**Case Nos. 14-4151 and 14-4165**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

**PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,**
**Plaintiff/Appellee,**

**v.**

**UNITED STATES FISH AND WILDLIFE SERVICE; et al.,**
**Defendants/Appellants,**

**and**

**FRIENDS OF ANIMALS,**
**Intervenor/Appellant.**

# BRIEF OF THE STATE OF UTAH, ALASKA, ARIZONA, COLORADO, IDAHO, KANSAS, MONTANA, SOUTH DAKOTA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

**On Appeal from the United States District Court for the District of Utah**
**Case No. 2:13-cv-00278-DB**
**Honorable Dee Benson, District Judge**

SEAN D. REYES
Utah Attorney General
BRIDGET K. ROMANO
Utah Solicitor General
ANTHONY L. RAMPTON
KATHY A.F. DAVIS
Assistant Utah Attorneys General
5110 State Office Building, P.O. 142477
Salt Lake City, UT 84114-2477
Telephone: (801) 538-9610
Attorneys for *Amici Curiae* States
(additional counsel on inside cover)

Additional Counsel:

State of Alaska
By: Attorney General Craig W. Richards
P.O. Box 110300
Juneau, AK, 99811
907-465-3600

State of Arizona
By: Attorney General Mark Brnovich
1275 W. Washington Street
Phoenix, AZ 85007
602-542-1610

State of Colorado
By: Attorney General Cynthia Coffman
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
720-508-6000

State of Idaho
By: Attorney General Lawrence G. Wasden
700 W. Jefferson Street, Suite 210
P.O. Box 83720
Boise, Idaho 83720
208-334-2400

State of Kansas
By: Attorney General Derek Schmidt
120 SW 10th Ave., 2nd Floor
Topeka, KS, 66612-1597
785-296-2218

State of Montana
By: Attorney General Tim Fox
215 N. Sanders, Third Floor
P.O. Box 201401
Helena, MT 59620
406-444-2026

State of South Dakota
By: Attorney General Marty Jackley
1302 E Hwy 14, Suite 1
Pierre, SD 57501
605-773-3215

State of Wyoming
By: Attorney General Peter K. Michael
123 Capitol Building
Cheyenne, WY 82002
307-777-7844

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## STATEMENT OF PRIOR OR RELATED CASES

The State of Utah is not aware of any prior or related appeals in these consolidated cases.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the State of Utah avers it is not a corporation, but a sovereign state government.

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**FRIENDS OF ANIMALS,**
**Intervenor/Appellant.**

As permitted by Rule 29(a), Federal Rules of Appellate Procedure, Utah Attorney General, Sean D. Reyes, files this brief on behalf of the States of Utah, Alaska, Arizona, Colorado, Idaho, Kansas, Montana, South Dakota, and Wyoming, as *amici curiae* in support of affirmance of the district court's order granting summary judgment in favor of Plaintiffs/Appellee. *See People for the Ethical Treatment of Property Owners v. Fish and Wildlife Service*, ___F. Supp.3d. ___; No. 2:13-cv-00278-DB, 2014 WL 5743294 (D. Utah, Nov. 5, 2014).

## STATEMENT OF THE CASE

The Utah prairie dog (UPD) is a species found exclusively in southwestern Utah. Approximately 70% of all UPD are located on state, private, and nonfederal land. Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158, 46,162 (Aug. 2, 2012); Statutory & Regulatory Addendum ("Addendum") to Appellant, U.S. Fish and Wildlife's (FWS) Opening Brief, 23-65.

The UPD was originally listed as "endangered" in 1973, under the provisions of the Endangered Species Conservation Act of 1969. Joint Appendix at 47. And in 1974, that listing was incorporated in The Endangered Species Act ("ESA") which replaced the Endangered Species Conservation Act. By 1984, population of the species had increased and the FWS reclassified the UPD as threatened. *Id*. at *2. Since that time, the species has continued to grow, leading the FWS to issue a special section 4(d) rule (the "Special Rule") to govern protection of the species.[1] 49 Fed. Reg. 22330. That Rule authorized the "take" of up to 5,000 UPD annually on certain lands within Iron County, Utah consistent with the provisions of state law. *Id*. at 22331. In 1991, the Special Rule was amended to increase the authorized take of up to 6,000 UPD annually, and to expand the geographic scope to include all private lands in the area. 77 Fed. Reg.

[1] Section 4(d) of the ESA authorizes the Secretary of Interior to "issue such regulations as he deems necessary and advisable to provide for the conservation of [threatened] species." 16 U.S.C. § 1533(d).

at 46,169-70. "Take" as defined under the ESA means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any endangered or threatened species listed as such under the ESA. *See* 15 U.S.C. §1532(19).

