

ORAL ARGUMENT REQUESTED

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.
Federal Defendants-Appellants,

and

FRIENDS OF ANIMALS,
Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CASE NO. 2:13-CV-00278-DB
THE HONORABLE DEE BENSON

INTERVENOR-APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Intervenor-Appellant, Friends of Animals, is a non-profit incorporated since 1957 in the state of New York with offices in Dairen, CT, New York, NY, Ashville, NC and Centennial, CO. Pursuant to Federal Rule of Appellate Procedure 26.1, Friends of Animals represents that it does not have any parent entities and does not issue stock.

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STATEMENT OF RELATED CASES

This case has not previously been before this Court and Friends of Animals is not aware of any related case in this Court or any other court.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346 because the action involved the federal government as the Defendant, and it arose under the laws of the United States. This Court has jurisdiction pursuant to 16 U.S.C. § 1291 because this appeal is from a final order of the United States District Court for the District of Utah. Appellant appeals Honorable Dee Benson's November 5, 2014 Order Granting Summary Judgment in favor of the Plaintiff, People for the Ethical Treatment of Property Owners ("PETPO"), which constitutes a final order that disposed of all claims. *PETPO v. U.S. Fish & Wildlife Service, et al.*, 2:13-cv-00278-DB, ECF 68. Friends of Animals and the Federal Defendants filed timely notices of appeal on November 26, 2014 and December 30, 2014, respectively, and within sixty days of the District Court's decision. Fed. R. App. P. 4(a)(1)(B).

ISSUES FOR REVIEW

This action involves the issuance of a "special rule" on August 2, 2012, by the U.S. Fish and Wildlife Service (the "Service"), a federal agency housed within the Department of Interior, pursuant to Section 4(d) of the Endangered Species Act (16 U.S.C. § 1533(d)) to allow for limited take (*e.g.*, killing or capture) of Utah prairie dogs, a species that has been listed as either endangered or threatened for nearly four decades. Plaintiff, PETPO, filed a Motion for Summary Judgment arguing that the regulation of Utah prairie dog takes through the Special 4(d) violates of the Commerce Clause (Article 1,

Section 8, Clause 3) of the U.S. Constitution. Honorable Judge Benson of the United States District Court for the District of Utah, granted PETPO's motion for Summary Judgment and found that Congress has no authority to authorize the Service to issue special rules to regulate take of Utah prairie dogs on private lands in Utah.

The following issues are raised on appeal:

1. Did the plaintiff have Article III standing to bring a facial challenge to the Special 4(d) rule for the Utah prairie dog where even if the District Court grants all the relief requested, PETPO's members' alleged harms would not be redressed because federal rules not being challenged in this litigation would be triggered that are more restrictive, prohibiting all take of prairie dogs on private land?
2. Is the challenged rule part of a comprehensive scheme under the Endangered Species Act to regulate endangered and threatened species that has a substantial relation to interstate commerce, and, thus, a valid use of Congress' commerce clause power under the Supreme Court's holding in *Gonzales v. Raich*, 545 U.S. 1 (2005)?
3. Does the listing of the Utah prairie dog as a threatened species under the Endangered Species Act, and the subsequent use of a special rule to limit the take of prairie dogs on private land, have a substantial relationship to interstate commerce where, as here, the record before the District Court demonstrates the value of Utah prairie dogs to animal tourism, scientific research, literature and poetry, and the protection of interrelated natural resources?

INTRODUCTION

In the District Court, PETPO couched this action as a narrow constitutional dispute over federal regulation of a single species—the Utah prairie dog—on private lands in the state of Utah. But what is really on display here is a difference of opinion over the value of America’s natural heritage. On one side, PETPO tends to view members of the animal kingdom to be valueless unless they can be reduced to mere “commodities;” if an animal cannot be sold or traded, then it is no more than a mere pest to be eradicated to make way for human development. On the other side, there is Friends of Animals, the Service, numerous scientists, and millions of Americans who recognize that protection of all members of the North American biota—from the smallest fungi to the greatest of mammals—is essential to biodiversity and to human economic health. In fact, the Utah prairie dog, with its immeasurable value to the western grassland ecosystems, is a textbook illustration for this irrefutable proposition.

While the District Court sided with PETPO, it did so by ignoring the clear intent of Congress to regulate economic activities that threatened the continued existence of species like the Utah prairie dog. There is little doubt that the Endangered Species Act (“ESA”) was passed for the purpose of protecting our nation’s flora and fauna from commercial exploitation to preserve it as a resource—both economic and otherwise—for future generations. As the House Report from 1973 explained:

As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable. . . .

H.R. Rep. No. 93-412 at 143 (attached hereto as “Addendum B”).

Notably, to date every court that has proceeded to address the constitutionality of any part of the ESA on commerce clause grounds has turned back the challenge based on the legislative history and text of the ESA. The Court should follow suit here, as there is simply no basis for concluding that Congress overstepped its constitutional authority by authorizing the regulation of economic activities that threaten the continued existence of the Utah prairie dog or any other wholly intrastate species.

STATEMENT OF THE CASE

A. General Overview.

In this action, PETPO “contends that the federal government has no constitutional authority to regulate the take of Utah prairie dog on non-federal land, and thus no authority to prevent PETPO’s members from protecting their property and other interests against the harms that prairie dog activity creates.” Appellants’ Joint Appendix (hereinafter, “APLT_APP”) at 15. Specifically, in its Petition for Review of Agency Action (“Petition”), filed in the District Court, PETPO asserts two claims. First, an Administrative Procedure Act (“APA”) claim that the Service’s regulation of Utah prairie dogs on private lands is not in accordance with law, 5 U.S.C. § 706(2)(A), or is contrary to any constitutional right, power, privilege, or immunity, *id.* § 706(2)(B). *Id.* at 31-33. The crux of PETPO’s APA claim is that such regulation violates the commerce clause. *Id.* Second, and in the alternative, a claim that the rule violates the Tenth Amendment to the U.S. Constitution. *Id.* at 32-34.

In the District Court, PETPO’s claims were argued in cross-motions for summary judgment. Memorandum Decision and Order (hereinafter, “Order”) at 2 (a copy is attached hereto as Addendum A). After briefing and oral

argument, the District Court granted summary judgment in favor of PETPO (presumably on the APA claim), holding that:

Although the Commerce Clause authorizes Congress to do many things, it does not authorize Congress to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce. Congress similarly lacks authority through the Necessary and Proper Clause because the regulation of takes of Utah prairie dogs is not essential or necessary to the ESA's economic scheme.

Id. at 16. The District Court did not address PETPO's Tenth Amendment claim.

B. Legal Background: The Federal Endangered Species Act.

The purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species . . .” 16 U.S.C. § 1531(b) (2013). The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” 16 U.S.C. § 1532(3) (2013).

