No. 14-4165 (consolidated with No. 14-4151)

United States Court of Appeals
FOR THE TENTH CIRCUIT

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,
Plaintiffs-Appellees,

v.

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

and

FRIENDS OF ANIMALS,
Intervenors-Defendants-Appellants.

On Appeal from the United States District Court
For the District of Utah Central Division, Case No. 2:13-cv-00278-DB
U.S. District Judge Dee Benson

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Appellant National Association of Home Builders ("NAHB") is a non-profit corporation organized under the laws of Nevada. NAHB has no parent companies or subsidiaries and has issued no shares of stock to the public. It is comprised of approximately 800 state and local home builders associations with whom it is affiliated, but all of those associations are, to the best of NAHB's knowledge, non-profit corporations that have not issued stock to the public.

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GLOSSARY

CSA	Controlled Substance Act (see *Raich*)
Corps	Army Corps of Engineers
DEA	Drug Enforcement Agency
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
FWS Op. Br.	Opening Brief for the U.S. Fish and Wildlife Service
GFSZA	Gun-Free School Zones Act of 1990 (see *Lopez*)
NAHB	National Association of Home Builders
PETPO	People for the Ethical Treatment of Property Owners
PETPO	*People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service*, -- F. Supp. 3d. --, 2014 WL 5743294 (D. Utah, Nov. 5, 2014)
SWANCC	*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).
VAWA	The Violence Against Women Act (see *Morrison*)

STATEMENT PURSUANT TO FED. R. APP. P. RULE 29

Pursuant to Fed. R. App. P. Rule 29, *Amicus Curiae* National Association of Home Builders ("NAHB") states as follows:

1. Authority to File. NAHB has received all parties' consent to file this brief as *amicus curiae* in support of Plaintiff-Appellant People for the Ethical Treatment of Property Owners ("PETPO").

2. Identity of Amicus Curiae. NAHB is a national trade association that represents over 140,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers.

3. Amicus Curiae's Interest in the Case. Through the regular course of operating their businesses, NAHB's members are subject to regulation under the Endangered Species Act ("ESA"). In addition, NAHB regularly participates in rulemakings and other proceedings before the agencies which administer the ESA, the U.S. Fish and Wildlife Service ("the FWS") and the National Marine Fisheries Service (which is responsible for marine species). Therefore, NAHB has knowledge of the impacts of the ESA on its members' land development and construction activities.

Furthermore, NAHB has substantial expertise in the constitutional and statutory issues in this matter, particularly in light of its status as the lead plaintiff in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). That case concerned the constitutionality of regulating land development to protect the Delhi Sands flower-loving fly, a species that only lives in California and has no commercial value.

3. Statement Regarding Preparation of this Brief. This brief has been authored solely by NAHB and its undersigned counsel of record. No party's counsel was involved in preparing and submitting this brief, nor did a party or a party's counsel contribute funding for or any other assistance relating to the preparation and submission of this brief. No person contributed any money or otherwise funded the preparation and submission of this brief, other than NAHB.

SUMMARY OF ARGUMENT

Under Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), and that provision's implementing regulations, it is unlawful for any person to "take" an endangered species.[1] The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

[1] Under the ESA, there are two classes of protected species. An "endangered species" is a species determined to be "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is a species that 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 relevant species here, the Utah prairie dog, is a threatened species.

16 U.S.C. § 1532(19). Section 4(d) of the ESA, 16 U.S.C. § 1533(d), provides that, whenever a species is listed as threatened, the Secretary is authorized to extend any or all of the Section 9 "take" prohibitions, as well as any other protective measures, to such species.

This case concerns a threatened species of rodent called the Utah prairie dog. Utah prairie dogs live only in southwestern Utah, and no interstate market exists for the species.[2] Through Section 4(d), the FWS issued a special rule establishing the conditions for and limitations on private land use activities that may take prairie dogs. *Revising the Special Rule for the Utah Prairie Dog*, 77 Fed. Reg. 46,158 (Aug. 2, 2012) (codified at 50 C.F.R. § 17.40(g)). As postured, the issue in this case is whether the federal government, pursuant to its Commerce Clause authority, may regulate the take of prairie dogs on non-federal land.