Subsequent to species reclassification, the UPD population has nearly doubled again, with the most recent FWS estimate being 40,666 animals. 77 Fed. Reg. at 46,169-70. Despite robust population growth, the FWS revised the Special Rule again on August 2, 2012 (the "Revised Rule"). 50 C.F.R. § 17.40(g). The Revised Rule significantly alters the Special Rule and places strict restrictions on the take of UPD. Takes are now "authorized only by permit [issued by the FWS] and only on 'agricultural lands, [private property] within [.5 miles] of conservation lands, and areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites.' The rule does not permit take of the Utah prairie dog on any federal land." *PETPO*, 2014 WL 5743294, at *2 (second and third alterations in original) (footnote omitted) (citation omitted); 77 Fed. Reg. at 46,158-59. Any person or entity acting in violation of the Revised Rule is subject to federal criminal penalties. *See* 50 C.F.R. § 17.40(g); 16 U.S.C. § 1540(b)(1).

PETPO, a nonprofit organization consisting of residents of southwestern Utah, filed this action on April 18, 2013, challenging the constitutionality of federal regulations protecting the UPD and, specifically, the Revised Rule. Joint

Appendix, at 12-35. There being no dispute as to the material facts, PETPO and FWS filed cross motions for summary judgment, *Id.*, at 194, with the intervenor Friends of Animals (FoA), filing pleadings in support of FWS. *Id*. at 9-11.

PETPO's motion was supported by affidavits from a number of Iron County residents who swore to the destructive and deleterious activities of the UPD on nonfederal property and to their inability to protect their property and livelihoods due to restrictions and prohibitions protecting the species. Id. at 138-66. For example, the Revised Rule prohibits local governments from removing or relocating UPD from recreational facilities where they pose a public health hazard, from municipal airports, where they have damaged runways and caused safety hazards, and also from the local cemetery, where they have damaged gravesites. *Id.* at 142-46. The affidavits also pointed to private citizens who have been prohibited from constructing homes on private property, *id.* at 147-50, and from starting independent, small businesses. *Id*. at 151-54.

On November 5, 2014, the District Court granted PETPO's motion and denied the cross motion filed by FWS. Notable here, the district court held

> 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.

*PETPO*, 2014 WL 5743294, at *8.

Judgment entered in PETPO's favor and FWS and FoA filed their Notices of Appeal. Joint Appendix, at 11-12.

## INTEREST OF THE *AMICI* STATES

The *amici* States have a vital interest in the recognition and preservation of the rights reserved to them and their individual citizens under the Tenth Amendment. The management of wildlife has always been the province of the sovereign states, according to which Utah has implemented its own prairie dog management plan for nonfederal lands within the State.

Far from endangered, and perhaps no longer even threatened, the economies of Utah's rural counties and communities face myriad, adverse effects from the reproduction and uncontrolled proliferation of the UPD. But private land owners and users of state and local land are unable to exercise the full panoply of rights due them as a result of prairie dog habitation. To manage its interest and those of the people who reside in and also who visit Utah, the State has implemented a prairie dog management plan, with the benefit of local and scientific input, designed to both conserve the UPD and to redress its deleterious impacts on private property in urban and rural settings. The brief of the *amici* State of Utah and her 9 sister states provides this Court with those states' unique perspective on the interplay between promoting state and local management of a purely intrastate and local species through viable state species management plans, and the powers

reserved to the federal government over management of purely federal land. Moreover, this case, the first ESA issue decided since the United States Supreme Court issued its decision in *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012) (*NFIB*), also presents the first opportunity for an appellate court to determine how far the federal government may reach under the Commerce Clause to regulate a purely intrastate interest that has no effect on interstate commerce.

## ARGUMENT

### I. FEDERAL REGULATION OF THE UTAH PRAIRIE DOG ON PURELY STATE, LOCAL, OR PRIVATE LANDS VIOLATES THE CONSTITUTIONAL PRINCIPALS OF FEDERALISM AND ENCROACHES ON POWERS RESERVED TO THE STATES AND THE PEOPLE UNDER THE TENTH AMENDMENT.

The Tenth Amendment to the United States Constitution recognizes that powers not expressly delegated to the federal government must remain with the states and the people. Aptly, the United States Supreme Court has observed:

> The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one." *Alden v. Maine*, 527 U.S. 706, 758, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.

*Bond v. United States*, -- U.S. --, 131 S. Ct. 2355, 2364 (2011). But succinctly, the Tenth Amendment states: "The powers not delegated to the United States by the

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X.