However, the protective provisions of the ESA do not do anything to conserve a species until that species is officially “listed” as either threatened or endangered under the terms of the Act. 16 U.S.C. § 1533 (2013). A species is listed as “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is listed as “threatened” if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

The Secretary of Interior (“Secretary”) is required to list as either threatened or endangered any species facing extinction due to any one, or any combination of, the following five factors: (1) the present or threatened destruction, modification, or curtailment of the species’ habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting the species’ continued existence. 16 U.S.C. § 1533(a)(1)(A)-(E). In considering these factors, the Secretary must use only “the best available scientific and commercial information regarding a species’ status, without reference to possible economic or other impacts of such determination.” 50 C.F.R. § 424.11(b) (2013).

Once a species is listed, the ESA provides strong legal protection to encourage the species’ recovery. For example, the ESA requires the Secretary to designate critical habitat for all threatened and endangered species concurrently with their listing and subsequently to develop recovery plans for such species. 16 U.S.C. § 1533(a)(3), 1533(f). The ESA also requires that all federal agencies “carry out programs for the conservation” of threatened and endangered species and consult with the Secretary in order to ensure that their actions are “not likely to jeopardize the continued existence” of such species or “result in the destruction or adverse modification” of their critical habitat. 16 U.S.C. § 1536(a)(1), (2) (2013).

Finally, the ESA prohibits any person from “taking” an endangered species.¹ 16 U.S.C. § 1538(a)(1)(B) (2013). This prohibition on take is not automatically extended by the statute to threatened species. However, the Service is authorized by Section 4(d) of the ESA to develop what are called “special rules” to regulate—including limiting or prohibiting take—species listed as threatened. 16 U.S.C. § 1533(d). Under this statutory provision, the Service promulgated a regulation in 1979 that clearly applies the Section 9 take prohibitions to all listed threatened species. 50 C.F.R. § 17.31 (2013). This so-called “general 4(d) rule” applies to threatened species **unless** the Service promulgates a special 4(d) rule that applies to a specific threatened species. In such a case, the species’ specific special rule takes precedent over the general 4(d) rule.

C. Factual Background.

1. Description Of Utah Prairie Dog.

The Utah prairie dog (*Cynomys parvidens*) is a member of the squirrel family (*Sciuridae*) of rodents native to the semiarid shrub-steppe and grassland habitats of Utah. 77 Fed. Reg. 46159-46161 (Aug. 2, 2012). The species’ native range is limited to the southwestern quarter of Utah in Iron, Beaver, Washington, Garfield, Wayne, Piute, Sevier, and Kane counties. 77 Fed. Reg. at 46161. The total length of an adult Utah prairie dog is approximately 10 to 16 inches, and the weight of an individual ranges from 1 to 3 pounds. 77 Fed. Reg. 46160. Utah prairie dogs range in color from cinnamon to clay, with dark markings above the eyes and white on the tip of the tail. *Id.*

¹ To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

The Utah prairie dog is a highly social, intelligent species, organizing themselves into social groups called clans. 77 Fed. Reg. at 46160. A clan consists of an adult male, several adult females, and their offspring. *Id.* Clans maintain geographic territorial boundaries although they will use common feeding grounds. *Id.* Members of a clan spend approximately 59 percent of their time feeding; 25 percent of their time in alert behavior, including predator watch and intruder monitoring; 2 percent of their time in social interactions between clan members; and the remainder of their time in various activities such as grooming, digging and burrow maintenance, and inactivity. See <http://www.fws.gov/mountain-prairie/species/mammals/utprairiedog/> (citing Wright Smith 1978).

2. The Utah Prairie Dog's History Under The Endangered Species Act.

The Utah prairie dog's total numbers were estimated to be about 95,000 in the 1920's. 49 Fed. Reg. 22330 (May 29, 1984). By 1982, this population of animals fell to an estimated 10,000 adult animals. *Id.* This decline was caused by poisoning programs to eradicate the species, habitat alteration from conversion of lands to agricultural crops, unregulated shootings, drought, and disease. *Id.*; 77 Fed. Reg. at 46161. As a result, the Utah prairie dog was listed as an endangered species on June 4, 1973. 38 Fed. Reg. 14678.

On November 5, 1979, the Utah Division of Wildlife Resources ("UDWR") petitioned the Service to remove the Utah prairie dog from the List of Endangered and Threatened Wildlife. 49 Fed. Reg. 22330. The Service found that UDWR's petition contained substantial scientific and commercial information, and the species was reclassified as threatened on May 29, 1984 (49 Fed. Reg. 22330), with a special 4(d) rule to allow take of prairie dogs on

agricultural lands. This special rule was amended on June 14, 1991 (56 Fed. Reg. 27438), to increase the amount of regulated take throughout the species' range. On August 2, 2012, after consideration of the available information and public and peer review comments, the Service again revised the established exemptions to prohibited take for the Utah prairie dog. 77 Fed. Reg. 46158. This special rule expanded upon who is permitted to take; enlarged the locations in which direct take is allowed; added site-specific limits on the amount of direct take; shortened the timing for allowable take; created an exception if human safety or significant human culture/burial grounds are threatened; provided an exemption for the incidental take when the situation involves agricultural activities; and increased restrictions upon methods for direct take in areas of close proximity to conservations. *Id.* The new special rule also changed the upper annual permitted take limit of 6,000 animals to not allowing the percentage of take to "exceed 10 percent of the estimated range-wide population annually; and, on agricultural lands, may not exceed 7 percent of the estimated annual range-wide population annually." *Id.*

3. Continued Threats To The Utah Prairie Dog.

The Service notes that although the Utah prairie dog was down-listed from endangered to threatened in 1984, threats remain across the range of the Utah prairie dog. 49 Fed. Reg. at 22332. These threats include the following: disease, urban expansion, over-grazing, cultivated agriculture, vegetation community changes, invasive plants, off-highway vehicle and recreational uses, climate change, energy resource exploration and development, fire management, poaching, and predation. 76 Fed. Reg. 36061 (June 2, 2011). While the trends for the Utah prairie dog population appear to be stabilizing or increasing the species existence continues to hinge on protections provided by the ESA. *See* 76 Fed. Reg. at 36056-36059.

STANDARD OF REVIEW

As this Court reiterated just last year:

The APA also compels us to "set aside agency action, findings and conclusions found to be . . . contrary to constitutional right." 5 U.S.C. § 706(2)(B). "Because constitutional questions arising in a challenge to agency action under the APA fall expressly within the domain of the courts, we review de novo whether agency action violated a claimant's constitutional rights."

Direct Communs. Cedar Valley, LLC v. FCC (In re FCC 11-161), 753 F.3d 1015, 1041 (10th Cir. 2014) (*quoting Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010)).