NAHB submits this brief to address two issues. In Part I of the Argument, NAHB explains that the regulated activity that the Court must analyze in this matter under the Supreme Court's recent Commerce Clause jurisprudence is the taking of Utah prairie dogs on non-federal land. NAHB also explains why the circuit court cases on which the FWS relies in its brief that address constitutional challenges to the ESA are inapposite.

[2] Additional information on the Utah prairie dog is found on the FWS's official website, at http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A04A (visited May 20, 2015).

In Part II of the Argument, NAHB explains that the Supreme Court's decision in *Gonzalez v. Raich* ("*Raich*"), 545 U.S. 1 (2005), controls how the "substantially affects" test is applied to the regulation of a commodity with an interstate market. This case does not fall within the bounds of *Raich*. In short, there is no market for Utah prairie dogs and nothing for the Court to aggregate in determining whether the regulation of take substantially affects interstate commerce.

For these reasons, NAHB submits that the district court's decision was decided correctly and should be affirmed.

ARGUMENT

I. THE PROPER FOCUS OF THE SUBSTANTIAL EFFECTS TEST IS THE OBJECT OF THE STATUTE.

The federal government's power to regulate local activities depends on whether those activities "exert[] a substantial economic effect on interstate commerce." *Raich*, 545 U.S. at 17 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). The first step in determining whether a regulated activity substantially affects interstate commerce is the proper identification of the regulated activity at issue. *United States v. Lopez*, 514 U.S. 549, 559 (1995); *United States v. Morrison*, 529 U.S. 598, 610 (2000); *see also Raich*, 545 U.S. at 23. The identification of the activity being regulated serves as the foundation on which a court analyzes whether a sufficient relationship to interstate commerce exists to

sustain federal jurisdiction under the Commerce Clause. If the activity is improperly identified, the Commerce Clause analysis is necessarily flawed.

A. *Lopez, Morrison* and *SWANCC* Focus on the Particular Activity Regulated by the Statute.

In *Lopez*, the Supreme Court held that the Gun-Free School Zones Act of 1990 ("GFSZA"), which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," exceeded Congress' authority under the Commerce Clause. *Lopez*, 514 U.S. at 551. In striking down the GFSZA the Court found that the regulated activity – the possession of a gun in a school zone – did not fall within any of the categories of activities that Congress may regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce . . . , *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59 (citing numerous cases). With respect to the third category, the Court concluded "that the proper test requires an analysis of whether the *regulated activity* 'substantially affects' interstate commerce." *Id.* at 559 (emphasis added).

As possession of a gun near a school was primarily a non-economic activity, the court rejected the first two categories as possible justifications for upholding the statute. *Id.* at 559. The third category – activities that "substantially affect"

interstate commerce – was also found inapplicable because the regulated activity was neither a commercial activity in itself nor an essential ingredient of an interstate economic activity. *Id.* at 559-64. Notably, the Court distinguished an earlier case, *United States v. Bass*, 404 U.S. 336 (1971), in which a federal statute that regulated receiving, possessing, and transporting firearms was upheld because the statute explicitly required a nexus to interstate commerce. *Id.* at 561-62.

In 2000, the Supreme Court in *Morrison* considered the constitutionality of The Violence Against Women Act ("VAWA"). The VAWA provides that, "[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured . . . ." *Morrison*, 529 U.S. at 605. The court determined that "given [the VAWA's] focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)," "the proper inquiry" is whether the regulated activity – gender-motivated violence – has a substantial impact on interstate commerce. *Id. at* 609. In analyzing the VAWA under the "substantially affecting interstate commerce" test articulated in *Lopez*, the Court concluded that the statute exceeded the limits of the Commerce Clause because gender-motivated violence was non-economic and only indirectly related to interstate commerce. *Id.* at 614-616.

The Supreme Court, albeit indirectly, also addressed the proper focus of a Commerce Clause "substantially affects" analysis in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001). The issue in *SWANCC* was whether under the Clean Water Act, which authorizes the Army Corps of Engineers ("Corps") to regulate "the discharge of dredged or fill materials into the navigable waters," 33 U.S.C. § 1344(a), the Corps had authority, consistent with the Commerce Clause, to regulate discharges into isolated, intrastate ponds used as habitat by migratory birds. *SWANCC*, 531 U.S. at 164-65. Ultimately, the Court held that the Corps' attempt to regulate the ponds exceeded the authority granted by the Act. *Id*. at 174.

The holding in *SWANCC* relied on the text of the Clean Water Act to "avoid the significant constitutional and federalism questions raised by [the Corps]." *Id*. The Court nevertheless observed that had it considered the constitutionality of regulating intrastate ponds, its analysis would need to begin with an "evaluat[ion] [of] the precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id*. at 173. In the court below, the Corps claimed jurisdiction over the petitioner's land based on the presence of "water areas used as habitat by migratory birds." *Id.* The agency subsequently argued on appeal that the ponds had a significant relationship to interstate commerce because the petitioner's project was commercial in nature. Seemingly perturbed by the Corps'

attempt to double down on its regulated-activity stance, the Court stated: "Respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature.'" *Id*. Noting that "this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends," the Court stated that the intrastate ponds that the Corps was attempting to regulate are the "precise object[s]" that must substantially affect interstate commerce. *Id*. In other words, the object at issue was the water body being regulated and its relationship to interstate commerce, not the manner in which the petitioner intended to use its property. [3]

Therefore, in *Lopez*, *Morrison* and *SWANCC*, the Supreme Court focused on the precise activity or object that by the words of the statute at issue Congress was regulating – possession of guns in a school zone, gender-based violence, and the discharge of fill material into isolated ponds. It did not consider, for example, why Mr. Lopez possessed a gun in a school zone, why Mr. Morrison allegedly assaulted

[3] In a subsequent opinion, the Court clarified that intrastate water bodies are subject to regulation under the CWA if they have a substantial relationship to a water that is navigable in the traditional sense and therefore subject to regulation under the Commerce Clause. *Rapanos v. United States*, 547 U.S. 715, 742 (wetlands must be adjacent to "a relatively permanent body of water connected to traditional interstate navigable waters" and possess "a continuous surface connection with that water" to be regulated) (plurality opin.), 784-85 (the Corps' jurisdiction over tributaries and adjacent wetlands depends on the existence of "a significant nexus with navigable-in-fact waters") (Kennedy, J., concurring in result) (2006). Thus, the analysis required under CWA is similar to the "substantially affects" test used in *Lopez* and other recent Commerce Clause cases.

Ms. Brzonkala, or why the Solid Waste Agency wanted to fill the isolated ponds. Thus, to determine if the federal government has authority to regulate an activity under the Commerce Clause, the analysis must focus on the specific activity being regulated under the statute.

B. The Regulated Activity in This Case is Take of Utah Prairie Dogs.

(1) The Regulated Activity Is Limited to Take of Utah Prairie Dogs on Non-Federal Land.

In this case, the Appellee, PETPO, has challenged the FWS's special 4(d) rule for the Utah prairie dog, codified at 50 C.F.R. § 17.40(g), which regulates whether and when landowners may take prairie dogs found on their property, including the locations where taking may occur, the amount of taking allowed, the methods by which taking may occur, and seasonal limitations on direct lethal taking. *See* 77 Fed. Reg. at 46,158 ("We are revising the regulations for where take [of prairie dogs] is allowed to occur, who may permit take, the amount of take that may be permitted, and methods of take that may be permitted.").

As an initial matter, it is important to note that PETPO has not challenged the constitutionality of the ESA generally, nor has PETPO challenged the constitutionality of the rule listing the Utah prairie dog as a threatened or endangered species. Moreover, PETPO has not challenged the application of the ESA to any species other than the Utah prairie dog, and even then, it has not

challenged the regulation of prairie dogs found on federal land (which Congress can manage and protect pursuant to the Property Clause[4]).