Thus, while the powers reserved to the States have experienced some diminution over the course of the twentieth century,[2] recent Supreme Court decisions signal a willingness to curtail federal authority in the face state sovereign authority. *See NFIB*, 132 S.Ct. at 2577-80 (recognizing in federalist system, "the responsibility of th[e United States Supreme] Court to enforce the limits of federal power by striking down acts of Congress that transgress those limits.") (citing *Marbury v. Madison*, 1 Cranch 137, 175-76, 2 L.ED. 60 (1803)). *See also, New York* v. *United States*, 505 U.S. 144, 157-58 (1992) (finding Federal government cannot compel states to enact or administer federal program because "Congress exercises its conferred powers subject to the limitations contained in the Constitution," which directs the court to determine "whether an incident of state

[2] *See generally*, Thomas B. McAffee, Jay S. Bybee & Christopher A. Bryant, *Powers Reserved for the People and the States: A History of the Ninth and Tenth Amendments*, Ch. 6, "Reserved Powers in the Second Half of the Twentieth Century."(Greenwood Pub. Grp. 2006); *See also, Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985) (Amendments to Fair Labor Standards Act not within authority granted Congress by Commerce Clause insofar as they operated directly to displace states' ability to structure employer-employee relationships in areas of traditional government functions. Congress had sought to wield its power in fashion that would impair states' ability to function effectively within federal system and that exercise of congressional authority did not comport with federal system embodied in Constitution).

sovereignty is protected by a limitation on an Article I power"); *Printz v. United States*, 521 U.S. 898, 918-21 (1997) (holding unconstitutional certain provisions of Brady Act, which imposed obligations on state officials to execute federal laws, because of residual state sovereignty, which was implicit "in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones" and was rendered express by the Tenth Amendment.); *United States v. Snyder*, 852 F.2d 471, 475 (9th Cir. 1988) (Suspension of a state driver's license for a federal DUI prosecution reversed because "[w]hile the principle of federalism evidenced by the Tenth Amendment establishes no limitation on Congress' power to regulate within its assigned spheres; the federal government may not override or interfere with state regulatory schemes in areas not constitutionally susceptible to federal regulation.").

Pertinent here, is *NFIB*, where although noting the Commerce Clause's broad reach, the Court held the clause was also not without limit. 132 S. Ct. at 2589. Reiterated there, Congress may (1) regulate economic activities that have a substantial and unattenuated effect on *interstate* commerce, or if falling outside this reach, (2) regulate an economic activity or market for an express *commodity*. *Id.* at 2585-93. *NFIB* does not permit the Congress to regulate any activity, but only those with substantial effects on interstate commerce. Here, the UPD is an *intrastate* species for which no commodity market exists. The UPD, therefore, fall

outside the Commerce Clause, and when they are located on state, local and private land, fall outside regulation under the ESA.

To reach a different conclusion, the *amici* states contend, would "come close to turning the Tenth Amendment on its head," but would permit the Commerce Clause to be read as to preserve unto Congress the authority to regulate Commerce in any manner not "prohibited" by the Constitution. *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J. concurring). But expanding Congress's reach under the ESA far beyond powers that impact interstate commerce, or that fall beyond the incidental powers of the Necessary and Proper clause, would transform the clause from a means of regulating activity "among the several States" into a means to appropriate traditional state authority, within one State, alone. *See United States v. Morrison*, 529 U.S. 598, 627 (2002) (Thomas, J., concurring); *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring). But supporting the federalism embodied by the Constitution, the Tenth Amendment compels a different result: reserving unto the States "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States."

That result remains unchanged even in light of the authority on which FWS relies. In its brief, FWS argues that in *Wyoming v. U.S.*, 442 F.3d 1262 (10th Cir. 2006), this Court has previously signaled its rejection of Tenth Amendment challenges to the federal exercise of jurisdiction under the ESA. *See* FWS Br., at

28. FWS misstates the holding of the case. There, the Court ruled only that it lacked jurisdiction because Wyoming had failed to identify any final agency action to be reviewed; this Court made *no ruling* on the ESA or Wyoming's specific Tenth Amendment claims: "Because we hold, however, that the Plaintiffs have failed to identify a final agency action which is necessary to satisfy the statutory standing requirements under the APA, unlike the District Court, we express no opinion on the merits of the Plaintiffs' ESA and NEPA claims." *Id.* (internal citation omitted).