SUMMARY OF ARGUMENT

The District Court's determination that regulation of the take of Utah prairie dogs should be overturned for any of four alternative reasons. First, PETPO lacks standing to bring this suit because even if it ultimately succeeds on obtaining a judicial determination that regulation of the take of Utah prairie dogs runs afoul of the Constitution, such a determination would only apply to the special 4(d) rule. PETPO has not challenged the general 4(d) rule, which contains more stringent take prohibitions, and any facial challenge to that rule is time barred. Accordingly, any relief obtained from the setting aside of the special rule will not redress PETPO's members' injuries.

Second, the ESA is a comprehensive regulatory scheme that does in fact have an aggregate, substantial relation to interstate commerce. Protection of endangered and threatened species in collectively contribute to the economy through animal tourism, scientific research, literature and poetry, and by protecting the health of interrelated natural resources for current and future generations. The District Court erred by requiring the Service to demonstrate

that Utah prairie dogs alone have a substantial relationship to interstate commerce.

Third, the ESA was intended to be a statute that directly regulates economic activities like the very ones PETPO and its members seek to pursue (agriculture, development, etc.) in order to protect species. Time and time again, Congress has made it clear that the ESA is needed because human economic activities pose one of the greatest threats to biodiversity.

Finally, even if the Court were to consider PETPO's more narrow argument—that regulation of the Utah prairie dog itself has no relationship to interstate commerce—that issue was wrongly decided by the District Court. The District Court relied upon evidence from outside the administrative record, which is not proper in an APA case. If the administrative record was insufficient with regard to the issue (which would not be surprising given that commerce clause challenges to the ESA were seemingly settled at the time the special rule was issued in 2012), the proper remedy was for the District Court to remand the rule back to the agency for additional fact finding.

ARGUMENT

A. PETPO Lacks Standing To Bring Its APA Claim.

To demonstrate standing to sue under Article III of the Constitution, PETPO must show that: (1) its members have suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *SUWA v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013). Here, however, PETPO cannot show that even complete success on its APA

claim will reduce the alleged harm suffered by its members, *i.e.*, denial of their right to use and develop their property. APLT_APP at 15 (Petition for Review ¶ 2.) The reason for this it is clear: even if PETPO succeeds, **stricter federal rules** would come into play that would bar **all** take of prairie dog on private land.

As noted above, two separate federal rules potentially regulate take of Utah prairie dog on private land. *Supra* pp. 7-8. The first is the special rule promulgated under Section 4(d) of the ESA that applies **only to Utah prairie dogs**. Under the special rule, take of Utah prairie dogs is not prohibited completely, but is regulated with regard to the amount and circumstances of the take. 77 Fed. Reg. 46158. The second is a general Section 4(d) rule that applies **to all species listed as threatened under the ESA**. Under this rule, take is prohibited completely, unless the party seeking to take an animal first obtains a permit under Section 10 of the ESA. 50 C.F.R. § 17.31 (2013); *see also Reservation Ranch v. United States*, 39 Fed. Cl. 696, 704 n.5 (Fed. Cl. 1997) (recognizing that the general take prohibition applies on private lands).

The District Court appears to believe that both of these rules are challenged by PETPO. Order at 8 (“If PETPO is successful in this suit, the federal government will have no authority to regulate the take of the Utah prairie dog on non-federal land, whether through special rule 4(d) or the general rule 4(d).”) In reaching this conclusion, the District Court glosses over two important set of facts. First, PETPO’s allegations in its Petition are aimed only at the constitutionality of the revised special 4(d) rule issued by the Service on August 2, 2012. While the APA claim is vague as to what agency action is actually being challenged, PETPO dedicates 18 full paragraphs describing the special rule (APLT_APP at 18-22 (*Id.* at 14 (¶¶ 20-38)), and numerous other paragraphs explain how the special rule harms its members

(*Id.* at 24 (¶48), 25-26 (¶59), 27 (¶66), and 29 (¶¶ 82 and 86). Nowhere in the Petition did PETPO even discuss the general 4(d) rule.

Second, any **facial** attack—as has been brought by PETPO here—on the general rule is time barred, as that rule was last amended in 1979 (44 Fed. Reg. 31580 (May 31, 1979)). As a general rule, the APA describes the exclusive mechanism—unless Congress specifically provides for an alternative mechanism in another applicable statute—for a court to review the actions of federal administrative agencies. *See Webster v. Doe*, 486 U.S. at 607 n.* (Scalia, J., dissenting). The APA does not, however, create an independent basis of subject-matter jurisdiction. *See Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1531 (10th Cir. 1990). Instead, it allows for judicial review of final agency action only if there is also an independent basis for subject-matter jurisdiction. *See Jarita Mesa Livestock Grazing Ass'n v. United States Forest Serv.*, 2014 U.S. Dist. LEXIS 160258 at *67-68 (D.N.M. Oct. 22, 2014) (*citing Colo. Dep't of Soc. Servs. v. Dep't of Health & Human Servs.*, 558 F. Supp. 337, 339 (D. Colo. 1983)). What the APA does do is provide for a waiver of sovereign immunity, stating that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. This waiver is limited, however, by the applicable statute of limitations. As the APA does not contain any specific time limitation for seeking judicial review, such actions are guided by 28 U.S.C. § 2401(a), which provides “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”² *Impact Energy Res.*,

² Under the APA, a cause of action generally accrues at the time of a “final agency action.” *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); 5 U.S.C.

LLC v. Salazar, 693 F.3d 1239, 1245-46 (10th Cir. 2012). And, of course, limitations and conditions upon which the federal government consents to be sued must be strictly construed in favor of the agency. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 41 (D.D.C. 2010)(citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)); see also *Block v. North Dakota*, 461 U.S. 273, 287(1983) (holding that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, “those conditions must be strictly observed, and exceptions thereto are not to be lightly implied”).

While it does not appear that this Court has taken up the precise issue, other Courts have concluded that facial challenges to agency regulations on constitutional grounds similarly must be brought under the APA. See *Jarita Mesa Livestock Grazing Ass’n*, 2014 U.S. Dist. LEXIS 160258 at *105-06 (that this case “alleges constitutional violations as well as statutory ones does not take it outside of the APA”); *Camp v. United States BLM*, 17 F. Supp. 2d 1167, 1169 (D. Or. 1998) (“Plaintiff’s APA and Fifth Amendment claims are barred by the six year statute of limitations”). This does not mean that someone whose constitutional rights have been violated by agency final action is without any potential remedy. As the Ninth Circuit has stated:

In our view, [*Oppenheim v. Coleman*, 571 F.2d 660 (D.C. Cir. 1978)] strikes the correct balance between the government’s interest in finality and a challenger’s interest in contesting an agency’s alleged overreaching. If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy-

§ 704. Similarly, a cause of action challenging an agency regulation generally accrues when the regulation is published in the Federal Register. *Dunn-McCampbell Royalty Interest, Inc. v. National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997).

based facial challenge to the government's decision, that too must be brought within six years of the decision. . . . If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint **for review of the adverse application of the decision to the particular challenger**. Such challenges, by their nature, will often require a more "interested" person than generally will be found in the public at large.

Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).

In other words, an individual suffering constitutional injury from a regulation **as applied** to that individual by the federal government may have a renewed claim under the APA. See *Dunn-McCampbell Royalty Interest*, 112 F.3d at 1287 ("It is possible, however, to challenge a regulation after the limitations period has expired, provided that the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority"). To sustain such a challenge, however, "the claimant must show some direct, [new] final agency action involving the particular plaintiff within six years of filing suit." *Id.*

The case at bar is a good example of why the Fifth, Ninth and D.C. Circuits all require that after the 6-year limitations period expires, a plaintiff can only challenge a regulation as it is specifically applied to her by the agency. Presumably, what concerns PETPO's members the most is the application of the ESA's Section 9 take prohibition to them personally. PETPO's members don't seem concerned over the listing of Utah prairie dogs as threatened, or that the take of Utah prairie dogs on public lands will remain illegal under the general 4(d) rule. But the prohibitions on take of Utah prairie dogs—on both

private and public land—attached at the time of the listing (May 29, 1984).³ Certainly the government (and the public generally) have an interest in the finality of regulatory actions that took place three decades ago. On the other hand, if a PETPO member is unhappy with the take restrictions as they apply to Utah prairie dogs on her land, she is free to seek an individualized incidental take permit under Section 10 of the ESA. *See generally, Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (discussing the nature of incidental take permits under the ESA). It may be that the agency and the applicant can agree on mutually acceptable terms to such a permit, alleviating the need for judicial action. If not, and the permit as requested is denied, final agency action will have occurred, through which the aggrieved party might have the right to challenge the constitutionality of the take prohibitions as applied to her.

In any case, to the extent PETPO is found to have asserted a facial challenge to the general 4(d) rule (in addition to the special 4(d) rule), that challenge is time bared.⁴ As a result, even if the District Court’s finding that the

³ Although not important to this appeal, Friends of Animals concedes that this listing action constituted final agency action that might have allowed a timely challenge of the listing decision, the special 4(d) rule, and possible the general 4(d) rule as well, as applied to Utah prairie dogs.

⁴ PETPO may assert that it has raised an as applied claim in as much as it alleges specific harms to specific members. But there are a few problems with such an argument. First, PETPO has not identified any specific final agency action applying the take prohibition, or denying relief from the prohibition, to a specific member or members. *Dunn-McCampbell Royalty Interest*, 112 F.3d at 1288 (“An ‘as applied’ challenge must rest on final agency action under the APA.”). The only final agency action identified in the Petition for Review was the promulgation of the most recent Utah prairie dog special 4(d) rule in 2012. But that regulation **reduced** restrictions on take of Utah prairie dog on private lands. Second, the APA claim as a whole has been presented by PETPO as a facial, policy-based challenge. *See, e.g.,* APLT_APP at 22 (Petition ¶ 38) (PETPO members “are each directly injured by the 4(d) Rules requirement that they

regulation of take of Utah prairie dog on private land is unconstitutional was a correct application of the commerce clause (which it was not), the general 4(d) rule cannot be struck down. And as the general rule is far more restrictive than the special rule, PETPO's member's injuries cannot be redressed through this action. Accordingly, the Court should reverse the District Court and dismiss this action for lack of Article III standing.⁵

B. Congress Has Authority Under The Commerce Clause To Protect Wholly Intrastate Species Under The ESA.

As an initial matter, Friends of Animals concurs with what is no-doubt one of the principal arguments made by the federal government in this appeal—that the District Court's reliance on *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), was misplaced. The proper context for resolution of PETPO's APA claim is to be found in

obtain a permit, or satisfy any other conditions, before taking the prairie dog on non-federal land"); APLT_APP at 25 (Petition ¶ 53) ("The Utah prairie dogs threaten the desecration of graves, including Dan Webster's, if they cannot be effectively removed and kept from the Cedar City Cemetery. This threat causes Brenda and Daniel Webster distress."); APLT_APP at 26 (Petition ¶ 60) ("The Lamoreauxs fear imminent enforcement and prosecution from the Service for illegal take of the Utah prairie dog should they choose to protect their interests, and therefore have refrained and will continue to refrain from otherwise acting to protect their interests."); APLT_APP at 130 (PETPO member asserting "I would like to protect my property by removing prairie dogs"); APLT_APP at 144-45 (Cedar City Corporation expressing desire to have prairie dogs captured and removed from public facilities).

⁵ Even if this Court were to find that it was possible to redress all or part of PETPO's alleged injury, and thus standing has been established, the District Court's remedy (finding regulation of all take on private land unconstitutional) was too broad. The District Court cannot vacate a regulation (the general rule) that has not been challenged by PETPO, or the challenge of which is time barred for reasons discussed above. This too is sufficient reason to overturn the District Court.

Gonzales v. Raich, 545 U.S. 1 (2005). In that case, the Supreme Court recognized three categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate purely local activities that substantially affect interstate commerce. *Id.* at 16-17 (citations omitted).

As the federal government argued below (and assuredly will do in its Opening Brief to this Court), up until the District Court decision in this case, it was well-established that Congress has the constitutional authority to protect endangered and threatened species wherever they occur. Five Circuits have evaluated and dismissed post-*Lopez* Commerce Clause challenges to the application of ESA Sections 4 and 9 to intrastate species. *See San Luis*, 638 F.3d 1163 (delta smelt), *cert. denied*, 132 S. Ct. 498 (2011); *Alabama-Tombigbee*, 477 F.3d 1250 (Alabama sturgeon), *cert. denied*, 552 U.S. 1097 (2008); *GDF*, 326 F.3d 622 (six species of subterranean invertebrates), *cert. denied*, 545 U.S. 1114 (2005); *Rancho v. Viejo*, 323 F.3d 1062 (arroyo toad), *cert. denied*, 540 U.S. 1218 (2004); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders ("NAHB") v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands Flower-Loving fly), *cert. denied*, 524 U.S. 937 (1998). *San Luis* and *Alabama-Tombigbee* evaluated these challenges in light of *Raich's* interpretation of Congress's Commerce Clause authority to regulate noncommercial intrastate activity as an essential part of a comprehensive statutory scheme that bears a substantial relation to commerce. On the other hand, as the government will assert, the District Court in this case erred by focusing on whether regulating take of Utah prairie dog **alone** had a substantial effect on interstate commerce; instead, the court

should have examined, as other courts have done, whether Congress had a rational basis for concluding that the regulation of take of all listed endangered and threatened species in the nation (both intra- and inter-state species) **in the aggregate** will substantially affect interstate commerce.” *Raich*, 545 U.S. at 22.

Friends of Animals does not intend to duplicate the government’s arguments regarding the District Court’s errors regarding this particular application of *Raich*. Instead, Friends of Animals seeks to shed light on another misunderstanding of the ESA that appears to confuse PETPO and the District Court; namely, that through the ESA Congress did not directly intend to “regulate . . . things in interstate commerce.” *Id.* at 16-17. In this regard, the District Court wrongly determined “the parties agree that the first two [*Raich*] categories do not apply, [and accordingly] the court’s analysis will focus solely on the third [] category.” Indeed, Friends of Animals disputed as much in its briefs below, as well as at oral argument in the District Court. *See* Addendum C attached hereto. In actuality, it was argued below that (1) the activity at which the statute is directed **is** commercial or economic in nature and (2) the link between the prohibited conduct and a substantial effect on interstate commerce is **not** attenuated.⁶ *See United States v. Grimmatt*, 439 F.3d 1263, 1272 (10th Cir. 2006).

⁶ This Court has also said other factors to consider in evaluating Congress’ use of commerce clause authority are whether: the statute contains an express jurisdictional element involving interstate activity that might limit its reach or Congress has made specific findings regarding the effects of the prohibited activity on interstate Commerce. *Grimmett*, 439 F.3d at 1272. However, neither are determinative. *Id.* (“failure of the jurisdictional element effectively to limit the reach of the statute is not determinative”); *Raich*, 545 U.S. at 21

1. PETPO Wrongly Defines The Nature Of The Regulated Activity At Issue In This Case.

One reason that PETPO and the District failed to comprehend that Congress intended to directly regulate things in interstate commerce through the ESA is their narrow view of the nature of the activity regulated by the ESA (as well as the special 4(d) rule). As the District Court put it, the special 4(d) rule regulates the “take” of Utah Prairie dog. Order at 8. The purpose of the ESA, however, is not principally to regulate the killing of species that are at risk of extinction. As Congress has made clear, its overriding goal in enacting the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b); *see also Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1237 (10th Cir.2000) (citing H.R. Conf. Rep. No. 97-835, 97th Cong., 2d Sess. at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2871) (“In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species.”)); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (noting that the plain intent of Congress in enacting the Endangered Species Act was to halt and reverse the trend toward species extinction, whatever the

(“While congressional findings are certainly helpful . . . and [we will consider them] in our analysis when they are available, the absence of particularized findings does not call into question Congress’ authority to legislate.”).

cost); *Village of Kaktovik v. Watt*, 689 F.2d 222, 233 (D.C. Cir.1982) (recognizing environmental protection as the sole objective of the Endangered Species Act).

In other words, Congress sought through the ESA to address the mounting evidence that: (1) economic development was destroying the habitat on non-human animals and (2) commercial use of plants and animals was increasing. H.R. Rep. No. 93-412 at 143-44 (“[T]he pace of species disappearance is accelerating. As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwilling) [we risk the future of even more genetic heritage]”).

In response, the ESA set up a comprehensive regulatory program to protect species and their habitats from continued human economic growth. At the heart of this scheme is a detailed process for identifying and listing endangered and threatened species (16 U.S.C. § 1533(b)), for identify habitat critical to a listed species survival (*id.*), and for the development of species specific recovery plans (*id.* § 1533(f)). The ESA also sets forth several mechanisms to prevent the further loss of habitat and species by restricting both private and public use of both, including the take prohibition in Section 9, incentives for federal-state cooperation to protect listed species (16 U.S.C. § 1535), and direct obligations on federal agencies to make sure their activities don’t harm listed species further (*id.* § 1536).

Again, properly defining the nature of the regulatory activity is important to resolution of PETPO’s constitutional claims. In this regard, the pivotal point in this case is not “that no enumerated powers authorize Congress to regulate take of an animal that is purely intrastate and that has no commercial market.” Order at 8. It is that the language of the statute, its

application in the real world, and its legislative history, all reveal that Congress adopted the ESA because it placed recreational, aesthetic, scientific, and economic value on all species, and accordingly sought to directly regulate other economic activities that, if left unchecked, would continue to undermine the preservation of the Utah prairie dog.

2. Congress Enacted The ESA To Restrict Economic Activities That Threaten To Undermine The Nation's Wildlife And Biodiversity.

The legislative history as well as the very text of the ESA illustrate that Congress was keenly aware when it passed the Act that biodiversity and human economic health are vitally linked. As the House Report makes clear:

From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask. . . .

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.

H.R.REP. NO. 93-93-412 at 143-44; *see also National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1052-53 (D.C. Cir. 1997) (“The variety of plants and animals in this country are, in a sense, a natural resource that commercial actors can use to produce marketable products. . . . [E]ndangered plants and animals are valuable as sources of medicine and genes. Fifty percent of the most frequently prescribed medicines are derived from wild plant and animal species. Such medicines were estimated in 1983 to be worth over \$15 billion a year. . . . In addition, the genetic material of wild species of plants and animals is

inbred into domestic crops and animals to improve their commercial value and productivity.”).

To protect these natural assets for current and future generations, the ESA unequivocally **does** regulate interstate commerce in several ways. First, the ESA directly regulates economic activities by the permitting and licensing process. Section 7 of the ESA, provides that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species

16 U.S.C. § 1536(a)(2). In enacting Section 7, Congress specifically had in mind the harm that economic development can cause to both endangered species and the habitats that are critical to those species' survival and recovery. As the Supreme Court recognized:

In shaping legislation to deal with the problem [of damage to the chain of life and loss of currently unknown economic values of species through extinctions], Congress started from the finding that ‘[t]he two major causes of extinction are hunting and destruction of natural habitat.’ Of these twin threats, Congress was informed that the greatest was destruction of natural habitats. Witnesses recommended, among other things, that Congress require all land-managing agencies ‘to avoid damaging critical habitat for endangered species and to take positive steps to improve such habitat.’ Virtually every bill introduced in Congress during the 1973 session responded to this concern by incorporating language similar, if not identical, to that found in the present § 7 of the Act.”

TVA v. Hill, 437 U.S. 153, 179 (1978) (internal citations omitted). In short, Section 7 of the ESA is directed at regulating economic activities that can cause

habitat destruction, loss of species, and a reduction on our nation's natural heritage.

The ESA also directly regulates interstate commerce in endangered and threatened species. Section 9 of the ESA provides, in pertinent part, that:

[W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to-

(A) import any such species into, or export any such species from the United States; . . .

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species, taken in violation of [Section 9's prohibitions on "take" of endangered species]; (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species; (F) sell or offer for sale in interstate or foreign commerce any such species . . .

16 U.S.C. § 1538(a)(1) (emphasis added). Such statutory prohibitions on “the interstate possession . . . of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.” *Raich*, 545 U.S. at 26.

Finally, as made clear by the very rule at issue here, application of the ESA take prohibitions are directed at economic activity. Thus, the special 4(d) rule regulates agricultural activities that may result in the take of prairie dogs, except where exempted as a standard agricultural practice. *See* 50 C.F.R. § 17.40(g)(5). PETPO acknowledges this in its Petition for Review asserting that “[w]hile the 4(d) Rule refers to agricultural lands . . . as ‘exempt’ from the take prohibition, these lands are subject to significant restrictions on the take of the Utah prairie dog.” APLT_APP at 20-23 (Petition ¶¶ 20, 36-37). Likewise, PETPO acknowledges that the special rule is regulating the construction of homes and business, all of which are part of interstate commerce. APLT_APP at 26-27

(Petition ¶¶ 63-64, 70-71). In short, the Court need only look at the history of the rule to see that one of the primary purposes of the original rule was to find a balanced approach to protecting the prairie dog through the regulation of economic activities like agriculture. *See* 49 Fed. Reg. at 22330 (previous regulation of take was affecting the agricultural community, costing farmers about \$1.5 million annually).

3. Congress Enacted The ESA To Protect The Economic Value Of The Nation's Wildlife And Biodiversity.

The District Court, parroting PETPO, was quite adamant that Utah Prairie dogs (and presumably every other animal with no direct commercial use) have no commercial value, and that their take is not an economic activity. Order at 8. In other words, under the District Court's analysis, a species has value only if it can be eaten, used for its skin or other parts, hunted for sport, or otherwise can be commercially profitable. The ESA, however, was not enacted to protect animals only so they can be used commercially; the act instead recognizes that it is important to protect all species because they can contribute directly to commerce without exploitation.

In the court below, Federal Defendants explained one such benefit of species protection—ecological tourism. APLT_APP at 167-71. While at first blush, it might seem logical to assume that most seek to view more majestic animals like whales, birds of prey, wolves, etc. (many of which also need ESA protection), in fact the viewing of odd, but unusual species, also fuels tourism and economic revenue. Creatures with unique behaviors or abilities, like frogs, spiders, fish, and, yes, prairie dogs, often draw human attention to the point that vacation plans are made around the possibility of viewing such animals. *See, e.g., Top 10 weird and exotic animals of Costa Rica*, Fox News (Oct. 11,

2013), available at <http://www.foxnews.com/travel/2013/10/11/top-10-weird-and-exotic-animals-costa-rica> (last visited April 14, 2015). Indeed, as other courts have recognized, endangered species can be the object of tourism, an interstate market obviously affected by a species' decline and extinction. *Gibbs v. Babbitt*, 214 F.3d 483, 494 (4th Cir. 2000); see also *Utah v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984)(upholding the constitutionality of Section 404 of the Clean Water Act against a commerce clause challenge after finding that the regulated activity provides for substantial recreational opportunities, including “the opportunity to observe, photograph, and appreciate a variety of bird and animal life.”).

An even more direct connection between the ESA and interstate commerce can be found in the connection between species protection and scientific research. As one court recognized:

Congress has determined that protection of any endangered species anywhere is of the utmost importance to mankind, and that the major cause of extinction is destruction of natural habitat. In this context, a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.

Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985, 994-995 (D. Haw. 1979) (citing *Brown v. Anderson*, 202 F.Supp. 96 (D. Alaska 1962) (indirectly supporting the proposition that federal power over wildlife derives from the interstate movement of persons utilizing or studying wildlife)); see also *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996) (rejecting Commerce Clause challenge to Bald and Golden Eagle Protection Act on same grounds).

Obviously, an "interstate market-scientific research- . . . generates jobs," and, thus, the ESA, which protects species that are the focus of such research, substantially affects that interstate market. *Gibbs*, 214 F.3d at 494; *see also infra* Part III.B. In fact, Congress expressly provided for scientific research of listed species in Section 10, which guides the Service's issuance of permits for activities that would otherwise be unlawful under Section 9. Section 10 provides that "[t]he Secretary may permit, under such terms and conditions as he shall prescribe . . . any act otherwise prohibited by [Section 9] of this title for scientific purposes or to enhance the propagation or survival of the affected species . . ." 16 U.S.C. § 1539(a)(1). The Service regularly issues permits for all kinds of scientific research of endangered and threatened species. *See, e.g.*, 79 Fed. Reg. 8473 (Feb. 12, 2014); 79 Fed. Reg. 6917 (Feb. 5, 2014).

The District Court, of course, found that the connection between interstate commerce and either recreation or research was too attenuated to justify Congress' use of the Commerce Clause. Order 12-13 ("After all, scientific research has also been conducted and books have also been published about both guns and women. Nevertheless, the Supreme Court ruled that federal regulation of gun possession and violence against women is beyond Congress' Commerce Clause power.") The difference here, of course, is that unlike the statutes before the Supreme Court on gun control and gender-based violence, **Congress explicitly has recognized the economic value of scientific research into endangered and threatened species.** *See* H.R.REP NO. 93-412, at 4-5; 16 U.S.C. § 1539(a)(1); *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 994-995 (D. Haw. 1979). Without ESA protection many species could go extinct, which would render research on the species impossible.

C. THE DISTRICT COURT'S CONCLUSION THAT THE UTAH PRARIE DOG ALONE HAS NO VALUE TO INTERSTATE COMMERCE WAS NOT BASED UPON THE ADMINISTRATIVE RECORD.

As set forth above, the District Court erred in its focus on whether or not the Utah prairie dog, when examined in isolation, has present or potential commercial value, the regulation of which could affect interstate commerce. Even so, if it were necessary to evaluate whether the Utah prairie dog is substantially related to interstate commerce, such an inquiry, in the context of an APA facial challenge, is limited to the administrative record that was before the agency. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1564 (10th Cir.1994). The District Court, however, allowed PETPO, as well as Friends of Animals, to submit declarations regarding both the negative and positive economic impacts of regulating the take of Utah Prairie dogs. APLT_APP at 138-64 and 172-92. To be honest, when the case was pending there was some uncertainty as to whether an APA claim that rests on an allegation that the agency action violated the Constitution was limited to record review. One court that considered the issue in this Circuit had concluded “no,” and even allowed for discovery. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Service*, 921 F.Supp.2d 1137, 1204 (D.N.M. 2013); *see also Wolfe v. Barnhart*, 446 F.3d 1096, 1004 n.6 (10th Cir. 2006) (acknowledging that the court below had gone outside the record to examine the constitutional aspects of an APA claim). However, the *Jarita* decision was ultimately changed by that court on a motion for reconsideration brought by the U.S. Forest Service. It was determined on reconsideration that all the procedural aspects of the APA, including record review, apply to constitutional issues raised in an APA claim. *Jarita Mesa Livestock Grazing Ass'n.*, 2014 U.S. Dist. LEXIS 160258 at *105-06. If this Court concurs with the *Jarita* decision, and believes that the court below properly

focused on the Utah prairie dogs relation to interstate commerce, it should remand this case back to the District Court to consider the issue based solely on the administrative record. If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Weight Loss Healthcare Ctrs. of Am., Inc. v. OPM*, 655 F.3d 1202, 1212 (10th Cir. 2011).

