No. 16-0933

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,

Plaintiff-Appellee-Cross Appellant

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Defendant-Appellant-Cross Appellee

and

BRITTAIN COUNTY, NEW UNION,

Defendant-Appellant

Appeal from the United States District Court for the District of New Union in No. 112-CV-2015-RNR, Judge Romulus N. Remus

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BRIEF FOR APPELLEE-CROSS APPELLANT

Respectfully submitted,

Team Number 22

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JURISDICTIONAL STATEMENT

The District Court for the District of New Union had jurisdiction over this action based on federal question jurisdiction under 28 U.S.C § 1331. The judgment of the District Court, (1) dismissing Appellant's claim for declaratory judgment declaring the ESA unconstitutional as applied to her property; (2) awarding damages of $10,000 in Appellant's favor against Appellee, United States Fish and Wildlife Service ("FWS"), for an unconstitutional taking of Appellant's property in violation of the Fifth Amendment to the Constitution; and (3) awarding damages in the amount of $90,000 against Appellee, Brittain County, for an unconstitutional taking of Appellee's property in violation of the Fifth Amendment to the Constitution was entered on June 1, 2016. The FWS and Brittain County, New Union each filed a Notice of Appeal on June 9, 2016. Thereafter, Cordelia Lear filed a Notice of Appeal on June 10, 2016. Those appeals were granted on September 1, 2016. The United States of Appeals for the Twelfth Circuit has jurisdiction over appeals from all final decisions of the District Court for the District of New Union pursuant to 28 U.S.C. § 129.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in holding that Congress has the authority under the Commerce Clause of the Constitution, through application of the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq*., to regulation private lands to protect against theoretical harm to the habitat of the wholly intrastate and commercially-irrelevant Karner blue butterfly, where the District Court's decision was based on circuit court decisions that are inconsistent with decisions of the United States Supreme Court.

2. Whether Cordelia Lear's takings claim against FWS is ripe when Cordelia did not apply for an Incidental Take Permit but was informed in a letter from the FWS that any disturbance to her ten-acre property other than annual mowing would constitute a "take" of the Karner blue butterfly in violation of the ESA.

3. Whether the relevant parcel for a regulatory takings analysis is the Cordelia Lot alone or the entirety of Lear Island when King James Lear divided Lear Island into three separate parcels in 1965.

4. Whether the Cordelia Lot has been completely deprived of any economic value when there is no market in Brittain County for a parcel, such as the Cordelia Lot, for recreational use or agricultural land without the right to develop a residence on the property.

5. Whether Cordelia's takings claim is precluded by public trust principles when Lear Island was granted to her family prior to New Union becoming a state; by a moratorium that would prevent her from doing anything on her property aside from annual mowing for 10 years; or by the Brittain County Butterfly Society's offer to pay her $1,000 annually for the right to conduct tours on her property when the property taxes alone on the Cordelia Lot cost $1,500 annually.

STATEMENT OF THE CASE

Appellee, Cordelia Lear, is the owner of a 10-acre parcel of land located New Union. Record at 5. While Cordelia plans to construct a single-family home on her property, her plans have been put on hold due to state and federal regulations preventing her from developing her property.

The property in question is located on Lear Island, which is approximately two miles long and one-mile-wide, consisting of 1,000 acres. R. at 4. In 1803, prior to New Union's statehood, Lear Island was granted to Cornelius Lear through an Act of Congress. *Id*. The 1803

grant included title in fee simple absolute to all of Lear Island and to "all lands underwater within a 300-foot radius of the shoreline of said island." R. at 4-5.

The Lear family have continued to live, farm, hunt and fish on Lear Island since the 1803 grant. R. at 5. In the early twentieth century, the family constructed a causeway connecting the island to the mainland by road. *Id*. In 1965, Kings James Lear, the sole owner of Lear Island and heir of Cornelius Lear, with the approval of the Brittain Town Planning Board, divided the property into three lots, one for each of his daughters, Goneril, Regan and Cordelia. *Id*.

After the Brittain Town Planning Board determined that each lot could be developed with at least one single-family residence, King James Lear deeded one lot to each of the three lots to his daughters, reserving a life estate in each lot for himself. *Id*. King James continued to reside in his original home located on the Goneril lot and built a residence on the Regan lot to be used by his daughter, Regan. *Id*. Although the Planning Board had approved the construction of a home on the Cordelia lot in accordance with the County's zoning requirements, no residence was ever built on the Cordelia lot. *Id*.

The Cordelia Lot is located on the northern tip of Lear Island and consists of nine acres of open field along with an access strip that is 40 feet wide by 1,000 feet long. *Id*. at 5. Unlike the rest of the island which has become naturally forested, the Cordelia Lot was kept open by annual mowing each October. *Id*. Because the Cordelia Lot has been kept open by the family for several decades, the land has become covered with wild blue lupine flowers. *Id*. Wild blue lupines are the only plant on which Karner Blue larvae can feed, making the flowers essential to the survival of Karner Blue butterflies. Karner Blues require a habitat, of partially shaded lupine flowers near successional forests, such as the Cordelia Lot. *Id*.

The Lear family unknowingly fostered the ideal habitat for Karner Blues through several decades of annual mowing of the Cordelia Lot coupled with natural forestation of the Goneril Lot. *Id*. Should Cordelia stop mowing her property, the lupine fields would naturally convert to a successional forest, eliminating the Karner Blues' habitat. *Id*.

The Karner Blue was placed on the endangered species list on December 14, 1992. *Id*. Because Karner Blues reside on Lear Island, the FWS designated The Heath as a critical habitat at the time Karner Blues became endangered. Although the only remaining population of Karner Blues in New Union live on the Cordelia Lot, populations of Karner Blues survive in several other states. However, Karner Blue do not migrate. R. at 5-6. Therefore, the subpopulation of Karner Blues residing on the Heath are completely intrastate and are unable to travel across any state boundaries. R. at 6.

Karner Blue butterflies lay eggs in the fall and winter. *Id*. The eggs hatch into larvae, commonly known as caterpillars, in the spring and the summer. *Id*. During this stage, the larvae remain attached to the lupine plant for protection and nourishment until they emerge from chrysalis as butterflies. *Id*. Any disturbance of the blue lupines during the larvae and chrysalis stages would result in the death of the Karner Blue. *Id*. Accordingly, in order for the Karner Blues to survive in New Haven, Cordelia Lear is required to mow the Cordelia Lot every October without any disturbance resulting from the construction of a house.

After King James Lear passed away, Cordelia gained sole ownership of the Cordelia Lot pursuant to the 1965 deed and began planning to construct a home on the property. R. at 5. In April 2012, Cordelia contacted the local FWS office to inquire about any permits or approvals required in order to build her home. *Id*. at 6. She was informed by an FWS agent that any

disturbance of the lupine habitat other than continued annual mowing would constitute a "take" of the endangered butterfly under section 9 of the Endangered Species Act ("ESA"). *Id*.

The FWS agent advised Cordelia that she could obtain an Incidental Take Permit ("ITP") under section 10 of the ESA, but in order to apply for an ITP, Cordelia would need to develop a habitat conservation plan ("HCP") for the Karner Blues along with an environmental assessment document under the National Environmental Policy Act. *Id*. The HCP would have to provide for additional contiguous lupine habitat on an acre-for-acre basis. *Id*. However, the only land that is contiguous to the Heath is the Goneril Lot, which Cordelia has no ownership interest in nor control over. *Id*. Although Cordelia has asked her sister to cooperate in an HCP, Goneril Lear has refused to consider cooperating. *Id*. Moreover, preparing an HCP would cost Cordelia $150,000 without any guarantee of approval, which is $50,000 more than the fair market value of the Cordelia Lot free of any restrictions on the development of a single-family home. *Id*.

One month after Cordelia's inquiry with the FWS, the local FWS office sent Cordelia a letter reiterating Cordelia's option to submit an application for an ITP and restating the extensive HCP requirements necessary for the ITP application. *Id*. This letter confirmed to Cordelia that her entire property was a critical habitat for the Karner Blues. In order to build her home and live on the property, she would not only need to convince Goneril to cooperate in the HCP, but would also have to pay $150,000 for the FWS to even consider issuing her an ITP and refrain from any disturbance other than annual mowing. *Id*.

Because the FWS letter confirmed that Cordelia's entire property was a critical habitat and any disturbance thereof would constitute a "take" of the Karner Blues, Cordelia developed an alternative development proposal ("ADP"). R. at 7. In the ADP, Cordelia proposed to fill one-half acre of the march in the cove to create a lupine-free building site, along with an access

causeway to provide access to the mainland without disturbing the Karner Blue habitat. *Id*. However, the ADP required a permit from the Brittain County Wetlands Board pursuant to the Brittain County Wetland Preservation Law. In August 2013, Cordelia filed a permit application with Brittain County Wetlands Board; however, that permit was denied in December, 2013 on the grounds that permits to fill wetlands would only be granted for a water-dependent use, and that a residential home site was not a water-dependent use. *Id*.

Due to FWS's conclusion that the entirety of Cordelia's 10-acres of land is a critical environment and Brittain Co. Wetlands Board's decision to deny Cordelia's permit application to fill the marsh, Cordelia is unable to build a home on her property. *Id*. At the time King James Lear divided his property for his three daughters in 1965, he envisioned each of his daughters living on and enjoying their respective lots. R. at 5. While Goneril and Regan are living in and enjoying residential properties on their inherited lots, Cordelia's right to build on and enjoy her property have been frustrated by federal and county regulations. R. 5-7.

SUMMARY OF THE ARGUMENT

Cordelia Lear's ownership and possession of land has been frustrated by the combined regulations of the FWS and Brittain County. The District Court's decision should be affirmed in part and reversed in part for two main reasons: 1) Congress's regulations of the Karner Blue butterfly is an impermissible exercise of its power under the Commerce Clause; and 2) Cordelia's property has been completely deprived of all economic value.

First, the listing of the Karner Blue butterfly as an endangered species and the FWS's subsequent threatened enforcement of provisions of the Endangered Species Act as the result of Cordelia Lear's potential "take" of Karner Blues, exceeds Congress' powers under the

Commerce Clause and intrude upon the core state and local government function of land use regulation. Properly applying the Supreme Court's precedents in Lopez and Morrison, the regulations of the Karner Blue butterfly at issue in this case cannot be sustained as a permissible exercise of Congress' power to regulate commerce among the states. Karner Blues are neither channels nor instrumentalities of interstate commerce, and the Appellants' assertions that the regulation of the Karner Blue "takes" can be sustained as an intrastate activity that substantially affects interstate commerce fails every one of the four factors the Supreme Court has considered in that prong of its Commerce Clause analysis. First, the "take of Karner Blues is not a commercial activity. Second, the regulations listing the Karner Blue contain no jurisdictional element. Third, the government made no specific finding of interstate commerce effect when it listed the Karner Blue butterfly on the endangered species list. Fourth and finally, the findings made by Congress regarding the effect on interstate commerce by all endangered species are too attenuated to sustain this intrusion into traditional state authority over local land use decisions.

The District Court's reliance on various circuit court decisions to dismiss Cordelia's motion for declaratory judgment that the ESA is an unconstitutional exercise of legislative power as applied to her property is contrary to Supreme Court precedent and cannot be sustained. The District Court's decision on this issue should be reversed and declaratory judgment instead entered on behalf of Cordelia Lear.

Second, Cordelia is entitled to compensation for the taking of her property under the Just Compensation Clause because the relevant parcel of land has been completely deprived of all economic value. Cordelia's taking claim is ripe because the FWS has made it known, to a reasonable degree of certainty, all possible uses of the Cordelia Lot. The New Union FWS agent advised Cordelia that anything outside of annual mowing would constitute a "take" of the Karner

Blue. This restriction was further confirmed one month later in a letter from the New Union Field office where it was confirmed to Cordelia that her entire property was a critical habitat for the Karner Blue. “once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.” Syl. Pt. 1 *Palazzolo v. Rhose Island*, 533 U.S. 606. The development of a HCP in an ITP application is futile because it cannot satisfy the requirements of the ESA. Moreover, the process of applying for the ITP does not provide an avenue for just compensation because the HCP would cost more than the land itself is worth.

Additionally, the District Court correctly found the Cordelia lot to be the relevant parcel to be considered, rather than the entirety of Lear Island. The circumstances of the combined regulations have established that the Cordelia Lot is the critical habitat for the Karner Blue. As such, the Cordelia Lot is the only lot affected by the regulations. Further, the District Court correctly determined that the relevant time period for Cordelia’s takins claim is any current permissible development of the property. By denying Cordelia of all use of her property, and as such are no different from permanent takings. “Temporary [regulatory] takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987). First, a 10-year moratoria on Cordelia’s land is an unreasonable amount of time to prevent a landowner from using or benefiting from her land. Second, even with the $1,000 annual payment from the the Brittain County Butterfly Society, Cordelia’s property would remain valueless and would in fact cost Cordelia $500 annually to hold on to a piece of property that she cannot use nor sell. Third, public trust principles are not applicable to this case because Congress’s intention to grant

Cornelius Lear the title to lands underlying the navigable waters within 300-feet of the shoreline of Lear Island was clear.

Finally, Cordelia's takings claim is not precluded by the 10-year moratoria the Cordelia Lot, nor the Brittain County Butterfly Society's offer to pay $1,000 annually to Cordelia for wildlife viewing, nor public trust principles. First, a 10-year moratoria on Cordelia's land is an unreasonable amount of time to prevent a landowner from using or benefiting from her land. Second, even with the $1,000 annual payment from the the Brittain County Butterfly Society, Cordelia's property would remain valueless and would in fact cost Cordelia $500 annually to hold on to a piece of property that she cannot use nor sell. Third, public trust principles are not applicable to this case because Congress's intention to grant Cornelius Lear the title to lands underlying the navigable waters within 300-feet of the shoreline of Lear Island was clear.

Cordelia Lear has established a takings claim against the FWS and Brittain County under the Just Compensation Clause. Cordelia has provided sufficient evidence to establish that Congress exceeded its power under the Commerce Clause when it listed the Karner Blue as an endangered species; that her takings claim is ripe for review; that the relevenat parcel of land for the takings analysis is the Cordelia Lot; that the Cordelia Lot has been completely deprived of all economic value; and that there is nothing precluding her takings claim.

Cordelia requests that the Court affirm the decision of the trial court in awarding Cordelia damages against the FWS and Brittain County and reverse the decision of the trial court in dismissing Cordelia's claim for declaratory judgment declaring the ESA unconstitutional as applied to her property so that justice can be achieved.

ARGUMENT

I. The ESA is not a valid exercise of Congress' Commerce Power as Applied to a Wholly Intrastate Population of an Endangered Butterfly.

The Service's regulation of the Karner Blue cannot be sustained under any of the activities Congress may permissibly regulate under the Commerce Clause. The Supreme Court has identified three types of activities that Congress can regulate under the commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), concluding that the regulation of gun possession near a school could not be justified under the commerce power because the Act had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," 514 U.S. at 561, 567.

A few years later, in *United States v. Morrison*, 529 U.S. 598, 608-09 (2000), the Court reaffirmed the types of activities that Congress could regulate under the commerce power. In *Morrison*, the Court held that the Commerce Clause could not justify the regulation of gender-motivated violence and therefore overturned the Violence Against Women Act, 42 U.S.C. § 13981. The federal government defended the law on the ground that violence against women has a substantial effect on the national economy. *See* 514 U.S. at 609. However, the Court rejected the Government's argument, explaining that Congress was attempting to regulate noneconomic activity that has traditionally been dealt with by state laws. *Id*. at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity"). The Court declined to adopt

a categorical rule aggregating the effects of any noneconomic activity, thus leaving open the possibility that regulation of non-economic activity might be constitutional in some circumstances. *Id*.

The Court addressed that possibility a few years later in *Gonzales v. Raich*, 545 U.S. 1 (2005). In *Raich*, the Court held that Congress constitutionally may use its power to regulate commerce among the states to prohibit the cultivation and possession of small amounts of medicinal marijuana. The Court, relying on *Wickard v. Filburn*, 317 U.S. 11 (1942), reasoned that marijuana, considered as a whole, has a substantial effect on interstate commerce. *Raich*, 545 U.S. at 15. In *Wickard*, the Court rejected a Commerce Clause challenge to the Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281-1393, upholding the Act's regulation of wheat grown at home for personal consumption. *See Wickard*, 317 U.S. at 128-29. The Court in *Raich* read *Wickard* to stand for the proposition that intrastate production of a commodity sold in interstate commerce is economic activity and thus substantial effect can be based on cumulative impact. *Raich*, 545 U.S. at 18. Therefore, the Court upheld the regulation of the consumption of homegrown marijuana because (1) the regulated activity touched upon a "fungible commodity" with an established interstate market, (2) the regulation was part of a statute that directly regulates typically economic activities, and (3) Congress could rationally conclude that the challenged regulation was essential to vindicating the statute's overall scheme to eliminate the marijuana market. *See Id.* at 32.

Raich expanded the third category of activities the Court found in *Lopez* and *Morrison* to be appropriate exercises commerce power, finding that Congress may regulate certain non-economic activities if, and only if, they are essential to vindicating a larger regulation of interstate economic activity. *Id.* at 16-17; 34-35 (Scalia, J., concurring in the judgment).

However, even with the expansion of commerce power in *Raich*, the FWS's regulation of the Karner Blue butterfly cannot be sustained under any of the four activities permissible under the Commerce Clause. It is clear the first two categories of activities Congress may regulate under the commerce power are not satisfied by the regulation of the Karner Blue; however, the third category, which *Raich* expanded upon, is disputed. Contrary, the FWS's and Brittain County's arguments that regulation of the Karner Blues is permissible under the Commerce Clause, the regulation of the Karner Blue does not substantially affect interstate commerce and therefore is an impermissible exercise of Congress's commerce power.

The District Court below, while interpreting *Lopez*, *Morrison*, and *Raich*, relied on the decision in *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041,1057 (D.C. Cir. 1997), along with similar federal circuit court rulings, to find that the ESA prohibition against an unpermitted "take" of the Karner Blue is a valid exercise of the commerce power because the relevant activity is the underlying land development through construction of the proposed residence, which is "clearly an economic activity." R. at 8. In *NAHB*, the D.C. Circuit Court upheld an endangered species regulation similar to the one at issue here on the grounds that the activity being regulated was clearly an economic activity because it involved the purchase of building materials and the hiring of carpenters and contractors. 130 F.3d 1041, 1044-45; 1060. However, the Supreme Court's decision in *Morrison* rejected the reasoning found in *NAHB*. 529 U.S. 598 at 611 ("*Lopez*'s review of Commerce law case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.") The Court in *NAHB* incorrectly held that the activity in question was the development of the property, rather than the "take" of the endangered species. Therefore, *NAHB* should no longer has

precedential force and the courts that have followed *NAHB*'s reasoning since the *Morrison* decision have been in error.

In analyzing whether a particular regulation "substantially affects commerce" in order to be permissible under the Commerce Clause, the Supreme Court in *Lopez* set forth four factors to consider: (1) was the regulation one of "economic activity"; (2) did the statute have an "express jurisdictional element"; (3) were there legislative findings regarding the effects on interstate commerce; and (4) was the link between the regulated activity and the effect on commerce so attenuated as to give Congress unlimited power under the Commerce Clause. *Lopez*, 514 U.S. 549, 561-564. These factors were reaffirmed and further developed by the Court in *Morrison*. 529 U.S. at 610-13. As discussed in the following sections, the FWS's actions at issue here fail all four prongs of this test. The District Court erred in relying on *NAHB*'s application of these factors, specifically by defining the development of the property as the "activity" in question.

A. The Take of Karner Blue Butterflies Is a Non-Economic Activity.

The ESA prohibits the "take" of species that have been determined to be "endangered." 16 U.S.C. §1538(a)(1)(B). The ESA prohibits these "takes" without any connection to a commercial transaction. *Id*. §1532(19) (defining "take" broadly to mean "harass, harm, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"). Further, the ESA's definition of "take," does not include any activities that are inherently economic. *Id*. *See also GFD Realty Investments, Ltd. V. Norton*, 326 F.3d 622, 634 (5th Cir. 2003) ("Congress, through [the Endangered Species Act], is not directly regulating commercial development").

It is clear that one can harm or injure a protected species for economic and non-economic reasons. *See Rancho Viegjo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg,

C.J., concurring) (finding that the "take" of an endangered species can but does not always affect interstate commerce). For instance, in both *Lopez* and *Morrison*, the activities covered some instances that could be economically motivated; however, that fact alone did not prevent the Supreme Court from finding that gun possession and gender-motivated violence are categorically non-economic. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. Therefore, just because a regulated activity may indirectly involve some economic affect does not convert that activity into an "economic" one. *Cf. Lopez*, 514 U.S. at 565 ("[D]epending on the level of generality, any activity can be looked upon as commercial.")

The court in *NAHB* on the other hand, contrary to the holding in *Lopez* and *Morrison*, found that a "class of activities can substantially affect interstate commerce regardless of whether the activity as issue . . . is commercial or noncommercial. 130 F.2d at 1049. However, that reading of *Lopez* was expressly rejected in *Morrison*. *See* 529 U.S. at 610-11 (noting that the Court has only sustained regulations of intrastate activity based upon the activity's substantial effects on interstate commerce where "the activity in question has been some sort of economic endeavor"). The Court in *Morrison* emphasized that the appropriate inquiry is whether the activity to be regulated is economic in nature. *Id*. The species at issue here, the Karner Blue butterfly, is not the subject of commercial activity. Therefore, the FWS's regulation prohibiting the "take" of Karner Blue is not authorized under the Commerce Clause.

The District Court below, relying in part on *NAHB*, found that the relevant activity in this case is the "underlying land development through construction of the proposed residence" and that "this activity is clearly an economic activity because it involves as it does the purchase of building materials and the hiring of carpenters and contractors. While Cordelia concedes that the development of a single-family home on the Cordelia Lot is an economic activity, she contests

the District Court's finding that the land development is the relevant activity. The Court's analysis in *Morrison* made it clear that the regulation must be *aimed at economic activity*, not simply imply some economic activity down the road, in order for it to be a permissible regulation of interstate commerce. 529 U.S. at 609-11. Here, the regulations prohibiting the "take" of the Karner Blue are not aimed at economic activity and therefore cannot be sustained against this Commerce Clause challenge.

B. The ESA Does Not Contain a Jurisdictional Element.

The FWS's regulation of the Karner Blue cannot be sustained because the ESA does not have a jurisdictional element. A jurisdictional statement is required to make the ESA constitutional because, as the ESA stands now, the federal government has unlimited discretion to regulate any and all activity that does not relate to interstate commerce. In *Morrison* the statute at issue, the Violence Against Women Act, failed because, according to the Court, instead of including a jurisdictional element, "Congress elected to cast [the statute's] remedy over a wider, and more purely intrastate body of violent crime. *Id*. at 613. Similarly, the Gun Free School Zones Act in *Lopez* did not contain a jurisdictional element and was invalidated in part due to the lack of an express jurisdictional element. Lopez, 514 U.S. 549 at 561-62. The same is true here. Instead of prohibiting the "take" of Karner Blues that have demonstrated an effect on interstate commerce, the FWS chose to cast its net over a wider, and more purely intrastate, class of activity. Neither *Lopez* nor *Morrison* permits such broad regulation.

The District Court, relying solely on the weight of precedent that holds that the ESA prohibition against an unpermitted "take" of a wholly intrastate species is a valid exercise of the Commerce power, failed to recognize that those cases, such as *NAHB*, did not even address this factor. *Morrison*, however, makes clear that the jurisdictional element is an important factor in

the *Lopez* analysis. Further, in other cases involving the ESA, courts have relied on jurisdictional elements contained in unrelated provisions of the ESA; however, neither *Lopez* nor *Morrison* allow for the borrowing of jurisdictional provisions from unrelated sections of the statute. *See Morrison*, 529 U.S. at 613 n.5 (striking down a provision of the Violence Against Women Act that did not contain a jurisdictional element even though other provisions of the Act did contain jurisdictional elements). Because Section 9 of the ESA has no jurisdictional element, it cannot be sustained under Commerce Clause jurisprudence.

C. Congress has provided no evidence of any effects Karner Blues have on interstate commerce.

To pass constitutional muster, the legislative findings of an act must provide a rational basis for Congress' conclusion that a regulated activity substantially affects interstate commerce. *NAHB*, 130 F.3d at 1051. Neither Section 9, nor its legislative history contains express congressional findings regarding the Karner Blue's effects on interstate commerce. Although the Supreme Court noted in *Lopez* that "formal findings" are not required, such findings may "enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce" especially where no such substantial effect is "visible to the naked eye." *Lopez*, 54 U.S. at 562-63; *Morrison*, 529 U.S. at 612.

While FWS argues that the Karner Blue has substantial impact on interstate commerce when their impacts are aggregated with the impacts of all other protected species, and that aggregation of all endangered species is appropriate because of the interdependence of all species, this argument does not hold any weight. Neither Section 9 of the ESA, its legislative history, nor the FWS's own website contain such findings. In fact, the FWS's website states that the only reason the Karner Blue is endangered is because it's "rarity and beauty make it a desirable addition to butterfly collections." The FWS has not made any specific finding that a

taking of the Karner Blue would have any effect on interstate commerce, let alone a substantial effect.

The final rule also fails to make any specific finding regarding the Karner Blue's impact on or contribution to society. While one comment to the proposed rule during the rulemaking process specifically inquired about the Karner Blue's contribution to society, the FWS did not provide an answer to this inquiry in the final rule. *See* 57 Fed. Reg. 59,236 (Dec. 14, 1992) ("There may be many opinions as to a particular species' contribution to society including aesthetic, scientific, ecological, or other significance, however this contribution of a species to society is not among the five factors upon which a listing determination is based."). As the final rule reveals, when adding a species to the endangered species list and preventing a "taking" of such species, the FWS is not even required to provide information about the species' contribution to society or effect on interstate commerce. Therefore, because neither Section 9, the FWS's rules, nor legislative history provide any evidence of the Karner Blue's effect on interstate commerce, Section 9 is not a valid exercise of Congress's Commerce power.

D. The connection between the noncommercial activity of the Karner Blue and interstate commerce is attenuated because the Endangered Species Act is not a comprehensive economic regulatory scheme.

Attenuation between a regulated activity and its effect on interstate commerce is fatal to Congress's authority to regulate that activity. Although there may be an effect on interstate commerce but-for the regulation of a noncommercial activity, "but-for reasoning" is insufficient to uphold federal regulations under the Commerce Clause. *See Morrison*, 529 U.S. at 613. As the Supreme Court explained in *Morrison*, Congress may not "follow the but-for causal chain from the initial occurrence of [an activity] to every attenuated effect upon interstate commerce." *Id.* at 615. In this case, the mere fact that the Karner Blue might produce something at some undefined

and undetermined future time which might have some undefined and undeterminable value on the ecosystem, which in turn might affect interstate commerce at that imagined future point is not enough to uphold the regulation of Karner Blues under the Commerce Clause. To accept the District Court's holding would give Congress the ability to regulate anything which might advance the pace at which the endangered species becomes extinct. *NAHB*, 130 F.3d at 1064 (Sentelle, J., dissenting).

Even if one were to accept the broad, undifferentiated findings made by Congress when it enacted the ESA in 1974, rather than requiring specific findings with respect to each individual species on the protected list, those findings are not sufficient to support the regulation at issue here. As the Supreme Court made clear in *Morrison*, "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." 529 U.S. at 598. "*Whether particular operations* affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative one." *Id.* (emphasis added).

The ESA looks nothing like the Controlled Substances Act ("CSA") in *Raich* that was designed to regulate an entire market of commodities. Although some provisions of the ESA do regulate economic activity, the regulation of economic activity is not the purpose of the statutory scheme. Instead, Congress, through the ESA, purported to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions" for endangered species. 16 U.S.C. § 1531 (b). The goal of the ESA distinguishes it from statutes

that directly regulate "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich,* 545 U.S. at 26.

Here, the District Court erred in relying on *Raich* to serve as a basis for regulating intrastate activity of Karner Blue butterfly takes because of the significant difference between the statutory schemes of the ESA and that of the CSA and the Agricultural Adjustment Act (in *Wickard*). Congress's concern when enacting the ESA was not in regulating a substantial market in endangered species, but rather, in protecting various species from extinction. The purely local and noncommercial nature of the Karner Blue precludes any federal regulation of this species. The take of the Karner Blue "[is] not, in any sense of the phrase, [an] economic activity." *Morrison*, 529 U.S. at 613. This Court should recognize the local and noncommercial nature of the Karner Blue by holding that such takes do not substantially affect interstate commerce.

In sum, listing the Karner Blue butterfly as endangered and the subsequent designation of critical habitat for the butterfly are not regulations of either the channels or instrumentalities of commerce, and their effect on interstate commerce is so attenuated as to be outside the authority conferred on Congress by the Commerce Clause. To uphold the regulations as issue here as compatible with the Commerce Clause would be contrary to the Supreme Court's decisions in *Lopez* and *Morrison* and "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *N.L.R.B. v. Jones and Laughlin Steel*, 301 U.S. 1 (1937) (quoted in *Lopez*, 514 U.S. at 557).

Because the Supreme Court has made clear that the FWS's application of the ESA in this case is not compatible with Congress' powers under the Commerce Clause, the District Court erred in dismissing Lear's claim seeking a declaration that the ESA is an unconstitutional exercise of legislative power as applied to her property. The District Court's dismissal of

declaratory judgment for Cordelia should therefore be reversed, and declaratory judgment should instead be entered for Cordelia Lear.

II. Cordelia's claim is ripe because all the known uses of her property were known to a reasonable degree of certainty, and the process for obtaining a permit would deprive her property of value.

The Ripeness doctrine limits the judiciability of matters that are premature for review. In regulatory takings claims, such as the one before this Court, a claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). "A final decision does not occur until the responsible agency determines the extent of permitted development on the land." Syl. Pt. 1 *Palazzolo v. Rhose Island*, 533 U.S. 606, *citing MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). However, "once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Id*.

An exception to the ripeness requirement in regulatory taking claims occurs when the process for obtaining a permit becomes futile because it "effectively deprives the property of value" or "[n]o reasonable landowner would find a door left open for obtaining a permit." *Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 236 n.1 and 235-38 (1996), *vacated without op. by* 121 F.3d 727, *on remand*, 45 Fed. Cl. 154 Cl. (1999). The requirement of a landowner to apply for permits is excused where it is obvious the regulating authority would deny such permits. *Eastern Minerals Int'l v. United States*, 36 Fed. Cl. 541 (1996); *see also Palazzolo*, supra.

Relevant to the challenged regulation at issue, the ESA provides that "[t]he Secretary may permit, under such terms and conditions as he shall prescribe" . . . "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." ESA §10, 16 U.S.C § 1538(a)(1)(B). For such a permit to be approved, the Secretary must find, amongst other requirements, that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." ESA §10, 16 U.S.C § 1538(a)(2)(B)(iv).

Accordingly, Cordelia contacted the FWS to inquire whether developing her property would require such approval from the Secretary, due to the presence of the Karner Blue on her property. R at 6. The FWS field office made it clear to Cordelia that any disruption or development of the Cordelia Lot, aside from annual mowing in October would result in "take" of the lupine habitat and the Karner Blue. *Id*. It further confirmed to Cordelia in a follow-up letter that her entire 10-acre property was a critical habitat, and reiterated that an acceptable HCP would require that all acreage of lupine field disturbed by the development would have to be replaced with contiguous acreage committed to annual October mowing. *Id*.

Cordelia's taking claim is ripe for review because the FWS made a determination regarding all permissible uses of her property. Any application for an ITP would be futile because she is unable to provide contiguous acreage to replace the land devoted to the development of the acreage. Moreover, Cordelia's pursuit of the ITP is futile because the HCP would cost $150,000, approximately $50,000 dollars more than the lot is worth without any restrictions. As such, there is no constitutional reason to require futile development applications merely for the sake of submitting such applications, particularly when the cost of the application

exceeds the fair market value of the property in question. To the contrary, fairness and justice mandate Cordelia's claim reviewed.

III. The application of Endangered Species Act and the Brittain County Wetlands Preservation Law combine to deprive Cordelia of any economic value of her property.

The Just Compensation Clause of the Fifth Amendment of the U.S. Constitution provides that " . . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. "The Fifth Amendment . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A total taking occurs under the Fifth Amendment when the relevant parcel of land has been completely deprived of all economic value. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)

A. The relevant parcel for the takings analysis is the Cordelia Lot because it is the only lot affected by the taking.

Courts must look at the "parcel as a whole" that is affected by a regulation rather than individual property interests in considering a taking claim. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In *Penn Cent.*, a New York City landmark preservation regulation prohibited construction of a high-rise building on top of Grand Central Terminal. *Id.* at 119. The Court rejected the takings claim brought forth by the owners because it considered the city tax block designated as the "landmark site" as the relevant parcel in question, and not specifically the Grand Central terminal. Because of this, the takings claim was too watered down to satisfy the partial factors set forth by the Court to be considered, such as "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . ." *Penn Cent*., 438 U.S. at 124. In its opinion, the Court declared that "Taking jurisprudence does not divide a single parcel into discrete

segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* However, the Court did not offer guidance for how exactly the "parcel as a whole" should be defined.

Following the decision in *Penn Cent.*, the Supreme Court analysis on the issue of the relevant parcel shifted to the jurisprudential "bundle of sticks". In *Andrus v. Allard*, the Court found that a federal ban on the sale of certain bird artifacts did not trigger a taking because the statute permitted other uses of the property. *Andrus,* 444 U.S. 51, 66-67 (1979). The Court held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* at 65-66.

Courts continue to broadly interpret the relevant parcel issue, though it is not clear as to how. The Court recognized this in *Lucas*, stating "the [parcel as a whole] does not make clear the 'property interest' against which loss of [economic] value is to be measured." *Lucas*, 505 U.S. at 1016 n. 7. Additionally, in *Palazzolo*, the Court referenced "the difficult, persisting question of what is the proper [parcel]." *Palazzolo,* 533 U.S. at 631.

The District Court correctly denied FWS and Brittain County's argument to assign the entirety of Lear Island as the relevant parcel for the taking analysis. Unlike *Penn. Cent.* and other cases cited in the District Court's opinion, the combined regulations of the ESA and Brittain County Wetlands Preservation Law deprive Cordelia of all economically viable use of her land. In a total taking claim, under *Lucas*, a court must look to the property interest affected by the regulation to determine the relevant parcel. *Lucas*, 505 U.S. at 1016 n. 7. The relevant parcel that is affected is the Cordelia Lot, because it is the only parcel on the island that has been designated as a critical habitat for the Karner Blue. R. at 6.

Further, contiguous parcels should only be considered for takings purposes when they are under the same ownership or included in the same development plan. *See Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) ("whole parcel" includes all parcels included in development plan); *East Cape May Associates v. State of New Jersey*, 693 A.2d 114, 128 (N.J. App. 1997) ("under same ownership" to be considered). Cordelia is not attempting to divide her lot into a "conceptual severance" of property rights. Rather, the Cordelia Lot was formally subdivided in 1965, transferring in full rights to Cordelia in 2002. R. at 5. Further, the Cordelia Lot is the only lot considered in the development plan.

The foundation of justice and fairness that support the Fifth Amendment require the Courts to consider the Cordelia Lot as the relevant parcel because she has not merely lost one "strand of [her] bundle of sticks." *Andrus,* 444 U.S. at 66-67 (1979). While the remaining land on Lear Island has homesteads in accordance with the states property laws, the combined regulations deprive Cordelia of all economic use.

B. The Cordelia Lot Has Been Completely Deprived of All Economic Value.

Having found that the relevant parcel is the Cordelia Lot as subdivided in 1965, the next inquiry is whether the property has been completely deprived of all economic value. The governmental regulations have deprived the Cordelia lot of all economic value because there is no market in Brittain County for a parcel such as the Cordelia Lot for recreational use without the right to develop a residence on the property, nor does the property have any market in its current state as agricultural or timber land.

As a general principle, two levels of government should not be able to avoid responsibility for a taking of property merely because neither of their actions, considered

individually, would unconstitutionally infringe upon private property rights. *Ciampetti v. United States*, 18 Cl.Ct. 548, 556 (Cl.Ct. 1989). Government decisions are not produced in a vacuum. *Id*.

The constitutions of the United States and the State of New Haven protect private citizens from governmental deprivation of their property without full compensation. Although there are certain qualifications, a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Just Compensation Clause. This protection is secured without regard to the nature and powers of the public body responsible for the taking. As such, the combined actions of two or more public bodies can constitute a taking, and that is exactly what occurred in this case.

Further, while the FWS and Brittain County argue (1) that the natural destruction of the Karner Blue's habitat in the future along with (2) the Brittain County Butterfly Society's offer to pay Cordelia $1,000 per year in rent for wildlife viewing and (3) public trust principles inherent in title all preclude Cordelia's takings claim, these arguments cannot be sustained. First, a 10-year moratoria on Cordelia's land is an unreasonable amount of time to prevent a landowner from using or benefiting from her land. Second, even with the $1,000 annual payment from the the Brittain County Butterfly Society, Cordelia's property would remain valueless and would in fact cost Cordelia $500 annually to hold on to a piece of property that she cannot use nor sell. Third, public trust principles are not applicable to this case because Congress's intention to grant Cornelius Lear the title to lands underlying the navigable waters within 300-feet of the shoreline of Lear Island was clear.

i. Cordelia has been completely deprived of any economically beneficial use of her property under the *Lucas* standard.

The Cordelia Lot has been completely deprived of all economic value. Although there are certain qualifications, a regulation which "denies all economically beneficial or productive use of

land" will require compensation under the Takings Clause, without regard to balancing any public interests served by the regulation. *Lucas*, 505 U.S. 1003 at 1027. The test for determining whether there has been a categorical taking of property requires the court "to compare the value that has been taken from the property with the value that remains in the property." *Forest Props., Inc. v. United States*, 177 F.2d 1360, 1365 (Fed.Cir.1999) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 479 (1987)).

In this case, there is no market in Brittain County for a parcel such as the Cordelia Lot for recreational use without the right to develop a residence on the property, nor does the property have any market in its current state as agricultural or timber land.

While Cordelia has not had her property reassessed following the denial of the permit under the Brittain County Wetland Preservation Law, this fact is of little importance. It has been established that the fair market value of the Cordelia Lot without any restrictions that would prevent development of a single-family house on the lot is $100,000 and that property taxes are $1,500 annually. Because no market exists for the Cordelia Lot absent the right to construct a home on the lot, there is no need for the property to be reassessed. Even if the property were reassessed to have some value, that value is meaningless if there is not a market for such property.

Moreover, although the Appellants argue that the Brittain County Butterfly Society's offer to pay Cordelia $1,000 annually for the privilege of conducting tours on the property gives the Cordelia Lot some value, this argument holds no weight. The annual property taxes alone are $1,500; thus, even with the $1,000 annual payment from the the Brittain County Butterfly Society, the property would remain valueless and in fact cost Cordelia $500 annually to hold on to a piece of property that she cannot use nor sell. A piece of property that incurs more in

property taxes than it can generate in income is by definition without economic value. Therefore, Cordelia has been deprived of all economic use of her property and is entitled to compensation from the FWS and Brittain County.

ii. Governments may be jointly and severally responsible for unconstitutional takings.

The Appellants in this case argue that there is no taking here because, individually, neither the federal nor local restriction results in a complete deprivation of Cordelia's property. However, in *Ciampetti v. United States*, 18 Cl.Ct. 548, 555-56 (1989), the court rejected a similar argument, finding that the interrelationship between Federal and State laws precluded the Federal government from essentially asserting the existence of the State wetlands regime as a per se defense to a Federal taking. In so concluding, the court reasoned that "[a]ssuming that no economically viable use remains for the property, the Constitution could not countenance a circumstance in which there was no fifth amendment remedy merely because two government entities acting jointly or severally caused a taking." *Id*. at 556. A similar rationale warrants rejection of defendant's argument in the instant case.

State courts have adopted the Supreme Court's reasoning in *Ciampetti*. In *Lost Tree Village*, *Corp. v. City of Vero Beach*, a city ordinance prohibited construction of a bridge to the plaintiff's coastal islands, and a town ordinance forbade construction of homes without a pre-existing bridge. 838 So. 2d 561, 565 (Fla. App. 2002). The combined ordinances deprived the claimant of all economically viable uses of his land. The court stated that "as a general principle, two levels of government should not be able to avoid responsibility for a taking of property merely because neither of their actions, considered individually, would unconstitutionally infringe upon private property rights." *Id*. at 568-69. *citing* at *Ciampetti*, 18 Cl.Ct. 548 556. The

court noted that the emphasis in both the federal and state constitutions is on the taking of the property, not the governmental unit responsible for the taking. *Id*. at 568-69.

In this case, the Endangered Species Act and the Brittain County Wetland Preservation Law, together, deprive Cordelia of all economically viable uses of her land. With guidance from the cases cited above and general fairness considerations, it is clear that to deny Cordelia just compensation for the taking of her property merely because two levels of government, together, created the complete deprivation of economic value, would be contrary to the policy behind the Fifth Amendment and general fairness doctrines. Therefore, the District Court's decision should be affirmed and this Court should find that Cordelia has been deprived of all economic use of her property and is entitled to compensation from the FWS and Brittain County.

iii. Public Trust Principles Do Not Preclude Cordelia's Taking Claim Based on the Denial of the Wetlands Permit.

Brittain County's argument that they have no liability for a taking of the Cordelia Lot because the limits on filling and developing lands underwater are well-established public trust limits fails for two main reasons. First, the U.S. Army Corps of Engineers has declared the marsh at issue to be "non-navigable." Second, clear congressional grants to lands under water prior to the formation of a state gives superior title to the congressional grantee as against a subsequent "equal footing" claim by a State.