Thus, PETPO's constitutional challenge is limited to the application of 16 U.S.C. § 1538(a)(1)(B) of the ESA (regulating take) and, more specifically, the special 4(d) rule codified at 50 C.F.R. § 17.40(g) regulating the taking of Utah prairie dogs found on non-federal land. Under the analytical framework approved in *Lopez*, *Morrison*, and other recent Supreme Court Commerce Clause cases, this challenge should focus on the activity or object being regulated, which, as the district court correctly held, is *the taking of Utah prairie dogs*. *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service*, -- F. Supp. 3d --, 2014 WL 5743294, at *6 (D. Utah, Nov. 5, 2014) ("*PETPO*"). It is irrelevant whether the special rule has "frustrated several proposed agricultural or commercial activities" in southwestern Utah. *Id.* Instead, "the question . . . is whether take of the Utah prairie dog has a substantial effect on interstate commerce." *Id.*

Therefore, the district court's analysis correctly applied and followed *Lopez* and *Morrison* by focusing on the object of the regulation – the taking of Utah prairie dogs – and not on the adverse impacts caused by the 4(d) rule on local land uses. Given the absence of credible evidence that prairie dogs have any

[4] *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529 (1976) (upholding the Wild and Free-roaming Horses and Burros Act, which protects specified wildlife found on federal land).

commercial value, the court correctly held that the federal government has no authority to regulate the taking of prairie dogs.

Unfortunately, there are cases from other federal circuits that have misapprehended and misapplied the "substantially affects" test in previous cases involving the ESA. The FWS relies on those cases in arguing for reversal. As shown in the next section, these cases employed flawed reasoning and should be rejected by the Court.

(2) The Circuit Court Cases on which Appellants Rely Are Inapposite to the Narrow Constitutional Challenge Presented in this Appeal.

In its Opening Brief, the FWS emphasizes that the constitutionality of the ESA under the Commerce Clause has been upheld by five Courts of Appeal. Opening Brief for the U.S. Fish and Wildlife Service ("FWS Op. Br.") at 22, 27, 32. And like the Utah prairie dog, the listed species at issue in those cases were found within a single state. What FWS has not disclosed is that those courts have applied different and often contradictory rationales to justify the regulation of listed species under the Commerce Clause. Furthermore, in these cases, either the court was addressing a broader challenge to the constitutionality of the ESA or simply failed to properly analyze the relationship between the regulated activity and interstate commerce.

The first appellate case to consider the constitutionality of the ESA's take provision (and to improperly expand the class of activity being analyzed under the "substantially affects" test), was *National Association of Home Builders v. Babbitt*. 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*"). *NAHB* involved the endangered Delhi Sands flower-loving fly, an insect found only in two California counties with no known commercial value. In a fractured decision that produced three opinions, the D.C. Circuit held that Congress' commerce power allowed the FWS to regulate takings of this fly. Judge Wald determined that there was a sufficient relationship between *endangered species* *as a class* and interstate commerce because taking flies would affect "biodiversity." *Id*. at 1054. Judge Henderson, in contrast, pointed to the relationship between commercial land development impacted by the presence of the fly and interstate commerce. *Id*. at 1059. Neither judge focused on the regulated activity – the taking of the fly. Finally, Judge Sentelle, dissenting, correctly looked for a relationship between the fly and interstate commerce, and concluded that there was no connection. *Id*. at 1067.

Three years later, in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), the Fourth Circuit considered whether Congress' commerce power authorized the FWS to regulate the taking of red wolves, a species found in North Carolina. Applying the *Lopez* "substantially affects" test, the *Gibbs* court properly identified the regulated activity as the taking of red wolves. *Id*. at 492-93. However, in

linking red wolf takes and interstate commerce, the court relied on the effect that protecting wolves would have on tourism and encouraging research, which "may have inestimable future value, both for scientific knowledge as well as for commercial development of the red wolf." *Id.* at 494. *Lopez* and *Morrison* instruct that the proper inquiry is whether the regulated activity itself substantially affects interstate commerce, which in that case was the taking of red wolves – not future scientific research or the promotion of tourism. *See, e.g., Morrison*, 529 U.S. at 614.

In 2003, the Fifth and the District of Columbia Circuits determined that Congress has the authority under the Commerce Clause to limit commercial development of private property where such development would result in the taking of an intrastate endangered or threatened species. The two circuits, however, traveled much different paths to reach the same result.

In *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003), several endangered cave-dwelling invertebrate species raised the ire of a landowner when he was denied an incidental take permit needed to develop his land in Texas. *Id.* at 625. The landowner sued, alleging that the ESA's take provision, as applied to the cave invertebrates, was unconstitutional. *Id.* at 627. In its "substantially affects" analysis, the Fifth Circuit correctly identified the regulated activity as "cave species takes," thereby rejecting the lower court's reliance on the landowners'

proposed development as the activity affecting interstate commerce. *Id*. at 633, 636. However, after the court found the relationship between the taking of the cave species and interstate commerce to be too hypothetical and attenuated to support regulatory jurisdiction, it improperly aggregated the cave species takes with all takes of all other endangered species under an "interdependent web" of life theory. *Id*. at 637, 640. This rationale, like Judge Wald's "biodiversity" theory in *NAHB*, would allow the federal government to regulate every species of fish, wildlife and plants found anywhere under the guise of regulating interstate commerce.

Later that same year, the D.C. Circuit in *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), accepted the same FWS argument that had been rejected by the Fifth Circuit in *GDF Realty*. The court erroneously held that the appropriate focus of the *Lopez* "substantially affects" analysis was the proposed private land use – a commercial real estate development – rather than the taking of a listed species of toad. The court stated that the "regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that is threatens." *Id.* at 1072. This was, of course, backward – the endangered species was the object of the regulation, not private real estate development.

In *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1253 (11th Cir. 2007), a coalition of industries and associations sought to vacate a

FWS rule listing the Alabama sturgeon as an endangered species. Contending that the Alabama sturgeon is a wholly intrastate species with negligible economic value, the coalition challenged the FWS's regulatory authority under the Commerce Clause. *Id.* at 1271. Applying the *Lopez* "substantially affects" test, the Eleventh Circuit erroneously identified the regulated activity as the protection of endangered species *as a whole*. *Id.* at 1273. The court noted that the ESA generally prohibits commerce in endangered species and helps to support a billion dollar industry that includes recreation and tourism. The court also found that the value of genetic diversity is "incalculable" in terms of medicinal and agriculture contributions. *Id.* at 1273-74. The court therefore concluded that the listing action was within Congress' power to regulate interstate commerce. Unfortunately, this bootstrap approach ignored species that, like the Utah prairie dog, have no commercial value and no relationship to interstate commerce.

Finally, in *San Luis & Delta Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011), the Ninth Circuit used the same flawed reasoning as the Eleventh Circuit in *Alabama-Tombigbee* to uphold federal regulation of activities affecting an intrastate species of fish. The issue in that case was whether the application of the ESA's consultation and take provisions to the delta smelt, a minnow found in the Sacramento River Delta, exceeded federal authority under the Commerce Clause. The court found that the physical and commercial isolation of

the delta smelt was of little consequence because the smelt was simply an individual component of a "general regulatory [ESA] scheme that bears a substantial relationship to interstate commerce." *Id*. at 1175. Thus, the regulation of the smelt was upheld on the basis that other fish and wildlife species have a substantial relationship to interstate commerce. The court improperly disregarded the object of the regulation.

In short, the circuit court opinions that have upheld the regulation of intrastate species under the ESA in the face of Commerce Clause challenges are inconsistent and their reasoning strained. The courts have looked at a variety of irrelevant facts to justify their decision (e.g., the effect on "biodiversity" and the "web of life") or assumed that the existence of some commercially valuable species allows every species to be regulated, while misapplying the "substantially affects" test prescribed in the Supreme Court's recent Commerce Clause jurisprudence. The *Lopez* and *Morrison* decisions, as well as dicta in *SWANCC*, make it clear that a court must first determine the activity or object being regulated under the statute, and then determine whether that activity or object substantially affects interstate commerce.

Here, the object of the challenged special rule is the taking of Utah prairie dogs, not the maintenance of biodiversity or the regulation of farms and real estate development. Moreover, the fact that some wildlife species have a tangible

commercial value does extend the federal government's regulatory authority to all species, regardless of those species' relationship to interstate commerce. Consequently, the Court should reject the strained reasoning employed in the foregoing cases, and affirm the district court's decision, which correctly applied *Lopez* and *Morrison* to the facts presented here.

II. *RAICH* IS DISTINGUISHABLE FROM THIS MATTER.

The FWS also relies on the Supreme Court's opinion in *Raich* to support its argument that Congress has authority under the Commerce Clause to regulate the takings of Utah prairie dogs. *Raich,* however, is distinguishable from the case at hand. As explained below, *Raich* applies when Congress regulates a commodity for which there is an intrastate market, and does not extend the reach of the Commerce Clause to the regulation of prairie dogs, a species of purely local concern for which no market exists.

A. *Raich* Involved an Interstate Market in a Commodity.

In *Raich*, the respondents legally (under California law) grew and used marijuana for their own medical purposes. After the federal Drug Enforcement Agency entered one of the plaintiffs' home and destroyed her marijuana plants, the plaintiffs brought suit seeking to keep the agency from enforcing the federal Controlled Substance Act ("CSA") against them. *Id.* at 7. The issue addressed by the Court was "whether Congress' power to regulate interstate markets for

medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Id.* at 9.

The Court began by explaining that even before 1937, a market for marijuana existed and that due to its negative effects, Congress passed the Marijuana Tax Act in that year. *Id.* at 11. Subsequently, in 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which contained the CSA. *Id.* at 12 & n.19. The purpose of the CSA was to conquer drug abuse and regulate the traffic of controlled substances. *Id.* at 12. Notably, "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Id.* at 12-13.

To achieve these goals, Congress enacted a comprehensive regulatory system "making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* at 13. Under this system, various controlled substances were grouped together into five "schedules." Each schedule was associated with a distinct set of controls regarding those substances' manufacture, distribution, and use. *Id.* at 13-14. Marijuana was classified by Congress as a "Schedule I" drug. *Id.* at 14.

The respondents contended that the application of the CSA to intrastate production and use of marijuana for medical purposes exceeded Congress' authority under the Commerce Clause. *Id.* at 15. The Court disagreed and upheld

Congress' authority to regulate the intrastate production and possession of marijuana. *Id.* at 9.

The Court explained that the Commerce Clause's "substantially affect" test allows Congress "to regulate purely local activities that are part of an *economic* 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17 (emphasis added). The Court further explained that under this test Congress may regulate an activity if the "total incidence" of that activity poses a threat to a "national market." *Id.*

The Court then clarified its decision in *Wickard*, which was described in *Lopez* as perhaps the most "far reaching" example of Commerce Clause authority. *Lopez*, 514 U.S. at 560. The Court in *Raich* explained that *Wickard* stands for the proposition that Congress may regulate a non-commercial activity if the failure to regulate that class of activities would "undercut" the regulation of the interstate market in a commodity. *Raich*, 545 U.S. at 18. In *Wickard*, an interstate market for wheat existed – an agricultural commodity that is grown, transported and sold both locally and nationally. The existence of this national commodity market placed the regulation of wheat within Congress' Commerce Clause authority. Moreover, the local production and use of wheat had a substantial impact on the wheat market when considered on an aggregate basis. *Id.* at 19. Thus, the court

clarified that the rule established in *Wickard* is used when it is necessary for Congress to regulate an interstate market in a commodity.

Having established the applicable framework, the Court found that the Commerce Clause provided Congress with the authority to regulate the local production and use of marijuana. It explained that the CSA regulates activities that are "quintessentially economic" because it regulates the production, distribution and consumption of commodities for which an interstate market exists. *Id.* at 25-26. And while the *Raich* respondents grew and possessed marijuana for personal use, there is a national market for marijuana, which is impacted by the personal production and use of marijuana in the same way that the personal production and use of small quantities of wheat affected the national market for wheat in *Wickard*.[5] Because the intrastate production and use of marijuana "frustrates" Congress' interest in eliminating the interstate market in marijuana, Congress could constitutionally regulate those activities. *Id*. at 19.

[5] While it is impossible to know the size of the national market for marijuana with any precision (because it is illegal under the CSA and in most states), the national market for this controlled substance has been estimated to be as high as $100 billion. *See, e.g.*, Sizing Up The Multi-Billion Dollar Cannabis Market, Accesswire (Jan. 14, 2014), *available at* http://www.marketwatch.com/story/sizing-up-the-multi-billion-dollar-cannabis-market-2014-01-14 (visited May 20, 2015); Ariel Nelson, How Big Is The Marijuana Market?, CNBC (April 20, 2010), *available at* http://www.cnbc.com/id/36179677# (visited May 20, 2015); How Big Is the Marijuana Market?, Marijuana Business News.Com, *available at* http://marijuanabusinessnews.com/How_big_is_the_marijuana_market.aspx (visited May 20, 2015).

In sum, when the Court has upheld federal regulation of an intrastate activity "substantially affecting" interstate commerce, as in *Raich* and *Wickard*, the cases have always involved the regulation of activities that in and of themselves are economic and impact interstate "markets," such as agriculture or labor. *See Morrison*, 529 U.S. at 611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."); *Lopez*, 514 U.S. at 559-60 (discussing cases upholding regulation of intrastate activities).

B. This Case Does Not Concern a National Market or a Commodity.

In this case, by contrast, neither the "take" prohibition of the ESA nor the special 4(d) rule for the Utah prairie dog concerns the regulation of a commodity with an interstate market. Consequently, the reasoning in *Raich* is not applicable to this case.

In *Raich*, the question articulated by the Court acknowledged that an interstate market for marijuana existed. *Raich*, 545 U.S. at 9; *see also Id.* at 18 n.28 (stating that the parties acknowledged that a market existed for marijuana). Conversely, in this case, there is no "interstate market" that Congress is regulating under the ESA's take provision and the FWS's special 4(d) rule. The FWS initially suggests that the local land use activities that impact the prairie dog (e.g.,

home building, airport operations, and operating a cemetery) are commercial and therefore place the take provision and 4(d) rule properly within Congress' Commerce Clause authority. FWS Op. Br. at 36. However, in *Raich*, the Court dealt with a statute that specifically concerned with a commodity that is bought and sold in interstate commerce. Congress specifically found that intrastate activities cannot "be differentiated from controlled substances manufactured and distributed interstate . . . ." 21 U.S.C. § 801(5). In contrast, Congress did not enact the "take" prohibition to regulate cemeteries and home building. The prohibition was enacted because various species of fish, wildlife and plants were threatened with extinction. 16 U.S.C. § 1531(a)(1), (2).[6]

In addition, there is nothing in the ESA's findings or in the language and structure of the statute itself suggesting that it was enacted by Congress to dictate whether and how non-federal land may be used. As the Supreme Court explained in *SWANCC*, the regulation of land use is a function traditionally performed by local governments. 531 U.S. at 174 (quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)). "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at

[6] Congress also explained that the species afforded protection have "esthetic, ecological, educational, historical, recreational, and scientific value." 16 U.S.C. § 1531(a)(3). Notably, Congress did not find that all protected species have "commercial" value.

173 (quoting *Bass*, 404 U.S. at 349). Yet the FWS uses the take prohibition to do just that, as this case illustrates.

The FWS also acknowledges that "species takes" is the regulated activity. FWS Op. Br. at 34-5. As explained above, to conform to *Raich*, this reasoning requires the regulation of "species takes" to be the regulation of an activity that affects an interstate market. Thus, the question becomes: Is there an interstate market for the species being taken? The FWS asserts that Utah prairie dogs are "(1) an important keystone species . . .; (2) of interest to wildlife viewers and photographers who travel interstate; and (3) a subject of scientific study." *Id.* at 35. Even if these factual assertions are true, this is not evidence of an interstate "market" (buying and selling) for prairie dogs, as the Supreme Court used the term in *Raich*.

The FWS and amici also suggest that this Court should look at the ESA in total, in essence arguing that because there is a market for *some* species, Congress can regulate *all* species. This is a misreading of *Raich*. In explaining and applying the rationale of *Wickard* to the use of home-grown marijuana, the Court stated:

> *Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.
>
> . . .

> In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here, too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

Raich, 545 U.S. at 18-19. Thus, interstate activities can be regulated when the failure to do so, when viewed in the aggregate, would "undercut" regulation of the interstate market. Here, in contrast, there are no findings by Congress or any other evidence showing that it is necessary to regulate the taking of Utah prairie dogs on non-federal land in order to be able to regulate species such as the American alligator, for which a market exists. Put another way, the invalidation of the take provision as applied to the prairie dog will have no effect on the price and market conditions for alligator skins. *See PETPO* at *8 (distinguishing *Raich* because "congressional protection of the Utah prairie dog is not necessary to the ESA's economic scheme").

Finally, in *Raich*, the Court made it clear that the case concerned a "commodity." It did not define "commodity," but used the term in its ordinary sense: an economic good that is distributed and sold.[7] Again, the FWS argues that the Utah prairie dog has "biological" value and is of interest to wildlife viewers

[7] Commodity—"1: an economic good: as a: a product of agriculture or mining b: an article of commerce esp. when delivered for shipment c: a mass produced unspecialized product . . . ." Merriam Webster's Collegiate Dictionary 231 (10th ed. 2000).

and researchers. Even assuming that this is correct, these circumstances do not make Utah prairie dogs a "commodity" analogous to marijuana (in *Raich*) or wheat (in *Wickard*). Furthermore, if Utah prairie dogs were a commodity, the government could properly rely on the sections of the ESA that prohibit the importing and selling of protected species. 16 U.S.C. § 1538(a)(1)(A), (F). These provisions of the ESA, which regulate the sale and distribution of protected species and their parts, are not at issue in this case and would apply in the unlikely event that a market for Utah prairie dogs were to develop.

In short, while *Raich* may seem to be a broad reading of Congress' Commerce Clause authority, it actually constrains the "substantially affects" test to a specific set of facts – the regulation of a commodity for which there is an interstate market. In this case, there exists neither a commodity nor an interstate market in which that commodity is purchased and sold. Therefore, *Raich* does not apply.

CONCLUSION

This case involves whether Congress has authority to regulate the "take" of Utah prairie dogs – a species that is found exclusively in southwestern Utah. This wildlife species is not bought and sold in interstate commerce and has no commercial value. Under these circumstances, the district court correctly determined that the application of the ESA's "take" prohibition and the FWS's

special rule regulating the taking of prairie dogs on non-federal land are not authorized under the Commerce Clause. For the foregoing reasons, the district court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of May, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitation set forth in Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Except for the portions of the brief described in Rule 32(a)(7)(iii), this brief contains 6,018 words.

/s/ Norman D. James
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FORM CERTIFICATION

I hereby certify:

1. There is no information in this brief subject to the privacy redaction requirements of Tenth Circuit Rule 25.5;

2. The hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically; and

3. The version of the brief submitted electronically was scanned for viruses with the most recent version of a commercial virus scanning program, and according to such program is free of viruses.

/s/ Norman D. James
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CERTIFICATE OF SERVICE

On behalf of Appellees National Association of Home Builders, I hereby certify that on this 21st day of May, 2015, I electronically filed the BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES through the Court's CM/ECF system, and thus served the following counsel of record electronically:

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