Nor does this Court's prior decision in *Wyoming v. U.S.*, 279 F.3d 1214 (10th Cir. 2002) warrant reversal. But there, the Court specifically ruled that "[t]he Property Clause simply empowers Congress to exercise jurisdiction over *federal land within a State* if Congress so chooses." *Id.* at 1227 (emphasis added). Rejecting Wyoming's Tenth Amendment challenge to the FWS's refusal to authorize Wyoming to vaccinate elk on the National Elk Refuge based on a threat to domestic cattle, this Court said nothing about Wyoming's jurisdiction on state or local land, but concluded that "[t]he Tenth Amendment does not reserve to the State of Wyoming the right to manage wildlife, or more specifically vaccinate elk, *on the NER*." *Id.* **(**emphasis added). Utah's prairie dog management plan specifically excludes management of the UPD on federal land and regulates only takes of UPD on *nonfederal lands***.** *See discussion infra, Point III.* Neither case,

therefore, is probative; but each is distinguishable instead. What is more, both cases were decided prior to the Supreme Court's ruling in *NFIB*. FWS's reliance on those cases proves too much.

## II. THE STATES, AS SOVEREIGNS, HAVE THE AUTHORITY TO MANAGE WILDLIFE WITHIN THEIR BORDERS.

Long-standing is the principle that the State, as sovereign, has inherent authority to manage wildlife within its borders. But established under a "system of dual sovereignty between the States and the Federal Government," and consistent with the Tenth Amendment, the states retain their sovereign authority except where abrogated by the Supremacy Clause. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); U.S. Const. amend. X; U.S. Const. art. VI, cl. 2. These principles, age-old and well-worn, were first extended to wildlife management in *Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979). There, the Court recognized that "the power [to manage and protect wildlife] which the colonies thus possessed passed to the states with the separation from the mother county, and remains in them at the present day, insofar as its exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." *Geer*, 161 U.S. at 528.[3]

[3] The States, today, retain this inherent management authority, despite the Court's subsequent decision in *Hughes v. Oklahoma*. Concluding that "challenges under the Commerce Clause to state regulations of wild animals should be considered

Congress has also recognized the States' sovereign authority over wildlife and continues to leave the authority to manage and conserve wildlife, even on some federal lands, in state hands. For example, the Federal Land Policy Management Act ("FLPMA") states that the federal authority under this Act should not be construed as "diminishing the responsibility and authority of the States for management of fish and resident wildlife." 43 U.S.C. § 1732(b) (2012). "Congress in [FLPMA] . . . for both wilderness and non-wilderness lands explicitly recognized and reaffirmed the primary authority and responsibility of the States for management of fish and resident wildlife on such lands." 43 C.F.R. § 24.4(c) (2006). [4] Courts have interpreted this language as "self-evidently plac[ing] the 'responsibility and authority' for state wildlife management precisely where

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according to the same general rule applied to state regulation of other natural resources," the Court acknowledged that, "[a]t the same time, the general rule we adopt in this case *makes ample allowance for preserving*, in ways not inconsistent with the Commerce Clause, *the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership*." *Id.*, 441 U.S. at 335 (emphasis added). Thus, in overruling *Geer*, the Supreme Court left intact the principle that the several States have inherent authority to regulate wildlife within its boundaries.

[4] Similar language recognizing the state's authority to manage and conserve its wildlife appears in many other federal land management acts. *See, e.g.*, National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd(m) (2012) ("Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System."); *National Forest Organic Act*, 16 U.S.C. § 528 (2012) ("Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests.").

Congress has traditionally placed it, *in the hands of the states*." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1249 (D.C.C. 1980) (emphasis added).

The State of Utah's authority, as a sovereign, to regulate and manage wildlife within its borders includes the state's ability to craft a management plan for the conservation and management of UPD on state and local, i.e., non-federal, land while reserving at all times Congress' ability, through the ESA, to manage land belonging to it alone. The Supreme Court and the U.S. Congress remain committed to the principles of *Geer*, that "the power [to manage and protect wildlife] which the colonies thus possessed passed to the states with the separation from the mother county, and remains in them at the present day," and do not run afoul of the Supremacy Clause. *Geer*, 161 U.S. at 528; *see also* 43 U.S.C. § 1732(b). So too, should this Court.

## III. UTAH'S PRAIRIE DOG MANAGEMENT PLAN IS A VALID EXERCISE OF STATE AUTHORITY, NOT AN INVALID INTRUSTION ON INTERSTATE COMMERCE.

