Case Nos. 14-4151 and 14-4165

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,
Plaintiff-Appellee,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,
Defendants-Appellants,

AND

FRIENDS OF ANIMALS,
Intervenor-Defendant-Appellant

From the United States District Court
for the District of Utah
(2:13-cv-00278-DB)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(c)(1) and 26.1, *amici curiae* the Chamber of Commerce of the United States of America and National Federation of Independent Business ("*Amici*") hereby submit the following corporate disclosure statement.

The Chamber of Commerce of the United States of America states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock.

The National Federation of Independent Business states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing environmental statutes such as the Endangered Species Act ("ESA").

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business. It is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's leading small business association, representing 350,000 members in

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

Amici and their members have a substantial interest in the proper resolution of this case. *Amici* recognize the need to protect certain species threatened with extinction. But this protection need not come from the federal government, especially when a particular species (such as the Utah prairie dog) is found entirely within one state and has no connection otherwise to interstate commerce. In such instances, state and local governments are best positioned to balance species preservation and reasonable local concerns about safety, agriculture, development, and other community needs. Allowing the ESA, which imposes the massive costs of species preservation almost entirely upon private landowners and businesses, to comprehensively regulate intrastate species is neither constitutionally legitimate nor economically sensible.

SUMMARY OF THE ARGUMENT

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Yet the U.S. Fish and Wildlife Service ("FWS") claims authority under the ESA to regulate all "listed species—wherever they occur—from take." Brief of United States Fish and Wildlife Service ("FWS Br.") at 25.

Appellants predicate their Commerce Clause argument mainly on two claims: (1) the federal regulations at issue govern interstate commerce because they interfere with commercial development of private land; and (2) the Utah prairie dog is "'part of an economic class of activities that have a substantial effect on interstate commerce,'" *id.* at 29 (quoting *Gonzalez v. Raich*, 545 U.S. 1, (2005)), based on an "interrelationships of species" theory, whereby the extinction of one species eventually will affect some other species that does have a substantial connection to interstate commerce, *id*. at 43. Neither argument is sustainable.

First, the Commerce Clause inquiry under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), must focus on the object of the regulation—not the conduct with which it interferes. Laws making it a federal crime to possess a handgun near a school or to commit violence against women inhibit commercial enterprise. But that was not pertinent to whether those laws regulated economic activity. It is likewise irrelevant that some applications of the ESA regulate interstate trade of some threatened or endangered species, such as red wolves and bald eagles. That was equally true of certain applications of the Crime Control Act of 1990 and the Violent Crime Control and Law Enforcement Act of 1994, just as it was true of the Patient Protection and Affordable Care Act examined in *NFIB v. Sebelius,* 132 S. Ct. 2566 (2012). In each case, however, the

Supreme Court examined the aspect of omnibus legislation challenged under the Commerce Clause. That must be the mode of inquiry here too.

Importantly, unlike in *Raich*, Appellee People for the Ethical Treatment of Property Owners ("PETPO") does not argue that isolated intrastate takes of Utah prairie dogs are immune from federal regulation because, notwithstanding the interstate market for the commodity, those particular takes happen to be non-economic in character. Rather, PETPO argues that the Utah prairie dog, unlike marijuana, is *not* an article of commerce and there is *no* interstate market for it—period. As a factual matter, the district court agreed. Unlike other species, the Utah prairie dog does not cross state lines, it is not a commodity (its pelt is not traded, for example), it is not sought after by scientists and researchers, and its presence on private land in Utah is not a tourism draw. In short, there is no market—interstate or otherwise—for this particular species.

Appellants thus ask this Court to sustain application of the ESA to the Utah prairie dog in the most controversial factual setting possible: sweeping federal regulation under the Commerce Clause of non-economic, purely intrastate activity based on a federal law with no jurisdictional limitation and no legislative findings regarding the species at issue. Appellants argue that the outcome they seek follows from *Raich* and *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). But that is not remotely true. Marijuana and coal are obviously articles of

commerce for which there is an established interstate market. Further, both laws included congressional findings that are noticeably absent here. Congress could not have rationally found that it needed to regulate Utah prairie dog takes to control a national Utah prairie dog market that does not exist.