If the Court does not concur with the *Jarita* decision, it must review the District Court's decision *de novo*. In this regard, there is ample extra-evidence before the Court that Utah prairie dogs directly contribute to interstate commerce, primarily through prairie dog tourism and scientific research.

1. The Utah Prairie Dog Has A Substantial, Direct Contribution To Interstate Commerce.

The Service has identified two significant contributions that the Utah prairie dog makes to interstate commerce. First, prairie dog related tourism generates revenue for airlines, railroads, hotels, campgrounds and restaurants both in and out of Utah. APLT_APP at 167-171. Second, prairie dogs are very important to the ecological health of western grasslands, an immense economic resource that provides for additional recreational and commercial opportunities. *Id.*; see also Conner, Seidl, VanTassell, and Wilkins, United States Grasslands and Related Resources: An Economic and Biological Trends Assessment (2001), available at <http://twri.tamu.edu/media/256592/unitedstatesgrasslands.pdf> (last visited April 14, 2015).

Friends of Animals asserts that restricting take (and thus protecting) the Utah prairie dog also protects the species direct contribution to interstate commerce as the subject of substantial scientific research and publication. For example, one Friends of Animals member, Dr. John Hoogland, is about to embark on his 41st year of research with prairie dogs. ALT_APP at 173 (Declaration of Dr. John L. Hoogland in Support of Friends of Animals' Response to Plaintiff's Motion for Summary Judgment (hereinafter, "Hoogland Decl.") at ¶¶ 2, 8). In this time, Dr. Hoogland has studied all four species that inhabit the western United States: Utah prairie dogs, black-tailed prairie dogs, Gunnison's prairie dogs, and white-tailed prairie dogs. *Id.* (¶ 8). This includes an entire decade that was devoted solely to fieldwork in Utah working with Utah prairie dogs. Collectively, Dr. Hoogland and his assistants have devoted over 185,000 man-hours of research. *Id.*

The work of Dr. Hoogland, his assistance, and others⁷ have contributed to the interstate economy in a multitude of ways. First and foremost, is the financial support he has received in the form of research from foundations, non-profits, and government agencies. *Id.* at 174 (¶ 9). He has received over 60 such grants from organizations like the National Science Foundation, the

⁷ Dr. Hoogland is not the only scientist that has researched and written about prairie dogs. *See, e.g.,* Elmore, R. D., and T. A. Messmer. 2006. *Public perceptions regarding the Utah Prairie Dog and its management: Implications for species recovery*, Berryman Institute Publication No. 23. Utah State University, Logan, available at http://extension.usu.edu/files/publications/publication/pub_8990805.pdf (last visited April 14, 2015); and Curtis, R. and Frey, S. (2013) *Effects of vegetation differences in relocated Utah prairie dog release sites*, *Natural Science*, 5, 44-4, available at <http://www.scirp.org/journal/PaperInformation.aspx?paperID=32012#.UwODTHkmVjY> (last visited April 14, 2015).

Denver Zoological Foundation, the Ted Turner Foundation, and the states of Colorado and New Mexico, to name just a few. *Id.* These grants have supported assistants, students, and Dr. Hoogland in their research of prairie dogs. *Id.* (¶ 10). Moreover, just this year, the National Science Foundation granted Dr. Hoogland funds to continue and expand his research for an additional 5 years. *Id.*

But the grants, which go to pay for interstate travel and salaries for Dr. Hoogland and his assistants, are just one aspect of how Utah prairie dog research contributes to the economy. Based upon his fieldwork, Dr. Hoogland has already published one book, edited another, and is about to release a second book this year. *Id.* at 177-78 (¶ 21). He has also authored over 60 scientific articles on prairie dogs. *Id.* at 178 (¶ 22). And his work has contributed to a cascade of projects by others that further contribute to interstate commerce. For example, because competition, infanticide, and inbreeding are major issues in behavioral ecology and population biology that affect humans and other social animals, research by other scientists studying these subjects routinely include his publications. *Id.* at 179 (¶ 27). Each of these scientists are also relying on grant money, and seeking to make a living from their work. The popular press also is curious about Dr. Hoogland's work. Publications such as *The New York Times*, *ABC News*, *Washington Post*, *Cleveland Plain Dealer*, *Chicago Sun Times*, *Detroit Free Press*, *Science*, *ScienceNow*, *National Geographic*, and *Le Generaliste*, to name a few, have highlighted his discoveries. *Id.* (¶ 28). Clearly these publications are all seeking a profit and are engaged in interstate commerce. *See, e.g., Chen v. China Central Television*, 2007 WL 2298360 at *5 (S.D.N.Y. Aug. 9, 2007) ("The broadcast of television programs and the dissemination of news, however, are clearly

activities by which private individuals and corporations engage in commerce.”).

Dr. Hoogland’s work has also been documented in two commercial books: Todd Wilkinson, *LAST STAND: TED TURNER’S QUEST TO SAVE A TROUBLED PLANET* (2013), and Terry Tempest Williams, *FINDING BEAUTY IN A BROKEN WORLD* (2008). APLT_APP at 180 (Hoogland Decl. at ¶ 29). The later author, Terry Tempest Williams is a hugely successful author who resides in Utah, and is currently the Annie Clark Tanner Scholar in Environmental Humanities at the University of Utah. *Id.* (¶ 30). Her writings have appeared in *The New Yorker*, *The New York Times*, *Orion Magazine*, and numerous anthologies worldwide as a crucial voice for ecological consciousness and social change. *Id.* Ms. Tempest-Williams joined Dr. Hoogland in his 2004 field season with Utah prairie dogs at Bryce Canyon National Park in Utah. *Id.* (¶ 31). Specifically, Williams assisted for two weeks in June 2004 with all aspects of their research: livetrapping, eartagging, marking, and release and observations of marked individuals. In her book, *Finding Beauty in a Broken World*, she extensively documents her research with Dr. Hoogland, as well as his work as a whole. The book was a finalist for the 2009 Orion Book Award, and remains in worldwide circulation today. *Id.*

Dr. Hoogland’s research has also been the subject of, or featured in, several movies and television videos. Of these, five videos specifically document his research of Utah prairie dogs (Population Biology of Prairie Dogs (Japanese Television, 2003); Prairie Dog Squad (National Geographic Society, 2002); Celebrity Crusaders (Animal Planet Network, 1999); Underdogs: Prairie Dogs Under Attack (Turner Television, 1998); Maryland’s Prairie Dog Companion (Maryland Public Television, 1997); Catching the Last Prairie Dog (Australian Wildlife, 1996); Plague in Prairie Dog Colonies (Utah Television

Network, 1995)). For three of these television productions, film crews and producers spent three days filming Utah prairie dogs with Dr. Hoogland in the field. APLT_APP at 178 (Hoogland Decl. at ¶ 24). Clearly, the film industry is also a major contributor to our nation's economy. *See FCC v. League of Women Voters*, 468 U.S. 364, 376, (1984)(holding it clear that under the Commerce Clause, Congress can regulate broadcast communication).

Dr. Hoogland also lectures on his work throughout the United States. APLT_APP at 179 (Hoogland Decl. at ¶ 26). He has attended several scientific symposiums, and has discussed his findings with professors and students at numerous colleges and universities. In all cases, the host institutions pay for his travel related expenses. *Id.*

Lastly, but possibly most significant, Dr. Hoogland's research has helped protect western grassland, which as noted above is an immense economic resource. The prairie dog (all species) is a keystone species, and that means that it has a profound impact on its grassland ecosystem. *Id.* at 175-76 (¶ 14). Prairie dogs serve as prey for terrestrial predators such as American badgers, black-footed ferrets, bobcats, coyotes, and long-tailed weasels, and for avian predators such as ferruginous hawks, golden eagles, northern goshawks, prairie falcons, and Swainson's hawks. *Id.* Their burrows provide homes for a diverse array of animals, such as black-footed ferrets, burrowing owls, bullsnakes, tiger salamanders, and hundreds of species of insects and spiders. The burrows also improve cycling of water and other nutrients. The subsoil exposed by excavations at colony-sites promotes the growth of certain plants, such as the aptly-named prairie dog weed, that do not commonly grow elsewhere. *Id.* Prairie dog research can greatly assist other scientists and conservationists in preventing degradation to, and in some cases help recovery of, grassland ecosystems. *See id.* at 176 (¶ 15).

2. The ESA Take Restriction Of The Utah Prairie Dog Is Directed At Activity That Is Commercial Or Economic In Nature.

As noted above, one of the primary reasons for passage of the ESA was Congress' recognition that the primary causes of extinction are the killing of animals and destruction of their natural habitat by humans. As a result, the ESA statutory prohibitions and requirements are aimed at curtailing such activities and help recover listed species.⁸ *Id.* Thus, the take prohibition also curtails two other forms of commercial exploitation of Utah prairie dogs that, while having very little value for most Americans, sadly contributes to interstate commerce. The first is the sport shooting of prairie dogs, known as "red mist." *See* APLT_APP at 183-84 (Declaration of Priscilla Feral in Support of Friends of Animals' Response to Plaintiff's Motion for Summary Judgment (hereinafter, "Feral Decl.") at ¶ 6). This so-called "sport" results in the sales of ammo, and in some cases state-issued licenses that generate revenue. Moreover, there are commercial outfitters that offer guided "hunts" of prairie dogs for a fee. *Id.*

Second, prairie dogs have long been subjected to poisoning by commercial exterminators who are paid by landowners to get rid of these animals. *See id.* at 183-84 (¶ 6). Again, PETPO not only ignores this aspect of the regulation, but offers no reason to believe that commercial exterminators would not be used against Utah prairie dogs if they succeed in this action. Certainly PETPO's own members seem like eager customers. *See, e.g.*

⁸ The Supreme Court recognizes that "Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity." *Gonzales v. Raich*, 545 U.S. 1, 19 n. 29 (U.S. 2005) (citations omitted). Here, it is necessary to apply ESA protection to the Utah prairie dog to prohibit commercial exploitation.

APLT_APP at 130 (PETPO member asserting “I would like to protect my property by removing prairie dogs”); APLT_APP at 144-45 (Cedar City Corporation expressing desire to have prairie dogs captured and removed from public facilities).

D. Neither The ESA Nor The Regulation Of Utah Prairie Dogs By The Federal Government Infringes On The Traditional Rights Of The States.⁹

The federal government has a long history of regulating wildlife. See generally Michael J. Bean & Melanie J. Rowland, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (3d ed. 1997). Although examples of federal regulation date back to the 1800s, Congress took an increasingly active role in wildlife protection in the 20th century with the passage of the Lacey Act of 1900, 16 U.S.C. §§ 3371-3378 and 18 U.S.C. § 42; the Migratory Bird Act of 1913, Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (repealed 1918); the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-711 (“MBTA”); and the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. The ESA passed in 1973 to replace the Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (repealed 1973), and the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, § 9(a), 83 Stat. 281 (repealed 1981), represents the culmination of the federal government's longstanding interest in and commitment to the conservation of America's wildlife resources.

The Supreme Court has affirmed the federal government's role in wildlife protection when it upheld the MBTA in *Missouri v. Holland*, 252 U.S. 416 (1920). Writing for the seven-member majority, Justice Oliver Wendell

⁹ While the District Court did not address PETPO’s Tenth Amendment claim, Friends of Animals provides the following argument in the event the claim is revived during the course of this appeal.

Holmes penned a stirring defense of federal power to protect wildlife: "But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain." 252 U.S. at 435; *see also Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (upholding national power to protect wildlife and stating "[the] assumption that the national commerce power does not reach migratory wildlife is clearly flawed"). And most recently, the Court affirmed the shared nature of federal and state power over wildlife in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) ("[A]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers.").

Although the federal government has broad authority under the Commerce Clause, in conjunction with the Necessary and Proper Clause, to protect all endangered species, including intrastate species and those with no current commercial value, this does not mean the ESA has no limiting principles or is inconsistent with federalism. First, "endangered wildlife regulation has not been an exclusive or primary state function" but is instead "an appropriate and well-recognized area of federal regulation." *Gibbs*, 214 F.3d at 500. As the *Gibbs* court held, "[i]t is as threatening to federalism for courts to erode the historic national role over scarce resource conservation as it is for Congress to usurp traditional state prerogatives in such areas as education and domestic relations." *Id.* at 505. Secondly, the ESA does not purport to protect all wildlife, but only threatened and endangered species that the states themselves have proven unable adequately to protect and restore. In

this regard, the ESA explicitly provides for state cooperative agreements, 16 U.S.C. § 1535, and relies in substantial part on the adequacy of state regulatory mechanisms in listing species for federal protection. 16 U.S.C. § 1533. It is at heart a cooperative federalism statute that protects the economic values of wildlife and regulates the negative impacts of economic activities on wildlife. Accordingly, the ESA's regulation of wildlife is bounded by the type of limiting principles that Justice Scalia discussed in his *Raich* concurrence and is consistent with our federalist system. A ruling to the contrary would truly "turn federalism on its head." *Gibbs*, 214 F.3d at 505.

CONCLUSION

For reasons set forth above, Friends of Animals requests that the Court reverse the District Court's November 11, 2014 Order granting summary judgment in favor of PETPO on its APA claim.

REQUEST FOR ORAL ARGUMENT

Pursuant to 10th Cir. R. 28.2(C)(4), Appellant requests oral argument because this action involves Constitutional questions that the Tenth Circuit has not previously addressed.