Utah's prairie dog management plan should be controlling because our Constitutional structure guarantees that Congress may not intrude on wildlife preservation and management at the state level unless Congress has clearly indicated, pursuant to an enumerated constitutional power, the federal law should have such reach. On May 8, 2015, Utah implemented its Utah Prairie Dog Management Plan on non-federal lands and the accompanying regulations in the

Utah Administrative Code R657-70, "Taking Utah Prairie Dogs" (the Utah Plan). *See* Summary of Utah Plan, Utah Division of Wildlife Resources ("DWR") website http://wildlife.utah.gov/learn-more/prairie-dogs.html (last visited May 17, 2015). The Utah Plan specifically prohibits the taking of Utah prairie dogs on all federal land, where, Utah acknowledges, the take of the species is regulated by the ESA and the FWS. Takes of UPD are also prohibited on nonfederal lands, except in specific situations where limited and controlled take is authorized through DWR. The plan seeks to supplement and establish self-sustaining prairie dog populations on federal and state lands away from human conflict by capturing problem animals on private lands and relocating them to preserve areas. This will gradually transition prairie dogs from human conflict areas that will never secure their future to preserve areas where they are unconditionally protected from take and can flourish without human interference.

An outline of the conditions covering takes of Utah prairie dogs on nonfederal lands is attached as Exhibit "A." For instance, UPD may be taken, without prior notification to DWR: 1) in areas outside mapped habitat documented as actively hosting a prairie colony; or 2) inside occupied or inhabited homes and businesses. The number and location of all such takes must be reported to the DWR at the end of each month. *Id.* Regulated takes are additionally authorized, for the following:

1. Developed lands. After notice to DWR, Utah prairie dogs may be removed by a landowner or an authorized law enforcement officer for "human health, and safety" reasons when they inhabit or occupy areas in and immediately around human development, such as homes, businesses, parks, playgrounds, airports, schools, churches, cemeteries, archeological and historical sites, areas of cultural or religious significance and similar areas of public concern. UPD conservation will never be achieved or secured in backyards, parks, school grounds, cemeteries, airports, or similar developed areas. For this reason, DWR will attempt to capture prairie dogs creating conflicts in developed areas and relocate them to protected areas away from human conflict;

2. Developable lands. Occupied and unoccupied UPD habitat may be commercially or residentially developed, once DWR has surveyed the property for prairie dogs and issued authorization to proceed. DWR will attempt to capture any prairie dogs on the property and relocate them prior to development. Take is constrained by an annual, range-wide limitation on cumulative prairie dog take across all developable lands, agricultural lands, and rangelands;

3. Agricultural lands and rangelands. UPD damaging cultivated crops or pastures may be removed by the landowner pursuant to the terms of a certificate or registration ("COR") issued by DWR. Landowners cannot take prairie dog

> damaging agricultural lands or rangelands without a COR. The COR limits the number of animals that may be removed from the property based on the number of prairie dogs counted on the property and the overall prairie dog population on the broader management unit. DWR will work with landowners to implement capture and relocation tactics in lieu of or prior to employing lethal removal techniques;

*Id.*

The Utah Legislature appropriated in S.B. 230 during its 2015 general session an additional $400,000 to DWR to fund and implement the UPD Management Plan. The State takes seriously its sovereign responsibility to both conserve the UPD and manage its impacts on private property and local economies.

The U.S. Supreme Court has recognized that, in a constitutional scheme of enumerated and reserved powers, regulations affecting local citizens should have a nexus with local government. *See Bond*, 131 S.Ct. at 2077, 2083 (2014) (holding that federal Implementation Act did not reach a purely local crime because "our constitutional structure leaves local criminal activity primarily to the States.") In *NFIB*, the U.S. Supreme Court held that individuals, and not just states, can have standing to raise a Tenth Amendment challenges to federal laws. Remanding the

case, without deciding the constitutionality of the challenged Act, the U.S. Supreme Court discussed the Tenth Amendment issues:

> "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. ___, ___, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011).

*NFIB*, 132 S.Ct. at 2578. Utah's prairie dog management plan need not impact only state interests, but both a state and her citizens are protected from unwarranted federal interference over purely intrastate activities. Here, that protection affords Utah, her local and municipal economies, and private landowners from actions that regulate purely intrastate species having only strong nexus to state government and local concerns; and no nexus to interstate commerce.

## CONCLUSION

The amici States underscore that the U.S. Constitution grants specific enumerated powers to the federal government leaving unenumerated powers to the States. To this end, the *amici* recite the refrain that the Tenth Amendment confirms that all powers not delegated to the federal government are reserved to the States and the people. The UPD is not an economic product and the Commerce Clause and the Necessary and Proper Clause do not apply to allow the federal government to regulate this purely intrastate species and state, local and private land.

For the reasons stated above, the *Amici* request this Court to affirm the decision of the District Court.

DATED this 26th day of May, 2015.

/s/ Anthony L. Rampton
Kathy A.F. Davis
Roger R. