court's approach, "[t]here would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *Id.* at 23. That criticism is misconceived. The district court did not suggest that an entity's involvement in commercial activities is by itself a sufficient basis for federal regulation of *other* conduct by the same entity, if the regulated conduct lacks a constitutionally sufficient nexus to interstate commerce. Rather, the district court found Section 9 to be constitutional as applied because the specific conduct that is restricted by the take prohibition in this case is the proposed development of petitioners' land for commercial purposes. See, *e.g.*, *id.* at 61; p. 5, *supra*.

Court recently reaffirmed that facial overbreadth challenges—*i.e.*, contentions that, even though the litigant's own conduct may validly be subjected to regulation, the statute applied to him is unconstitutional on its face because it would be invalid as applied to others—are very rarely warranted. See *Sabri* v. *United States*, 124 S. Ct. 1941, 1948-1949 (2004). The Court in *Sabri* cautioned that "[f]acial challenges of this sort are especially to be discouraged," and it observed that this Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome [the Court's] well-founded reticence." *Id.* at 1948.

To bar application of ESA Section 9 to commercial development activities, based on a claim that the provision would be unconstitutional as applied to noneconomic conduct, "would mean recognizing the kind of overbreadth challenge [this] Court has expressly forsworn." *Rancho Viejo*, 323 F.3d at 1078.[6] Recognition of an overbreadth claim would be especially inappropriate in the present context, since takings of listed species in violation of ESA Section 9 *characteristically*

[6] Petitioners' legal theory reflects an artful attempt to obtain the most advantageous features of both "as applied" and "facial" review. On the one hand, petitioners contend that the Court should focus solely on the economic consequences of takings of the Cave Species, and should ignore the economic effects of other applications of Section 9 (and of the remainder of the ESA). At the same time, petitioners ask the Court to disregard their own status as business entities, and the commercial character of the specific development activities that implicate the take prohibition in this case, on the ground that Section 9 applies to noneconomic as well as economic actors. See *Rancho Viejo*, 323 F.3d at 1077 (characterizing a similar line of argument as "simply the plaintiff's attempt to have its cake and eat it too"); Pet. App. 57-58.

result from economic activity. See p. 9, *supra*. Compare *United States* v. *Raines*, 362 U.S. 17, 23 (1960) (suggesting that facial invalidation may be appropriate where a statute is "unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover"). In *Lopez* and *Morrison*, by contrast, there was no reason to suppose that violations of the challenged statutes would typically be committed for economic reasons or by commercial actors.[7]

4. Petitioners contend that the lower courts are in "complete disarray regarding the scope of the federal government's Commerce Clause authority to regulate takes of intrastate, non-economic species." Pet. 22; see Pet. 22-30. Petitioners do not and cannot contend, however, that *any* court has held Section 9 to be unconstitutional, either on its face or as applied to any set of facts. See p. 7, *supra*. Rather, the thrust of petitioners' claim of lower court "disarray" is that different courts have employed different rationales in sustaining Section 9 against Commerce Clause attack.

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[7] The petition in this case need not be held pending the Court's decision in *Ashcroft* v. *Raich*, cert. granted, No. 03-1454 (June 28, 2004). *Raich* presents the question whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, may constitutionally be applied to the "intrastate cultivation and possession of marijuana for purported personal 'medicinal' use or to the distribution of marijuana without charge for such use." 03-1454 Pet. at (I). Unlike the plaintiffs in *Raich*, petitioners are business entities, and they do not dispute that their proposed development activities are commercial in nature. The Court's decision in *Raich* therefore is unlikely to affect the proper disposition of the instant case.

This Court "reviews judgments, not statements in opinions." See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see also *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827). The difference in reasoning that petitioners describe does not create a circuit conflict, nor does it leave regulated entities in any practical uncertainty as to the scope of their obligations under the ESA. Absent some disagreement among the circuits regarding the ultimate question whether ESA Section 9 is constitutional, this Court's review is not warranted.

In addition, petitioners overstate even the divergence between the approaches of the different courts of appeals. Although the Fifth Circuit in the instant case (unlike the D.C. Circuit in *Rancho Viejo*) declined to resolve the constitutional question solely on the ground that the regulated entity's own conduct was commercial in character (see Pet. App. 27), the Fifth Circuit found it "obvious that the majority of takes would result from economic activity" (*id.* at 33), and it attached some (though not dispositive) significance to the fact that the specific takes at issue in this case "would occur as a result of [petitioners'] planned commercial development" (*ibid.*). Moreover, the biodiversity rationale for sustaining ESA Section 9 against constitutional challenge, on which the Fifth Circuit principally relied, was endorsed by the D.C. Circuit in *NAHB*, see 130 F.3d at 1058-1059, and the court in *Rancho Viejo* specifically disclaimed any intent to repudiate that aspect of *NAHB*'s analysis, see 323 F.3d at 1066-1067 & n.2. The *Rancho Viejo* court's express *reservation* of the question whether that mode of analysis remains appropriate

(see *id.* at 1077 & n.20) cannot reasonably be thought to conflict with the Fifth Circuit's decision here.

In any event, it is altogether clear that the outcome of the instant case, which involves the application of ESA Section 9 to large-scale commercial development, would be the same under the D.C. Circuit's constitutional approach. See *Rancho Viejo*, 323 F.3d at 1077-1078. Even if the analytic variance between the courts of appeals potentially warranted resolution by this Court, the instant case would therefore be an inappropriate vehicle to resolve it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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