Team 42

In the
UNITED STATES COURT OF APPEALS
for the
TWELFTH CIRCUIT

No. 16-0933

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

BRIEF IN SUPPORT OF CORDELIA LEAR

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JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a civil case. *See* R4. This Court has jurisdiction under 28 U.S.C. § 1291.

The district court had jurisdiction over Lear's Fifth and Fourteenth Amendment claim against Brittain County under 28 U.S.C. § 1331.[1] Jurisdiction over Lear's Commerce Clause and Fifth Amendment claims against the Fish and Wildlife Service ("FWS") was based on 28 U.S.C. § 1331 and § 1346(a)(2), respectively.[2] Each of the parties filed a timely notice of appeal on June 9, 2016, eight days after the district court's judgment. R1.

STATEMENT OF THE ISSUES

1. According to FWS, the Endangered Species Act ("ESA") empowers the agency to regulate land use for the purpose of protecting a wholly intrastate population of butterflies. Is this a valid exercise of the commerce power, despite the absence of any interstate environmental impact?

2. FWS suggested that Lear could build a home if she received an Incidental Take Permit under § 10 of the Endangered Species Act. But because the agency imposed impossible-to-fulfill conditions, and because Lear would have lost $50,000 on the venture, she did not apply for a permit. Is Lear's Takings claim against FWS unripe because of her refusal to file a futile permit application?

3. Lear's property is located on an island divided into three lots. Although Lear's father previously owned all three lots, each one has a different owner now. No common enterprise unites

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[1] Because Brittain County is a municipal corporation, rather than an arm of New Union, the Eleventh Amendment did not deprive the district court of subject-matter jurisdiction. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment . . . does not extend to counties and similar municipal corporations.").

[2] The United States has waived its sovereign immunity for claims seeking review of agency action. *See* 5 U.S.C. § 702 (2012); *see also Bowen v. Massachusetts*, 487 U.S. 879 (1988).

the three landowners, and Lear's tract comprises one percent of the island's total area. For Takings analysis, is the relevant parcel the entire island, or Lear's lot?

4. FWS suggests that Lear could build a house if she were to stop mowing for ten years, let a forest grow over her grassy property, and thereby destroy the Karner Blues' habitat. Can the government circumvent the Takings Clause by asking Lear to not only abandon her property for ten years, but also risk prosecution under the ESA for intentional habitat destruction?

5. An eco-tourism group has offered to pay Lear $1,000 per year for use of her property. But her property taxes are $1,500 per year. Does Lear's property still have an economically beneficial use merely because she could operate an eco-tourism business at an annual loss of $500?

6. Lear could avoid ESA liability by filling a marsh on her property and building there. But in doing so, she would violate Brittain County's Wetland Preservation Law. Under the public trust doctrine, does the state's interest in the navigability of its waters limit Lear's title to the marsh?

7. The combined effect of the Endangered Species Act and the Wetland Preservation Law is to completely deprive Lear of any economically beneficial use of her land. In deciding whether a taking has occurred, should the Court ignore this total deprivation and analyze the two laws separately?

STATEMENT OF THE CASE

Cordelia Lear, the plaintiff in this case, wants to build a home on her ten-acre lot. R4, R6. However, because her land is home to an endangered species of butterfly, she cannot develop the property without running afoul of the Endangered Species Act ("ESA"). Lear now seeks either (1) a declaration that the ESA as applied exceeds Congress's constitutional authority, or (2) just compensation for the loss of all beneficial use of her land.

Section 9 of the Endangered Species Act makes it unlawful to "take" an endangered animal. Endangered Species Act of 1973 § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). By regulation, the term

"take" includes damaging the species' habitat in a way that kills or injures the animals. *See* 50 C.F.R. § 17.3 (2016).

Cordelia Lear owns a 10-acre lot at the northern tip of Lear Island, located in Lake Union. R4, R5. The land previously belonged to her father, King James Lear. For a time, he owned the entirety of Lear Island as a single parcel of 1,000 acres. R5. Later in life, in 1965, he subdivided it into three lots, and then deeded each lot to one of his three daughters. R5. Upon King James Lear's death, Cordelia Lear inherited only ten acres—or one percent—of the island, with the rest passing to her sisters Goneril and Regan. R5.

Cordelia Lear recently sought to build a home on her land, but she ran up against a regulatory wall. *See* R6–R7. Her entire lot is covered in wild blue lupine flowers, which provide a habitat for an isolated population of endangered Karner Blue butterflies. R5. By building a house anywhere on her lot, Lear would damage the butterflies' protected habitat in violation of the ESA's take prohibition. *See* 16 U.S.C. § 1538(a)(1)(B) (2012) (prohibiting takes); 50 C.F.R. § 17.3 (2016) (defining "take" to include damage to habitat).

The Fish and Wildlife Service ("FWS"), which is partially responsible for enforcing the ESA, suggested that Lear apply for an incidental take permit—effectively a waiver of the take prohibition. R6. But after discovering that the application would cost $150,000—which is $50,000 more than her land would be worth *with* the permit—Lear opted not to apply. *See* R6, R7.

Instead of obtaining an incidental take permit, Lear sought to fill a half-acre of marshland on her property and build there, avoiding any encroachment on Karner Blue habitat. R7. But once again, regulation stymied Lear's plans. Under Brittain County's Wetland Preservation Law, Lear would need a separate permit to fill the marsh. R7. She applied, but the County denied her the permit. R7.

After Lear's efforts were thwarted, FWS and Brittain County suggested what they considered a way out: letting a forest grow over the open fields on which the Karner Blues depend, thereby wiping out the butterfly population and rendering the ESA inapplicable. R7, R10. To facilitate forest growth, Lear would have to stop mowing her lot for ten years. R7. Only after a decade of idleness would the land become butterfly-free and hence developable. R7.

The combined effect of the federal and county regulations renders Lear's land valueless. In Brittain County, there is no market for an undevelopable lot like hers. R7. Nor is her land useful for farming or timber, for those uses too would damage Karner Blue habitat in violation of the ESA. *See* R7. Lear's land does not even have any recreational value. R7. Lear could earn $1,000 per year off Karner Blue-related eco-tourism, but that would cover just two-thirds of the lot's $1,500 per year property taxes. *See* R7. In its current state, the land is of no use to Lear or to anyone else.

Having been deprived of any economically beneficial use of her land, Lear filed this action against FWS and Brittain County in the United States District Court for the District of New Union. *See* R4. She sought compensation from both defendants under the Takings Clause of the Fifth Amendment.[3] R1. Lear also challenged the constitutionality of the ESA as applied, arguing that it exceeded Congress's power under the Commerce Clause. R7. FWS argued that Lear's claim was unripe because she had not applied for an incidental take permit. R9. The district court rejected Lear's Commerce Clause challenge, held that the claim was ripe, and awarded damages of $10,000 and $90,000 against FWS and Brittain County, respectively. R12.

[3] Lear brought her Takings claim against Brittain County via the Fourteenth Amendment. *See* R1.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*, without deference to the district court's legal conclusions. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The district court's factual findings are reviewable only for clear error. *See* FED. R. CIV. P. 52(a)(6). Clear error is established where the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Pullman Standard v. Swint*, 456 U.S. 273, 284–85 n.14 (1982).

SUMMARY OF ARGUMENT

Cordelia Lear thought she could make a home on her 10-acre tract. But now, regulators want to commandeer her land—without paying her a cent in compensation. Left unchecked, the government will leave Lear's plot worthless, useless, and uninhabitable. The Takings Clause prohibits this kind of abuse. Having stripped Lear's land of all economically beneficial use, the government must now fairly compensate her. The district court recognized as much in the decision below, and this Court should reach the same result.

1. For four reasons, the ESA as applied exceeds Congress's authority to regulate interstate commerce. First, unlike the statutes the Supreme Court has sustained under the Commerce Clause, the ESA is not aimed at regulating economic transactions. Second, the ESA lacks a jurisdictional element. Third, no congressional findings establish a link between the ESA and commerce. Fourth, any effects the butterflies may have on commerce are too attenuated to sustain the law as applied.

2. Lear's claim is ripe even though she has not applied to FWS for an incidental take permit. Refusal to file a futile permit application does not render a claim unripe. Here, an application would be futile for two reasons. First, Lear cannot comply with FWS's acre-for-acre habitat-replacement requirement because there is no land available for that purpose. Second, because a permit would cost about $150,000, and her property would be worth only $100,000 with the

permit, applying would at best result in a net loss of $50,000. This would be economically irrational and hence futile.

3. The Cordelia lot is the only relevant parcel for Takings analysis. That is so because the lot has always been treated as a distinct parcel since Lear obtained possession, and because it encompasses all of Lear's property rights.

4. The government cannot escape liability with its unreasonable suggestion that Lear stop mowing, wait ten years for the butterflies to die off, and only then build her house. By changing her maintenance practices with the intention of killing the endangered butterflies, Lear would risk criminal and civil liability under the ESA. Moreover, because government action would deprive Lear of the use of her land for a full decade, she would still have suffered a taking.

5. Eco-tourism cannot be considered an economically beneficial use of Lear's land. She would run a loss because her property taxes exceed the projected income from eco-tourism by $500 per year.

6. Public trust principles do not limit Lear's use of her wetlands. The public trust doctrine did not apply to Lake Union when the land was granted to Cornelius Lear in 1803, and the equal footing doctrine is insufficient to make public trust principles applicable to the wetlands.

7. FWS and Brittain County regulations must be combined when analyzing the economic deprivation to Lear's land. The Takings Clause is meant to remedy the effects of governmental takings such as those burdening Lear, and the law of categorical takings could not survive the theory advanced by FWS and Brittain County.

Accordingly, this Court should hold that the ESA as applied is beyond the commerce power and remand to the district court to enter an appropriate order. In the alternative, this Court should sustain the district court's award of damages against both defendants.

ARGUMENT

A. As applied here, the ESA works an intrusion into local affairs well beyond the scope of Congress's power to regulate interstate commerce.

FWS's attempt to regulate the Lear Island butterflies—an isolated population with no commercial significance—extends the ESA further than any court has approved and beyond the reach of the Commerce Clause. Although "expansive," the commerce power is far from unlimited. *United States v. Lopez*, 514 U.S. 549, 556–57 (1995). If sustained, the federal government's actions on Lear Island "would effectually obliterate the distinction between what is national and what is local." *See id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

The Supreme Court twice has repudiated similar unconstitutional expansions of federal power disguised as commercial regulations—first in *Lopez*, and again in *Morrison*. *Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000). As those cases reaffirmed, the commerce power is limited, extending only to three objects of regulation: (1) the "channels of interstate commerce"; (2) instrumentalities of, and persons and things in, interstate commerce; and (3) activities that "substantially affect interstate commerce." *Lopez*, 514 U.S. at 558–59; *Morrison*, 529 U.S. at 608–09.

FWS's extraordinary assertion of federal authority over an isolated and commercially insignificant animal population cannot be squared with any of these three prongs. It is undisputed that the ESA falls outside the channels-of-commerce and the things-in-commerce prongs.[4] Thus,

[4] No circuit has ever held otherwise. *See, e.g.*, *Markle Interests, LLC v. U.S. Fish and Wildlife Service*, 827 F.3d 452 (5th Cir. 2016) (ruling out channels-of-commerce and things-in-commerce justifications for the ESA); *San Louis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1174 (9th Cir. 2011) (same); *Gibbs v. Babbitt*, 214 F.3d 483, 490–91 (4th Cir. 2000) (same). A lone D.C. Circuit opinion purported to hold that the ESA fit within the channels-of-commerce prong, but that theory commanded only one vote on the three-judge panel. *See Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1062–63 (D.C. Cir. 1997) (Sentelle, C.J., dissenting) (noting the split decision).

unless the government can justify its actions based on their effects on interstate commerce, the application of the ESA in this case cannot be sustained.

The government cannot meet that burden. The Supreme Court has identified four factors relevant to the substantial-effects inquiry: whether the statute (1) is "an essential part of a larger regulation of economic activity"; (2) contains a "jurisdictional element" to "ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce"; (3) includes "express congressional findings" about the regulated activity's effects on interstate commerce, and (4) has direct rather than attenuated effects on commerce. *Morrison*, 529 U.S. at 609–13; *Lopez*, 514 U.S. at 561–67. Applying each of these factors reinforces the same conclusion: the ESA as applied here is beyond the commerce power.

i. The ESA's ultimate goals have nothing to do with commercial transactions.

The ESA as applied here exceeds the commerce power because protecting an isolated population of butterflies serves no broader economic goal. A law "cannot be sustained" under the Commerce Clause unless it is "an essential part of a larger regulation of economic activity," or, more precisely, a regulation of "commercial transaction[s]." *Lopez*, 514 U.S. at 561. In other words, the *sine qua non* is a connection between commercial transactions and the statute's ends. *See id.* It follows that the means employed—whether they relate to commerce or not—are irrelevant.

Thus, in *Lopez*, the Court held that a law regulating gun possession was not a valid exercise of the commerce power because its ultimate goal was to prevent violence, not to regulate transactions. *See id.* For the same reason, the *Morrison* Court struck down a law that provided victims of gender-motivated violence with a federal remedy. *See* 529 U.S. at 601–02. On the other hand, where the Court has sustained statutes under the Commerce Clause, the challenged laws

were aimed squarely at regulating transactions. For example, the statute upheld in *Wickard v. Filburn* was designed to stabilize the prices buyers paid for wheat. 317 U.S. 111, 115 (1942). More recently, one goal of the statute upheld in *Gonzales v. Raich* was to stop the sale of marijuana. 545 U.S. 1, 25–26 (2005).

Like the statutes struck down in *Lopez* and *Morrison*, and unlike the ones upheld in *Wickard* and *Raich*, the ESA was enacted for reasons unrelated to commercial transactions. Its ultimate purpose is "the conservation of . . . endangered species." 16 U.S.C. § 1531(b). Because the ESA's *ends* are non-economic, it is immaterial that the statute's *means*—such as stopping Lear from building a home—sometimes involve a restraint on a transaction. The district court missed this means–ends distinction in its opinion below, mistakenly concluding that the ESA could be characterized as a regulation of the construction industry. *See* R8. But the ESA is not, as the district court suggested, about "the purchase of building materials and the hiring of contractors." R8. It is about wildlife. *See* 16 U.S.C. § 1531(b) (ESA statement of purpose). Because the protection of Lear Island's butterflies is not "an essential part of a larger regulation of economic activity" but rather the government's ultimate and noneconomic purpose, the ESA as applied here "cannot be sustained" under the Commerce Clause. *Lopez*, 514 U.S. at 561.

ii. Like the statutes in Lopez *and* Morrison*, the take prohibition lacks a jurisdictional element.*

There is no jurisdictional element in the ESA to prevent the statute's take prohibition from being applied to purely local affairs—which is exactly what has happened here. In *Lopez* and *Morrison*, the Court emphasized that a valid regulation on commerce may be expected to contain an "express jurisdictional element." *Morrison*, 529 U.S. at 611–12; *Lopez*, 514 U.S. at 561–62. A satisfactory jurisdictional element, the Court said, would ensure via a "case-by-case inquiry" that

the regulated activity in any given case actually does affect interstate commerce. *Lopez*, 514 U.S. at 561.

The ESA contains no such jurisdictional element. *See* 16 U.S.C. § 1538 (2012) (ESA take prohibition); *see also GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 288 n.2 (5th Cir. 2004) (memorandum opinion) (noting the absence of a jurisdictional element). The statute purports to extend federal control over *any* member of an endangered species, regardless of whether the survival of that particular animal would have even the slightest effect on interstate commerce. *See* § 1538.[5]

iii. Here, as in Lopez, *no congressional findings link the ESA to interstate commerce.*

It is telling that no congressional findings establish a link between the ESA and interstate commerce. In *Lopez*, the Supreme Court relied in part on the absence of any such findings, ultimately striking down the Gun Free School Zones Act. *See Lopez*, 514 U.S. at 562–63. Here, as in *Lopez*, Congress made no finding that the statute would affect commerce at all. *See* 15 U.S.C. § 1531 (2012) (ESA congressional findings). Every U.S. Court of Appeals to consider this issue has recognized as much.[6] The absence of congressional findings may not itself be dispositive, but it further undermines the government's argument that the ESA is a valid regulation of commerce.

[5] Congress might, for example, have required that the regulated species have an actual or foreseeable commercial use, or that a commercially important animal depended on the survival of the regulated species. But Congress included no such limits.

[6] *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (noting that "there are no [congressional] findings or history" concerning the ESA's effect on commerce); *GDF Realty*, 362 F.3d at 288 n.2 (noting that the ESA's "legislative history and congressional findings fail to tie species protection to commerce"); *Gibbs v. Babbit*, 214 F.3d 483, 493 n.3 (4th Cir. 2000) (noting that "there are no formal congressional findings that the ESA affects interstate commerce").

iv. Lear Island's butterflies have no direct effect on commerce.

Any effects the Lear Island butterflies may have on interstate commerce are too attenuated to justify congressional regulation. In both *Lopez* and *Morrison*, the Court rejected the government's reliance on multi-step causal chains linking the statute's immediate effects to ultimate impacts on interstate commerce. *See Morrison*, 529 U.S. at 612–13; *Lopez*, 514 U.S. at 563–67. In *Lopez*, the government defended a ban on gun possession near schools, arguing that the restriction reduced violence, thereby lowering the national economic costs of crime and emboldening travelers who otherwise might have stayed home out of fear. *See* 514 U.S. at 563–64. The government made essentially the same argument in *Morrison*, where it defended a statute providing "a federal civil remedy for gender-motivated violence." 529 U.S. at 601–02, 615. In both cases, the Supreme Court held that the causal link between local violence and interstate commerce was too attenuated, and the Court therefore struck down both statutes. *See Morrison*, 529 U.S. at 601; *Lopez*, 514 U.S. at 564. Invoking the commerce power to achieve such remote effects, the Court warned, would permit Congress to assume a general police power—something the Constitution forbids. *See Morrison*, 529 U.S. at 618–19; *Lopez*, 514 U.S. at 564–65.

Here, as in *Lopez* and *Morrison*, any connection between the regulated activity and interstate commerce is attenuated at best. Nothing in the record suggests that the Karner Blues have any commercial significance. In this respect, the present case is distinguishable from cases such as *Gibbs v. Babbit*, which sustained applications of the ESA under the Commerce Clause. 214 F.3d 483, 492 (4th Cir. 2000). In *Gibbs*, unlike here, the species in question—the red wolf—was directly involved in several interstate industries. *See id.* Specifically, the *Gibbs* court relied on the existence of an active red wolf eco-tourism industry, the importance of ongoing scientific research about the wolves, and the hope of reviving a once-thriving pelt trade. *See id.* at 494–95. In contrast, the record in this case reflects no economic activity at all involving the Karner Blues.

Here, unlike in *Gibbs* and similar cases, the application of the ESA cannot be sustained on the basis of the species' direct involvement in commerce.

The possibility that the loss of Lear Island's butterflies could ripple through the ecosystem, ultimately harming plants and animals with commercial uses, is equally insufficient to justify the ESA's application here. Any such ripple effects would be just the sort of attenuated impact that failed to suffice in *Lopez* and *Morrison*. And, in any case, the record contains no evidence that any commercially significant species depend, even indirectly, on the Karner Blues.

The purely speculative possibility of eco-tourism on Lear Island also fails to save the ESA's application to this case. The Commerce Clause does not permit Congress to push a person into a commercial activity from which she would prefer to abstain. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012). Requiring Lear to preserve the butterflies so she can invite eco-tourists to view them would amount to just such a compulsion.

In sum, the loss of Lear Island's isolated butterfly population would have at most an attenuated impact on commerce. This is yet another reason that the ESA as applied here is beyond the commerce power.

v. This court should hold that the ESA, as applied, is outside the commerce power.

FWS's extraordinary assertion of federal power is incompatible with the Constitution. Each of the four factors identified in *Lopez* and *Morrison* points in the same direction: FWS's application of the ESA in this case is beyond the commerce power. This Court should therefore reverse the district court's Commerce Clause holding and reverse the denial of declaratory relief.

B. Lear's claim is ripe because any application for an incidental take permit would be futile.

The government cannot evade liability by appealing formalistically to the ripeness doctrine and demanding that Lear file a futile permit application.[7] The Supreme Court recently reaffirmed that dismissals based on ripeness are disfavored, emphasizing that federal courts have a "virtually unflagging" "obligation to hear and decide cases within [their] jurisdiction." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (internal quotation marks omitted). Consistent with this skepticism towards ripeness challenges, the Court has held that in Takings Clause cases, "federal ripeness rules do not require the submission of . . . futile applications" to regulatory agencies. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

For two reasons, it would be futile for Lear to apply for an incidental take permit. First, Lear cannot fulfill FWS's acre-for-acre permit requirement because there is no land available for that purpose. As an absolute condition on an incidental take permit, FWS would require Lear to replace any destroyed habitat acre-for-acre. R6. That is impossible. The entirety of Lear's 10-acre lot is already given over to Karner Blue habitat. *See* R5–R6. There is no room on the lot for any additional, replacement habitat. Nor can Lear look to neighbors for the necessary land. The only lot adjacent to Cordelia Lear's is that of her sister, Goneril. R6. The sisters are estranged, and Goneril has already refused to cooperate with Cordelia in fulfilling FWS's permit requirements. *Id.* Lear is out of options. For this reason alone, application for a permit would be futile.

[7] Of the two ripeness doctrines—prudential and Article III—only prudential ripeness is disputed here. Article III ripeness requires only "concrete legal issues, presented in actual cases, not abstractions." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947); *see also Montana Envt'l Info. Cen. v. Stone-Manning*, 766 F.3d 1184, 1188 n.3 (9th Cir. 2014) (explaining the two ripeness doctrines). That requirement is easily satisfied in this case, where the dispute centers on a real government action against a real property owner and her land.

If that were not enough, applying for an incidental take permit would also be a money-losing venture—and thus futile from the perspective of any rational landowner. Lear would have to spend $150,000 to prepare a permit application. R6. With the permit, her land would be worth only $100,000. R7. At best, then, Lear stands to lose $50,000 by applying for a permit—and that is assuming FWS would grant the permit, which is far from certain. This is an economic impracticality.

Complying with a permit would be impossible, and applying for it would be economically irrational. Lear should not be expected to throw away $150,000 on a permit whose conditions she cannot possibly fulfill. Nor should her Takings claim be defeated by her refusal to perform such a futile and wasteful ritual. Instead, this Court should apply *Palazzolo*'s straightforward rule, reject the government's formalistic attempt to escape liability, and hold that this case is ripe.

C. Lear's lot constitutes the relevant parcel for Takings analysis because it encompasses the entirety of her property rights.

No court has ever held that distinct lots owned by separate individuals constitute the same parcel merely because they are adjacent or because they had the same previous owner. The Takings Clause of the Fifth Amendment prohibits the government from taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. Yet, that is exactly what the government seeks to do by encouraging this Court to evaluate the fictitiously large parcel that encompasses different individuals' lots. Lear is only asking this Court to define her property by "the metes and bounds that describe its geographic dimensions." *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 331–32 (2002). There is no risk that focusing the analysis on Lear's lot would run afoul of the Supreme Court's admonition against conceptual severance and "divide a single parcel into discrete segments." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 130–31(1978). When deciding what the relevant parcel is, courts take a

"flexible approach, designed to account for factual nuances." *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1181 (D.C. Cir. 1994). Here, the facts show that Lear's lot is the relevant parcel—both legally and practically.

i. Lear's lot is separate from neighboring lots legally because her entire bundle of property rights have always been encompassed in her lot.

All Lear got was the Cordelia lot, and the lot was a separate parcel legally divided and distinct from the adjacent lands. Courts look into what was included when the individual received the land "in light of the developing regulatory framework." *Loveladies,* 28 F.3d at 1181. In *Loveladies,* a lot divided from adjacent property before the government imposed restrictions was considered the relevant parcel for the takings analysis. *Id.* The court held as much because the act of dividing the land was not subject to strategic property separations that could help the property owners avoid eminent domain. *See id.* Lear received the Cordelia lot, and only the Cordelia lot. Similar to the timing of the land subdivisions in *Loveladies,* Lear received her parcel before the property was subjected to the restriction. King Lear originally subdivided the lots in 1965, before the passage of the ESA and before any of the island was designated as critical habitat. *See* R5-R6. As the court below noted, King Lear's subdivision is inconsistent with strategic behavior to evade eminent domain because he thought each subdivision could develop one single-family residence. *See* R10. Lear did not receive any rights to the adjacent property. R10. If the intent was to grant joint ownership, King Lear could have deeded a tenancy in common, but this was not the case. King Lear's choice to subdivide was not calculated to avoid eminent domain, and because Lear received the land as a distinct parcel, this Court should consider the Cordelia lot as a distinct parcel. All Lear got was the Cordelia lot, and the lot has been treated as a single parcel since Lear came into its possession.

If the relevant parcel goes beyond the bounds of Lear's actual property rights, then the government will never be required to compensate for a taking. A Takings analysis is relative to the owner's "full bundle of property right." *Andrus v. Allard*, 444 U.S. 51, 100 (1979) (internal quotation marks omitted). Lear's bundle of property rights encompass the Cordelia lot and no more. She has no additional easements, nor can she even enter her neighbor's property. Should this Court expand the Takings analysis beyond the bounds of Cordelia Lear's lot, it will open the door to any individual's Takings claim being thwarted by the mere existence of a neighboring parcel.

ii. Lear's lot has been treated as a distinct parcel by every interested party.

Because every party that interacts with the Codelia Lot has treated it as a distinct parcel, it should remain a distinct parcel for Takings analysis. When interested parties treat a property as a separate parcel, that separation should be respected in Takings analysis. *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991). Unless an owner treats a parcel as part of a larger economic scheme involving adjacent land, that single lot—rather than the entire neighborhood—is the relevant parcel. *See Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005). In *Appolo Fuels*, as part of an overarching plan to mine all the coal in a certain area, the plaintiff purchased a single lot, intending to buy the adjacent parcels later. *See id.* Because acquiring this first parcel was just one step in a larger plan to buy the whole area, the court held that the lot could not be isolated for Takings analysis. *See id.*

Lear, unlike the plaintiff in *Appolo Fuels*, has never intended to buy the adjacent parcels. Since obtaining ownership, she has paid taxes only on her ten-acre lot. R7. She has not contributed to the payment or upkeep fees in the adjacent lots. *See* R7. Lear's behavior indicates that the Cordelia lot is a distinct parcel.

Even the neighbors and the government treat the Cordelia lot as its own distinct parcel. Cornelia Lear's neighbors—her sisters—are estranged from her and have refused to cooperate with her homebuilding plans. *See* R6. New Union also treats Lear's lot as a separate parcel: it imposes property taxes on her lot individually and zones the lot separately. R6. Even FWS treats the three Lear sisters and their lots as independent parties by asking Cordelia Lear—and her alone—"to commit to maintain the . . . lupine fields by annual mowing each October." R6. The government cannot have it both ways by requiring Lear to be solely responsible for the lot when it comes to her affirmative duties, but then consider the lot a part of a larger parcel when it comes to Takings analysis.

Everyone involved treats Lear's lot as distinct. Her relationship with her neighbors is not merely arms-length, but adversarial. It would be unrealistic and unjust to write off Lear's losses merely because the rest of the neighborhood remains unaffected. Accordingly, the relevant parcel for Takings analysis is Lear's lot.

D. The government completely deprives Lear of economic value by requiring Lear to risk violating the Endangered Species Act and not use her land for 10 years.

Requiring Lear to risk criminal prosecution under the Endangered Species Act and wait an entire decade before using her land is not a real option. When an individual's land loses all economically beneficial use because of a regulation, the regulation has gone too far. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). On the other hand, if the regulation still leaves Lear with an *actual* option to benefit from the land, it is not a categorical taking. *See id.* at 1019. Lear's option to cease using her land for ten years and wait for the natural destruction of the Karner Blues' habitat is not really an option at all. First, it risks violating the Endangered Species Act. Second, it forces Lear to wait for an extraordinary long amount of time.

i. The government cannot escape Takings liability by asking Lear to stop mowing and thereby risk prosecution under the Endangered Species Act.

The government cannot escape liability by asking Lear to roll the dice and risk prosecution under the Endangered Species Act. But that is just what it seeks to do. FWS, the very agency that promulgated the rule against destroying habitat, now suggests that Lear intentionally kill the Karner Blues by ceasing the annual mowing that sustains their habitat. R10.

Section 9 of the ESA prohibits the "take" of any endangered species. *See* 16 U.S.C. § 1538(a)(1)(B) (2012). The term "take" includes any "intentional . . . omission which creates the likelihood of injury to wildlife." 50 C.F.R. § 17.3. If Lear accepted the government's invitation to stop mowing, she would be committing an omission with the intent of killing the Karner Blues. It would be obvious that this was her intention. Her family has mowed the land for decades, R5, and her only plausible reason for stopping now would be to wipe out the butterflies. The government could thus prosecute Lear for violating the ESA's take prohibition. Even if Lear ultimately prevailed, that would be cold comfort: she still would have suffered the indignity and expense of defending a civil or criminal case against the federal government—on top of foregoing the use of her land for ten years.

In light of that risk, to stop mowing and wait for the Karner Blues to die out is not a viable option. A taking occurs anytime the government leaves the property owner with no "economically beneficial or productive options" for the land. *Lucas*, 505 U.S. at 1016. An option that is even potentially unlawful—regardless of whether it is beneficial or productive—is no option at all. Never in a Takings case has a court countenanced an "option" which leaves the property owner vulnerable to criminal prosecution. Nor should this Court. Sidestepping the ESA by killing the Karner Blues, whether by act or omission, is not a viable choice for Lear. Because she has no

economically beneficial or productive options left, she is entitled to compensation under the Takings Clause.

ii. No legitimate planning concerns justify the extraordinary ten-year delay the government would impose on Lear's use of her land.

The government's suggested ten-year plan to kill the butterflies not only exposes Lear to liability, but also imposes an unjustified and unreasonably lengthy deprivation. In *Tahoe-Sierra*, the Supreme Court held that "the temporary nature of a land use restriction" does not "preclude[] finding that it effects a taking." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337 (2002). There, a government agency needed time to make and implement plans for Clean Water Act compliance, so the agency imposed a 32-month moratorium on private development. *See id.* at 311. The Court emphasized that moratoria "are an essential tool" relied upon by planning agencies, affording adequate time for "informed decisionmaking." To avoid intruding on this important government interest, the Court held that the landowner was not entitled to compensation for a 32-month deprivation. But the Court cautioned that even a one-year moratorium "should be viewed with extreme skepticism," and that an "extraordinary delay" could indeed amount to a taking. *Id.* at. 332, 342.

The ten-year wait the government would impose on Lear is just the sort of extraordinary delay the *Tahoe-Sierra* Court alluded to. Indeed, the delay here is almost four times as long as the one in *Tahoe-Sierra*. *See* 535 U.S. at 337. Moreover, the government's interests that justified the 32-month delay in *Tahoe-Sierra* are absent from this case. Here, unlike in *Tahoe-Sierra*, the delay is not motivated by a planning agency's desire to buy time for careful deliberation. FWS does not need ten years to decide what to do. Rather, the only reason to wait is to kill a population of endangered animals—a purpose antithetical to FWS's mission and far removed from the legitimate planning interests considered in *Sierra-Tahoe*.

The government's unreasonable and potentially unlawful plan to kill the Karner Blues cannot be a shield against Takings Clause liability. Because the only option the government left available exposes Lear to liability and requires her to wait through an extraordinarily long and unjustified delay, this Court should hold that she has suffered a complete deprivation.

E. Lear's inability to gain net economic benefits constitutes a complete loss in economic value.

The government wants Lear to sacrifice any economic benefit she might derive from her land for the public good. A regulation that leaves a property owner with no economic benefits is a categorical taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). A mere token interest is insufficient to mitigate complete economic loss. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). Lear's option to receive annual payments from the Brittain County Butterfly Society would leave her with an economic loss every year.

i. Lear will not profit from payments by eco-tourists because her mandatory property tax will still result in an annual loss.

Lear will be stuck paying the government more money in property taxes than she will be able to make from eco-tourism. Any revenue from eco-tourism revenue would be a token interest that would leave Lear with no net gains. When the property owner "will be unable to derive economic benefit" from the property, she suffers a complete economic deprivation. *Andrus v. Allard*, 444 U.S. 51, 66 (1979). A direct economic benefit can only truly be a "benefit' if it has the potential to result in a net economic gain. Lear has to pay $1,500 in property taxes for the Cordelia lot every year. R7. But by charging eco-tourists to enter her property, she would earn only $1,000 per year. R7. That leaves Lear unable to do anything but lose $500 every year.

ii. The regulation leaves Lear's land valueless because it has no lawful, profitable use.

Not only is Lear unable to generate net profits from her property, but the regulation leave her property with no value. When a property is left valueless by a regulation, it is a complete economic deprivation. *Lucas*, 505 U.S. 1003, 1020 (1992). Although Lear should not be expected to sell her land, *see Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1117 (Fed. Cir. 2015), she would not be able to sell it in any case. There is no market for agricultural or timber use of the Cordelia lot. R7. While Lear can use the land recreationally, this is not an economic value because there is no market for the recreational use of the Cordelia lot. R7. The county and federal regulations leave Lear's property valueless, and Lear has suffered a complete economic deprivation.

F. Public trust limitations are inapplicable to Lear's title and cannot constitute a background principle of state law.

Lear's property is not subject to any relevant background principles of state law. The law of "takings" has long recognized that the relative nature of property rights implies certain restrictions upon the use of one's property; some rights must yield to the police power of the State. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). These few circumstances where the restrictions are legitimate derive from the people's expectation that the State retains some control over how one's property is used. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992). However, when a government regulation has the effect of prohibiting *all* economically beneficial use of one's land, the State may only avoid compensation if this restriction has always been inherent in the title. *Id.* at 1027–29. Where such a "background principle of state law" always proscribed the conduct at issue, the owner must have expected the State to interfere, and no compensation is owed.

The doctrine of public trust is inapplicable to Lear's wetlands, and therefore does not allow Brittain County to block her construction plans. No public trust limits were inherent in the 1803 Congressional grant of title, and the equal footing doctrine is not sufficient to override the federal government's power to convey said land.

iii. Lear's original title does not include public trust limitations due to Lake Union's non-tidal status.

Because Lear's non-tidal land cannot be treated as though it has tidal status, the original title cannot be limited by the public trust doctrine. The doctrine of public trust derives from the English common law, which recognized the essential public nature of tidal waters in light of their importance to navigation and commerce. *See Shively v. Bowlby*, 152 U.S. 1, 11 (1894). The king held the title (the *jus privatum*) to such waters and their underlying lands as the sovereign, but he held the dominion (the *jus publicum*) only as a representative of the people; essentially, he held this property in trust for the public. *Id.* A titleholder generally cannot convey a greater title than that which he himself possesses, *Mitchell v. Hawley*, 83 U.S. 544, 550 (1872), and thus any conveyance of title by the sovereign necessarily incorporates the limitations of the public trust.

In practice, the public trust doctrine acts to restrain governments and landowners from making certain use of those submerged lands to which it applies. The contours of the doctrine differ by state, but it generally places three restraints upon the property in question: it must be maintained for use by the general public, may not be sold, and must be maintained for particular types of use. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 477-78 (1969).

Brittain County justifies its restriction of Lear's land under the third rationale, arguing that her proposed construction is not a water-dependent use. However, such public trust limitations are inapplicable here. Because "background principles of state law" derive from a landowner's

expectations as to his property rights, any public trust limitations must have inhered in the title when it passed to Cornelius Lear in 1803. R5. Lake Union is a non-tidal lake; there is simply no way that public trust principles could limit Lear's title, because no American legal authority at that time had recognized non-tidal waters as subject to the public trust.[8] Indeed, to this day, no legal authority in New Union has even defined the scope of the state's public trust doctrine. R10. Lear's title cannot be subjected to "background principles of state law" when the scope of that law is wholly undefined.

When Congress granted Cornelius Lear the submerged land within 300 feet of the shore, the public trust doctrine could not apply to the property, and therefore cannot constitute a "background principle of state law."

iv. The equal footing doctrine cannot impose public trust limitations on Lear's title because the equal footing doctrine is inapplicable where the State is treated as the original States were treated upon admission.

The equal footing doctrine cannot have imbued Lear's wetlands with public trust restraints when New Union's became a state because (1) the 1803 title had no such inherent limitations which could constitute a background principle of state law, (2) the doctrine is irrelevant because New Union is not, in fact, on "unequal footing," and (3) the doctrine cannot overcome Congress's authority to grant territorial lands to a private party for appropriate public purposes. The historical use of the wetlands as a boat landing is not sufficient to convey the land's title to New Union.

The equal footing doctrine, derived from *Martin v. Lessee of Waddell* and its progeny, ensures that a State is not legally disadvantaged merely because it joined the Union later than

[8] *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), briefly surveys the shift from the English tide-based distinction to the American rule of "navigability-in-fact." The earliest authority diverging from the tidal rule was in 1810, seven years after the 1803 Lear grant. *See id.* at 1227 (citing *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810)); R5.

others. 41 U.S. 367, 410 (1842). In *Martin*, the Court held that when the original 13 colonies became states, the sovereign people of each State acquired the rights to all navigable waters within its borders, and these lands became subject to the public trust. *Id*. Subsequent cases held that because the states are coequal sovereigns, all states acquire title to navigable waters upon statehood so as to enter on an "equal footing." *See Lessee of Pollard v. Hagan*, 44 U.S. 212, 228–229 (1845); *Knight v. U.S. Land Ass'n.*, 142 U.S. 161, 183 (1891); *Shively*, 152 U.S. 1 at 26-31. In other words, states enjoy the same legal status regardless of when they were admitted to the Union.

For three reasons, Brittain County's reliance upon this doctrine is insufficient to escape Takings liability. First, even assuming arguendo that the equal footing doctrine did subject Lear's lands to the public trust upon New Union's statehood, this does not establish that the public trust constitutes a background principle of state law. Such background principles should be expected by the property owner and thus must inhere in the title itself. *See Lucas*, 505 U.S. at 1027–29. Because New Union became a state after Lear received the land, R4, and no American legal authority in 1803 had yet subjected non-tidal wetlands to the public trust, *PPL Montana*, 132 S.Ct. at 1227, no public trust limitations inhered in the title. Had the equal footing doctrine imposed public trust principles on Cornelius Lear upon New Union's admission, that would have been an unexpected and uncompensated abridgement of the property rights he previously enjoyed.

Second, the doctrine is irrelevant to this case because Brittain County is not on unequal footing with any other state. The inapplicability of public trust limitations to non-tidal waters as of 1803 is not unique to New Union. No state—including one of the original 13—could have imposed such restrictions on Lake Union's waters. New Union has not been deprived of any interest that another sovereign State would enjoy.

Third, the equal footing doctrine is inapplicable to Lear's non-tidal wetlands. Brittain County suggests that New Union gained title to all navigable waters at the time it became a state, and that public trust limitations must therefore inhere in Lear's wetlands.

However, all rights to land a State acquires via the equal footing doctrine are still subject to the powers granted to the federal government under the Constitution. *See Martin*, 41 U.S. at 410. Because the United States is the only government with authority over territories, these powers are plenary. *See Shively*, 152 U.S. at 48. The federal government had the full power to grant Lear the submerged lands surrounding Lear Island prior to New Union's statehood if doing so effected an appropriate public purpose. *See id; see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987) ("the Federal Government could defeat a prospective State's title to land under navigable waters by a pre-statehood conveyance of the land to a private party for a public purpose appropriate to the Territory."). Although there is a presumption against disposal of territorial land, this can be overridden by a clear Congressional intent. *See United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

Congress's land grant to Cornelius Lear supports a public purpose, namely, interstate shipping. An appropriate public purpose includes the "promotion and convenience of commerce . . . among the several States." *Shively*, 152 U.S. at 48. The wetland at issue was historically a boat landing which was used throughout the nineteenth century to carry the farm's produce over an interstate lake. R5. Thus, the Congressional grant supports a public purpose and falls under the powers of the United States. The equal footing doctrine cannot override this valid grant.

The Congressional grant also satisfies the final caveat of the equal footing doctrine: a clear intent to convey the submerged land. *See Holt State Bank*, 270 U.S. at 55. There is a presumption against such conveyances because the federal government has dominion over Territories, but

simultaneously holds the land in trust for future States. *See id*; *see also Montana v. United States*, 450 U.S. 544, 552 (1981) (presumption against conveyance unless "the claim confirmed in terms embraces the land under the waters of the stream"). In the present case, there is no question as to Congress's intent: it declared that Cornelius Lear held full title to the submerged land within 300 feet of Lear Island's shore. R4–R5.

Cornelius Lear's title could not have been subject to the public trust doctrine when Congress granted him the land due to its non-tidal status, and the equal footing doctrine cannot restrain the clearly intended grant of the wetlands to Lear.

G. The federal and local regulations must be combined for Takings Clause analysis in order to accurately determine who shoulders the burden of the regulations made for the public good.

The regulations promulgated by FWS and Brittain County combine to deprive Lear of all economically beneficial use of her property. These regulations must be analyzed together. To do otherwise would elevate form over substance and render meaningless the protections the Fifth Amendment was meant to afford.

The purpose of the Takings Clause is to prevent someone like Lear from bearing burdens which, in fairness, should be borne by the public as a whole. *See Armstrong v. United States,* 364 U.S. 40, 48 (1960). It is the effect of the state action, not the cause, which the Fifth Amendment addresses. This is especially true in the context of a categorical regulatory taking, which, like a physical taking, must be compensated regardless of the state's purpose. *See Lucas*, 505 U.S. at 1028; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The bottom line is that when government action impinges on a fundamental right of ownership, a taking occurs. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

Lear's deprivation may be caused by distinct government actions, but that is immaterial. The Takings Clause is meant to shield people from unreasonable governmental intrusion into their property. Lear is entitled to compensation for shouldering a public burden, regardless of how many governments are involved in the taking.

The loophole FWS and Brittain County now advance is incompatible with the rule of categorical takings laid down in *Lucas*. It would permit federal and state governments to structure their respective regulations so that each contributes to but does not by itself effect a total deprivation. Indeed, governments would have a strong incentive to abuse the rule proposed by FWS and Brittain County. A State would only need to identify a federal law that takes a part of the landowner's property, and the State would then be free to expropriate the remainder for itself—at zero cost to either sovereign. Worse, federal and state governments could collude in future policymaking decisions to skirt Takings liability. Property owners could thus be forced to forego all beneficial use of their property without compensation. This is something the Fifth Amendment does not tolerate. *See Lucas*, 505 U.S. at 1027.

The federal and county governments cannot absolve themselves of liability by taking all of Lear's property in bits and pieces. To allow that would not only undermine the core purpose of the Takings Clause; it would also require this Court to read all the practical import out of *Lucas*. Lear has been deprived of all economic use of her land, and she is entitled to just compensation from the responsible government actors.

CONCLUSION

The Lear Island butterflies have no commercial significance, and protecting them would serve no larger, economic program. This Court should therefore hold that the ESA as applied is beyond the commerce power and remand to the district court to enter an appropriate order.

But even if this Court sustains this application of the ESA, the government must compensate Lear. Working in tandem, the ESA and Brittain County's Wetland Preservation Law deprive Lear of all economically beneficial user of her land. Lear is therefore entitled to just compensation under the Takings Clause. Thus, this Court should sustain the district court's award of damages against both defendants.