Finally, Appellants ask this Court to adopt an "interrelationships of species" theory that attempts to end-run the limitations on Congress's Article I authority. The fundamental flaw with this theory is the district court's finding that the Utah prairie dog is not essential to the survival of any other species. Regardless, the Supreme Court already has rejected this kind of attenuated reasoning. The five-justice majority in *NFIB* held that regulation of potential future effects on interstate commerce is not regulation of economic activity. And *Lopez* and *Morrison* certainly would have turned out differently if this kind of speculative connection between the object of the regulation and interstate commerce were sufficient. If FWS can regulate purely intrastate, non-economic activity based on the mere existence of the food chain, there is no longer a constitutional distinction between "what is truly national and what is truly local." *Lopez,* 514 U.S. at 567-68.

This case illustrates the practical importance of enforcing the constitutional limits of Congress's authority to regulate purely intrastate species. More than 70% of Utah prairie dogs are found on private land. Their burrowing activity can be particularly destructive to agriculture, cemeteries, airports, and other road projects.

The listing of the Utah prairie dog thus imposes substantial burdens on Utah landowners and local businesses, requiring expensive (and often unsuccessful) solutions to protect their property, and limiting the number and frequency of prairie dogs that can be captured and relocated. Moreover, the ESA regime places decisions about who should receive permits for accidental or incidental "take" of those dogs in the hands of federal officials far removed from the concerns of those Utahns forced to bear the bulk of the costs associated with protecting this purely intrastate animal species.

This disproportionate burden the ESA imposes here is neither an accident nor an anomaly. There are myriad documented examples of individuals and businesses suffering significant economic losses following the designation of a species as endangered or threatened. Landowner compliance with the ESA can cost millions of dollars. Exacerbating this problem, FWS has adopted the narrowest of possible views as to the role these economic considerations may play in its listing and enforcement decision-making processes. Because FWS will not consider the full costs of compliance, it is crucial that courts confine Congress's authority to implement the ESA to its constitutional bounds.

Enforcing those limits does not require abandonment of conservation efforts for intra-state endangered or threatened species. There is substantial evidence that the ESA itself is not particularly effective at preserving species, and that its heavy-

handed enforcement regime creates perverse incentives to *destroy* habitat and suppress information about the existence of threatened or endangered species. But more important, States have the same interest as the federal government in ensuring that species unique to their ecosystems do not become extinct. Utah's effort to protect its namesake prairie dog underscores that fact. Utah has a comprehensive statutory and regulatory scheme that fully protects Utah prairie dogs, but it does so in a pragmatic way responsive to local concerns about safety, fairness to landowners, and preservation of important economic enterprise. This case demonstrates that the ESA's laudable goal can be achieved without extending it to cover animal species that have no connection whatsoever to interstate commerce, and thus lie outside the boundaries of Congress's constitutional powers. The district court's decision should be affirmed.

ARGUMENT

I. Congress's Regulation Of The Utah Prairie Dog Exceeds Its Authority Under Article I Of The Constitution.

Although the Supreme Court has found that "Congress has broad authority under the Clause," *NFIB*, 132 S. Ct. at 2585 (Roberts, C.J.), the commerce power is not unlimited. The Commerce Clause reaches only "the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison*, 529 U.S. at 609. FWS acknowledges that the first two

categories are inapplicable, *see* FWS Br. at 26, and Friends of Animals does not argue otherwise, *see* Brief of Friends of Animals ("FOA Br.") at 18-19. If this regulation is to be upheld as constitutional, it must be as an intrastate activity substantially affecting interstate commerce.

The Court should reject Appellants' reliance on this "most unsettled, and most frequently disputed, of the categories." *United States v. Patton*, 451 F.3d 615, 622 (10th Cir. 2006). Indeed, this Court has been appropriately hesitant to uphold *any* federal regulation under the aggregation principle. *See id.* ("If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless."). The Supreme Court has validated that instinct. *See NFIB*, 132 S. Ct. at 2646 (joint dissent) ("At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants."); *see also id*. at 2578 (Roberts, C.J.) (same).[2] Were the aggregation principle to be deployed in an unrestrained fashion, "it is difficult to perceive any

[2] The five-Justice conclusion in *NFIB* that the individual mandate violates the Commerce Clause is a holding; it was that conclusion that compelled the Chief Justice to further analyze it under the taxing power. *See* 132 S. Ct. at 2600-01 (Roberts, C.J.) ("It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.").

limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S. at 564. As explained below, the federal regulation at issue here epitomizes those concerns.