Public trust is a common-law doctrine that limits the power of state legislatures and their administrative agencies from conveying land owned by the state lying under navigable waters to private parties. At common law, states own the land under water present within its borders so long as the body of water meets the federal test of navigability. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988). However, in this case, the

marsh does not meet the federal test of navigability as the U.S. Army Corps of Engineers has already determined the marsh to be "non-navigable." R. at 7.

Even if this Court were to find the marsh to be "navigable waters" under the federal test, the Appellant's argument still fails under the equal footing doctrine. The general rule of public trust stems from the equal footing doctrine. The Supreme Court in *Shively v. Bowlby* established the constitutional doctrine of equal footing. 152 U.S. 1, 49. This doctrine creates a presumption that lands underlying navigable waters passed to a state upon its admission to the Union, and that after admission these lands could not be granted away by Congress. *Id*. However, once the federal government was formed, the United States became the owner of the submerged lands in the non-state territories that it then owned and later acquired. *Utah v. United States*, 403 U.S. 9, 10 (1971). Further, in *United States v. Holt State Bank*, the Supreme Court examined the policies behind equal footing, and decided to strengthen the presumption against congressional grants of lands underlying navigable waters prior to a state's entering the Union. There, the Court held that such grants "should not be regarded as intended unless the intention was definitely declared or otherwise very plain."" 270 U.S. 49 (1926).

In this case, even with a strong presumption against congressional grants of lands underlying navigable waters prior to a state entering the Union, the District Court correctly found that the congressional grant giving Cornelius Lear title to lands underwater bordering Lear Island was clear and gave Cornelius, and now Cordelia, superior title to against any subsequent equal footing claims by New Union. Congress, in 1803, prior to New Union entering the United States, granted Cornelius Lear title in fee simple absolute to all of Lear Island and to "all lands under water within a 300-foot radius of the shoreline of said island," as well as an additional grant of lands under water in the shallow strait separating Lear Island from the mainland. R. at 4-5.

Therefore, there was a clear intention to grant Cornelius Lear the title to lands underlying the navigable waters within 300-feet of the shoreline of Lear Island.

iv. The relevant time period for Cordelia's taking claim is the current permissible development of the property because even temporary regulatory takings require just compensation under the Takings Clause.

The Supreme Court recognizes that temporary regulatory takings require just compensation under the takings clause. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). In *First English*, the Court found that "temporary [regulatory] takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318.

However, in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, a 32-month moratorium restricted development in the Lake Tahoe region was challenged as a categorical taking. *Tahoe-Sierra*, 535 U.S. 302, 306 (2002). The Court rejected the claim, stating that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as the prohibition is lifted." *Id.* However, it is important to note that the Court did not declare that a temporary land-use restriction does not automatically preclude a taking claim from being valid, and should not "be given exclusive significance on way or the other." *Id.* at 337. Once more, the Court reaffirmed the necessity to review such takings claims in a case-by-case basis, and further underscored the role of fairness and justice in doing so. *Id.* at 334.

The moratorium and property considered in *Tahoe-Sierra* is distinguishable to that of the restrictions on the Cordelia Lot for two reasons. First, the moratorium was established to put a hold on development until a Tahoe Regional Planning Compact completed its "final plan" to

determine the "environmental threshold carrying capacities" in accordance with state law to preserve the Lake Tahoe area. *Id.* at 310, *citing* 94 Stat. 3235, 3239. The Court found that the moratorium affected "the parcel as a whole" instead of the "conceptual severance" discussed in previous cases. Here, the relevant parcel is the Cordelia lot and not the entirety of Lear Island. As such, the analysis is quite different because the Court in Tahoe-Sierra weighed the factors set forth in *Penn. Central*, and found that the land still had value even during the moratorium. Here, the Cordelia Lot has lost all value due to the combined regulations of the ESA and Brittain County Wetland Preservation Law. As such, the standard set forth in *First English* is more appropriate. The burden on Cordelia is not merely incidental of ownership due to "fluctuations in value during the process of governmental decision making" discussed in *Tahoe-Sierra*. *Id.* at 332 (*quoting Danforth v. United States*, 308 U.S. 271, 285 (1939)).

Moreover, the moratorium in *Tahoe-Sierra* did not extend for an entire decade. The District Court was correct in noting the irony in the FWS's argument. The FWS initially told Cordelia that any activity on her land aside from annual October mowing would constitute a "take" of the Karner Blue. Now, however, they argue that her takings claim is barred because all she must do is stop mowing the Lot. Therefore, the 10-year moratorium should be treated no differently than a permanent taking and should not prevent Cordelia from receiving just compensation for the Government's taking of her property.

CONCLUSION

The District Court's decision should be affirmed in part and reversed in part because Congress's regulations of the Karner Blue butterfly is an impermissible exercise of its power under the Commerce Clause and because Cordelia's property has been completely deprived of all economic value. Cordelia has provided sufficient evidence to establish that her takings claim

is ripe for review, that the Cordelia Lot as subdivided in 1965 is the relevant parcel for the purpose of her takings claim, and that neither a 10-year moratorium, nor public trust principles, nor Brittain County Butterfly Society's offer to pay $1,000 annually to conduct tours on Cordelia's property preclude Cordelia's takings claim.

For these reasons, Cordelia requests that the Court reverse the District Court's holding that the ESA is a legitimate exercise of congressional power under the Commerce Clause as applied to a wholly intrastate population of Karner Blue Butterflies, and affirm the District Court's holdings that Cordelia's claim for an uncompensated taking under the Fifth Amendment was ripe; that the relevant parcel for the purpose of Cordelia's takings claim is the Cordelia Lot as subdivided in 1965; that the potential future natural destruction of the Cordelia Lot's lupine fields does not preclude Cordelia's takings claim; that the Brittain County Butterfly Society's offer to pay $1,000 annually as rent for wildlife viewing did not preclude Cordelia's takings claim; that the public trust principles inherent in Cordelia's title do not preclude her takings claim; and that the ESA as administered by FWS and the New Union Wetlands Preservation Law, as administered by Brittain County, combine to deprive the Cordelia Lot of all economic value.