A. The Commerce Clause Inquiry Must Focus On Takes Of The Utah Prairie Dog.

The first step in determining if a federal regulation may be upheld under this category is assessing whether "'the activity at which the statute is directed is commercial or economic in nature.'" *Patton*, 451 F.3d at 623 (quoting *United States v. Grimmett*, 439 F.3d 1263, 1272 (10th Cir. 2006)); *see also GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003) ("Each of the three *Lopez* categories recognizes Congress' power to regulate where the *object of regulation* relates to interstate commerce: channels, instrumentalities, or activities.") (emphasis in original); *Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000) (analyzing "the taking of red wolves on private land"). Here, the take of the Utah prairie dog is the activity at which this FWS regulation is directed. *See* Brief for People for the Ethical Treatment of Property Owners ("PETPO Br.") at 2 (citing Final Rule Revising the Special Rule for the Utah prairie Dog, 77 Fed. Reg. 46,158, 46,162 (Aug. 2, 2012)). That must be the focus of the Court's inquiry.

Appellants try to sidestep this issue by focusing on the economic enterprise the regulation inhibits. FWS Br. 36-37; FOA Br. 23-25. But that is not how the inquiry works. *Lopez*, for example, would not have turned out differently if the

challenge had been brought by a business seeking to open a shooting club within 1000 feet of a school. The question was then, and is now, whether the "*regulated activity* 'substantially affects' interstate commerce." *Lopez*, 514 U.S. at 559 (emphasis added). "The point of *Lopez,* as further explained in *Morrison,* is not that Congress can regulate any activity if the act of regulating catches an entity or an action that is itself commercial independent of the noncommercial nature of the regulated entity and activity. It is rather that '[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'" *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1159 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of rehearing en banc) (quoting *Morrison*, 529 U.S. at 610)). FWS does not regulate agriculture or commercial development. FWS Br. at 36. "Arguably, Congress could pass a statute prohibiting anyone engaged in interstate commerce from 'taking' endangered species. But Congress did not do so in these parts of the statute." *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 291 n.4 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc). The ESA regulates takes of the Utah prairie dog.

Appellants also try to draw attention away from the challenged regulation by asking the Court to analyze the ESA as a whole. FWS Br. at 39-42; FOA Br. at 20-22. Here too, however, Appellants run headlong into a wall of precedent. In *Lopez*, the Gun-Free School Zones Act was not saved because it was housed in the Crime

Control Act of 1990. PETPO Br. at 29 n.19. Nor was the Violence Against Women Act immunized because it was passed as part of the Violent Crime Control and Law Enforcement Act of 1994. *See id.* And the regulation of marijuana under the Controlled Substances Act could not have been sustained based on the existence of an interstate market for cocaine or heroin. More recently, the fact that the Patient Protection and Affordable Care Act included measures governing activity that is concededly economic in nature did not resolve the constitutionality of the individual mandate to purchase health care insurance. In all of these cases, the Supreme Court carefully examined the specific aspect of the omnibus legislation subject to challenge on constitutional grounds. That is how the Court must proceed in this appeal as well.

Appellants conflate the need to sort the regulation being challenged here from other applications of the ESA with the proposition that "[w]here [a] class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Raich*, 545 U.S. at 23. This class of activities is not within the reach of federal power. *See infra* at 14-21. More to the point, PETPO is not seeking to excise trivial instances of this class of activities. *See* PETPO Br. at 30. Such a challenge would argue that takes of certain Utah prairie dogs do not have a substantial affect on interstate commerce even if other takes of Utah prairie dogs do, much like it was argued that

certain uses of marijuana did not substantially affect that interstate market. *See Raich*, 545 U.S. at 30 ("The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected."). Rather, PETPO quite appropriately claims that no take of the Utah prairie dog—aggregated or otherwise—has a substantial effect on any interstate market. Appellants may not thwart litigation over that issue by hiding behind other aspects of the ESA.

The reason why Appellants go to such lengths to avoid the question at the heart of this case is obvious: the take of the Utah prairie dog is not of "an apparent commercial character." *Morrison*, 529 U.S. at 611 n.4. The Utah prairie dog is in no sense "an article of commerce." *Raich*, 545 U.S. at 26. The district court made no factual finding that the Utah prairie dog is traded at all (let alone traded in interstate commerce), that its pelt is a valuable commodity, that any scientific research has at most an attenuated link to interstate commerce, or that its presence on private land draws tourism to Utah. *See People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1344-45 (D. Utah 2014); *see also* PETPO Br. at 2, 24-27. As with the Texas cave bug, then, "there is no link" between Utah prairie dog takes and "*any* sort of commerce, whether tourism, scientific research, or agricultural markets." *GDF Realty Investments*, 362

F.3d at 291 (Jones, J., dissenting from denial of rehearing en banc). In sum, this regulation "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561.

Contrary to Appellants' argument, *see* FWS Br. at 37-39; FOA Br. at 26-27, 36-37, this case is therefore readily distinguishable from *Andrus v. Allard*, 444 U.S. 51 (1979), and the Fourth Circuit's decision in *Gibbs*. In *Anders*, the Supreme Court explained that there was an interstate market in bald eagle products. *See id*. at 54-56. In *Gibbs*, the Fourth Circuit upheld the district court's factual finding that red wolves are "things in interstate commerce because they have moved across state lines and their movement is followed by tourists, academics, and scientists." 214 F.3d at 490 (citations and quotations omitted). On those facts, the court held that "[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." *Id*. at 492.

The district court made no such findings here. Nor was the issue overlooked. The district court contrasted Utah prairie dogs with bald eagles, explaining that "there is a national market for bald eagles and bald eagle products" and that "[i]f Congress is not authorized to regulate purely intrastate takes of bald eagles, its attempt to regulate the market for bald eagles will be frustrated." *PETPO*, 57

F. Supp. 3d at 1346. The difference is crucial: without a finding that the Utah prairie dog is an article of commerce, there can be no conclusion that the FWS prohibition of such takes regulates economic activity.

B. Takes Of The Utah Prairie Dog Do Not Substantially Affect Any Interstate Market.

Because this case concerns non-economic, purely intrastate activity, FWS faces an uphill battle in defending its regulation. Although the Supreme Court "has not adopt[ed] a categorical rule against aggregating the effects of any noneconomic activity," it has so far "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613. In considering whether to allow Congress to aggregate non-economic, intrastate activity, the Court looks to whether "the statute contains an express jurisdictional element involving interstate activity that might limit its reach," whether "Congress has made specific findings regarding the effects of the prohibited activity on interstate commerce," and whether "the link between the prohibited conduct and a substantial effect on interstate commerce is attenuated." *Grimmett,* 439 F.3d at 1272.

Here, the ESA includes no jurisdictional element. FWS Br. 30 n.17; FOA Br. 19-20 n.6. Indeed, FWS claims authority to protect all "listed species—wherever they occur—from take." FWS Br. 25. The ESA likewise includes no "specific findings" concerning the effect of Utah prairie dog takes on interstate

commerce. Appellants' argument thus boils down to this: despite the lack of any jurisdictional limitation on FWS's authority or specific findings from Congress, FWS may comprehensively regulate this non-economic, purely intrastate activity under the Commerce Clause and Necessary and Proper Clause because Utah prairie dog takes "'are part of an economic 'class of activities' that have a substantial effect on interstate commerce." FWS Br. 29 (quoting *Raich*, 545 U.S. at 17). But this case is nothing like *Raich*.

There, the Supreme Court found that marijuana is an article of commerce and that "[p]rohibiting the intrastate possession or manufacture of an *article of commerce* is a rational (and commonly utilized) means of regulating commerce in that *product*." *Raich*, 545 U.S. at 26 (emphasis added). While growing marijuana for personal consumption was not "itself 'commercial,' in that it is not produced for sale," there was an "interstate market in that commodity." *Id*. at 18. The federal ban on growing marijuana in California (even if used strictly for intrastate personal consumption) was therefore constitutionally justified as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id*. at 36.

But—as the district court found—the Utah prairie dog is not a commodity. *See supra* at 12-13. As a result, the *Raich* argument fails at the outset. At least with respect to Utah prairie dogs, FWS does not regulate "the production, distribution,

and consumption" of a commodity "for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 26. That is, although growing marijuana—even for personal consumption—could, in the aggregate, have "a substantial effect on supply and demand in the national market for that commodity," *id*. at 19, no multiple of Utah prairie dog takes could substantially affect an interstate market for Utah prairie dogs that does not exist.

Appellants' reliance on *Hodel* is misplaced for similar reasons. FWS Br. 41-42. In *Hodel*, Congress made "express findings, set out in the Act itself, about the effects of surface coal mining on interstate commerce" and those findings found "ample support" in the legislative record. 452 U.S. at 277-78. Congress neither made express findings nor filled the legislative record with evidence concerning the economic market for the Utah prairie dog. Moreover, the Supreme Court found that "coal is a commodity that moves in interstate commerce." *Id*. at 281. The Utah prairie dog is neither a commodity nor moves interstate. Thus, although "Congress rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity," *id*., no such rational determination is possible here. The constitutional and legislative building blocks for concluding that interstate commerce will suffer adverse effects from Utah prairie dog takes are entirely absent.

Appellants are therefore left to argue that the regulation should be sustained under "the interrelationships of species" theory that other circuits have adopted. FWS Br. at 43-46. Under this theory, "[e]ven if a particular species could have no independent commercial value," it may be regulated because "the loss of one species can have significant impacts on other species" and thus at some juncture on "interstate commerce." *Id.* at 54-55 (citations omitted). As an initial matter, FWS has chosen here to regulate a species to which its theory is inapplicable. The district court made a factual finding that *no* other species is dependent on the Utah prairie dog for its survival. *See PETPO*, 57 F. Supp. 3d at 1346 ("Defendants do not claim that the Utah prairie dog is a major food source for [golden eagles, hawks, and bobcats], and those animals are known to prey on many other rodents, birds, and fish.").

In any event, the "interrelationships of species" theory is legally untenable. The notion that elimination of one species might in some unknown way bear on future interstate commerce as to some other species is not the regulation of "economic activity" as the Supreme Court understands that term. *NFIB*, 132 S. Ct. at 2591 (Roberts, C.J.). By "economic activity," the Supreme Court means "preexisting economic activity." *Id*. Just as "precedents recognize Congress's power to regulate classes of *activities,* not classes of *individuals,* apart from any activity in which they are engaged," *id.* at 2590 (citations and quotations omitted),

they recognize Congress's authority to regulate interstate commerce involving specific species of animals, not all species of animals irrespective of any present connection to interstate commerce.

In holding that the individual mandate to purchase health insurance exceeded Congress's Article I authority, the Supreme Court emphasized that for most people "significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government." *Id*. at 2591. In other words, someone or something is not in interstate commerce now because he, she, or it may be in interstate commerce at some point down the road. That important lesson applies with force here. The Utah prairie dog's speculative *future* effect on other species that might or might not be articles of commerce is not a basis for regulating it under the Commerce Clause and Necessary and Proper Clause *today*. To the extent the decisions adopting the "interrelationships of the species" rationale were defensible at the time they were issued, they certainly are not after *NFIB*.

But this theory was never compatible with governing precedent in any event. It requires the Court to "'pile inference upon inference' in order to establish that noneconomic activity has a substantial effect on … commerce." *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 567). *Lopez*

rejected a "costs of crime" theory that would have allowed Congress to regulate "all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." 514 U.S. at 564. And in *Morrison*, the Supreme Court likewise rejected a limitless theory of the Commerce Clause that "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." 529 U.S. at 615. Yet Appellants ask this Court to adopt an even more attenuated theory of the ESA that would afford the Utah prairie dog "federal protection that was denied [to] school children in *Lopez* and the rape victim in *Morrison*." *GDF Realty Investments*, 362 F.3d at 287 (Jones, J., dissenting from denial of rehearing en banc). Appellants' argument simply cannot be squared with *Lopez* and *Morrison*.

Appellants' theory, which depends on an endless chain of inferences, falls of its own weight. It cannot be that "every take is 'essential' to the ESA because the extinction of any species risks the extinction of all species, and the extinction of all species could lead to the extinction of ecosystems." *Id*. at 291. If such an argument finds acceptance, "it is difficult to perceive any limitation on federal power," *Lopez*, 514 U.S. at 564, given that it amounts to "a theory that everything is within federal control simply because it exists," *NFIB*, 132 S. Ct. at 2649 (joint dissent). This assertion of vast federal power is in no way "narrow in scope," *United States*

v. Comstock, 560 U.S. 126, 148 (2010), and to embrace it "would open a new and potentially vast domain to congressional authority," *NFIB*, 132 S. Ct. at 2587 (Roberts, C.J.). "Concluding that a relation can be put into a verbal formulation that fits somewhere along a causal chain of federal powers is merely the beginning, not the end, of the constitutional inquiry. The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of 'this is the house that Jack built.'" *Comstock*, 560 U.S. at 150 (Kennedy, J., concurring in the judgment) (quoting Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 The Papers of Thomas Jefferson 547 (B. Oberg ed. 2004) (internal and other citation omitted)). That is this case.

Sometimes Congress just goes too far. The Commerce Clause and Necessary and Proper Clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). When the political branches cross the line, the judiciary must step in. *See NFIB*, 132 S. Ct. at 2579 (Roberts, C.J.) ("Our deference in matters of policy cannot, however, become abdication in matters of law."). There may be constitutional applications of the ESA. But the attempt to

regulate takes of the Utah prairie dog—a species that does not cross state lines and for which there is no interstate market—is not one of them.

II. The Fish And Wildlife Service's Heavy-Handed Regulatory Approach Causes Significant Economic Harm To Landowners.

Although the focus of the Commerce Clause inquiry must be on the take of the Utah prairie dog, *see supra* at 9-10, the Court should not lose sight of the significant economic ramifications that overzealous enforcement of the ESA has for the business community. Quite the opposite, confining the ESA to the limits the Constitution imposes is particularly important given that the economic consequences following a listing decision are often devastating to state and local economies. Notwithstanding the ESA's noble goal to protect wildlife resources as a public good, the costs associated with compliance fall predominantly on private landowners. The Government Accounting Office reports that "[a]pproximately half of listed species have at least *80 percent* of their habitat on private lands,"[3] yet those landowners receive no compensation for the severe restrictions placed on the use of their property by the ban on even the accidental "take" of a listed animal and FWS's designation of "critical habitat" for those species.

[3] *See* Bean, et al., *The Private Lands Opportunity: the Case for Conservation Incentives*, at 2 & n.4 (Environmental Defense 2003), *available at* http://www.fws.gov/southeast/ grants/pdf/2677_ccireport.pdf.

The Utah prairie dog fits comfortably within that general trend. Previous surveys have suggested that 70% of the Utah prairie dog's population is located on private land.[4] Because the FWS regulations have limited their relocation and prevented their extermination, local municipalities were forced to construct elaborate (and expensive) fences and underground barriers to protect airport runways and cemeteries from damage—to mixed results, at best. *See, e.g.,* Jim Carlton, *In Utah, a Town Digs Deep to Battle Prairie Dogs,* Wall Street Journal (May 6, 2012).

This kind of expense and burden to landowners is commonplace in the aftermath of ESA listing decisions:

- Ongoing efforts to protect the three-inch delta smelt, a small fish that lives in the San Joaquin-Sacramento River Delta, have resulted in water pumping restrictions that have devastated agricultural production in Northern California, even before the state began to feel the effects of a prolonged drought that continues to this day. Economic assessments of the impact on the pumping restrictions estimated the direct and indirect cost at more than $500 million annually even before California's drought reached the critical stage it is at today—in an area where unemployment runs in the double digits.[5]

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[4] *See* S. Nicole Frey, *Managing Utah Prairie Dog on Private Lands,* NR/ Wildlife/2015-01pr (February 2015), *available at* http://extension.usu.edu/files/ publications/publication/NR_Wildlife_2015-01pr.pdf.

[5] *See* Sunding, et al., *Economic Impacts of the Wagner Interim Order for Delta Smelt*, Berkeley Economic Consulting (2008), *available at* http://cdm16658. contentdm.oclc.org/cdm/ref/collection/p267501ccp2/id/1771.

- Efforts to protect the northern spotted owl in the Pacific Northwest have led to logging restrictions on hundreds of thousands of acres of private land (in addition to millions of acres of federal land). A massive decline in the region's logging industry, and the loss of tens of thousands of jobs and million of dollars, are attributed to those restrictions.[6] Despite the logging restrictions, the spotted owl now faces significant competition from other species, which prompted, among other things, proposals by FWS to kill thousands of barred owls each year.[7]

- In central Texas, the listing of the golden-cheeked warbler led the value of 15 acres owned by one woman, Margaret Rector, to decline from $991,862 to $30,360 due to significant development restrictions and permitting requirements on the property.[8] This is a recurring problem in Texas, a "hot spot" for many listed species. One Texas A&M study determined that in Travis County alone, the ESA had diminished property values by $74 million.[9]

- The appearance of the Delhi Sands flower-loving fly led to the FWS requirements that stalled for decades a wide variety of economic development projects in eastern California, including a 218-acre retail

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[6] *See* Randy T. Simmons and Kimberly Frost, *Accounting for Species: The True Costs of the Endangered Species Act*, at 14 (Property and Environment Research Center), *available at* http://www.perc.org/sites/default/files/esa_costs.pdf.

[7] *See* Craig Welch, *The Spotted Owl's New Nemesis*, Smithsonian Magazine (January 2009), *available at* http://www.smithsonianmag.com/science-nature/the-spotted-owls-new-nemesis-131610387/?page=1.

[8] *See* Brian Seasholes, *Bad for Species, Bad for People: What's Wrong with the Endangered Species Act and How to Fix It,* NCPA Policy Report No. 303, at 6 (National Center for Policy Analysis September 2007), *available at* http://www.ncpa.org/pdfs/st303.pdf.

[9] *See id*. at 7.

> and residential development, a recycling plant, and more than a dozen other projects.[10]

These examples are not unusual or cherry-picked. They are the foreseeable result of a statutory scheme that severely restricts the extent to which economic costs can be taken into account at the listing stage. *See, e.g., Tenn. Valley Authority v. Hill*, 437 U.S. 153 (1978). And although economic costs are taken into account when FWS designates critical habitat, it has adopted a narrow approach to that mandate. Indeed, FWS has approved final regulations that make clear the agency's consideration of economic impacts at the critical-habitat stage are limited to the *incremental* effects of that designation, and will exclude any economic impacts that FWS determines arose from the original listing decision. *See Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat,* 78 Fed. Reg. 53058 (Aug. 28, 2013); 50 C.F.R. §424.19.[11] Hence, there is little chance that economic effects—no matter how severe—can ever serve as an effective brake on FWS's implementation of the ESA.

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[10] *See, e.g., Endangered Fly Stalls Some California Projects*, New York Times (Dec. 1, 2002); Leslie Parrilla, *Colton to finally develop on land on hold due to endangered fly,* San Bernardino Sun (Feb. 4, 2015).

[11] In doing so, FWS has rejected *New Mexico Cattlegrowers Ass'n v. FWS*, 248 F.3d 1277 (10th Cir. 2001), which refused to defer to a similar approach taken by the agency in the absence of any formal rulemaking.

Moreover, FWS is in the midst of an extraordinary undertaking that could result in massive expansion of listed species within the next four years. As part of a 2011 settlement with several environmental groups and resulting consent decrees, FWS has committed to reviewing 757 candidate species for listing as endangered or threatened, and to make a final decision on more than 251 pending species by 2018.[12] Because the current list of ESA-protected animals has only about 1,400 species on it, this effort could constitute a major expansion of the ESA's reach. If the history recounted above is any guide, the resulting economic impact on private landowners will be measured in billions of dollars. This looming threat to people, their land, and their livelihoods requires that courts enforce, rather than ignore, the clear constitutional limits on FWS's authority to list intrastate species.

None of this means, however, that the goals of the ESA cannot be realized even if Congress and FWS must operate within constitutional parameters. As an initial matter, there is good reason to question whether FWS's no-costs-barred approach is even effective at protecting listed species. The ESA has a paper-thin record of success: only 59 species have been removed from the threatened and

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

endangered list (which now includes more than 1,500 domestic animal and plant species), and of even that small number, 10 were removed due to extinction and another 19 were removed due to data errors, as opposed to successful recovery.[13] In the meantime, the ESA is widely known to have incentivized landowners to take extreme steps in order to prevent a listed species from inhabiting (and inevitably devaluing) their property. "[U]nder the ESA, economic theory and increasing empirical evidence suggest that, at least in the context of private land, land use regulations are likely doing more harm than good." Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls,* 49 B.C. Law Rev. 301, 364 (2008). One analysis of landowner patterns in North Carolina during the 25-year period of ESA listing of the red-cockaded woodpecker found that "the ESA has led some forest landowners to preemptively harvest timber in order to avoid costly land-use restrictions," resulting in the reduction of suitable habitat for the species on private land. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act,* 46 J. L. & Econ. 27, 51-52 (2003); *see also* Adler, *supra*, at 326-330 (noting that "the studies conducted to date uniformly support the hypothesis that … the ESA

[13] *See* FWS delisting report, *available at* http://ecos.fws.gov/tess_public/reports/delisting-report.

harms species conservation efforts on private land because of the incentives it creates").

But setting aside the ESA's debatable effectiveness at achieving its goals, this case illustrates that enforcing constitutional limits need not result in any harm to efforts to preserve an endangered or threatened species. The Utah prairie dog enjoys extensive protection under Utah law. The applicable wildlife protection law and related regulations generally prohibits the taking of a Utah prairie dog without permission, and provides a layered enforcement approach depending in part upon the type of land at issue,[14] the local population of prairie dogs,[15] and the identity of the person engaged in the taking.[16] Utah law provides for capture and relocation of Utah prairie dogs interfering with certain activities (when feasible).[17] Between

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[14] *See, e.g.,* Utah Administrative Code R657-70-5–70-12 (providing varying regulations for the taking of Utah prairie dogs in "Inhabited Structures on non-federal Land," "Unmapped Land" "Developed Land" "Developable Land," "Agriculture Land," and "Rangeland").

[15] *See, e.g.* Utah Administrative Code R657-70-9 (imposing limits on overall taking on some types of lands); *id.* R657-70-11(2)(c)(i)(A)-(D) (providing for maximum take on Agricultural Land tied to annual productivity based on population counts).

[16] *See, e.g.,* Utah Administrative Code R657-70-8 (authorizing procedures for local law enforcement taking of Utah prairie dogs that present health threat).

[17] *See* Utah Administrative Code R657-70-10(b)(ii) (providing that if "prairie dogs are discovered on [developable land], the division will first attempt to trap and relocate the animals to the extent feasible and in coordination with the project proponent.").

2009 and 2012, state wildlife officials relocated more than 3,200 Utah prairie dogs from roughly two dozen sites to 11 new locations, resulting in the establishment of new colonies and repatriation of the species to areas from which it had disappeared.[18]

Utah's measured regulatory approach to the management of prairie dogs, which balances the importance of preserving the species with the needs for agriculture and economic development, underscores that the ESA is not the only option to protect fragile species. And it is telling that Utah's Division of Wildlife Services announced that it was "happy" about the district court's decision in this case, because of the state's "strong history of successfully protecting and conserving sensitive wildlife species," and its goal "to work cooperatively, with local officials and property owners in southern Utah, to ensure that the species continues to be an important part of the landscape." Wildlife News, *Utah Prairie Dog Still Protected*, Utah Division of Wildlife Resources (Nov. 7, 2014), *available at* http://wildlife.utah.gov/wildlife-news/1535-utah-prairie-dog-still-protected.html. The delegation of intrastate matters to the States was the motivation behind the Constitution's enumeration of limited congressional powers. Respecting those

[18] *See* S. Nicole Frey, *Managing Utah Prairie dogs on Private Lands,* NR/Wildlife/2015-01pr (February 2015), *available at* http://extension.usu.edu/files/publications/publication/NR_Wildlife_2015_01pr.pdf.

limits need not come at the cost of any threatened or endangered species, as Utah's regulatory approach illustrates.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the page limitations of Fed. R. App. P. 29(d) because it contains no more than one-half the maximum length authorized by this Court's rules for a party's principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that on this 26th day of May, 2015, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Tenth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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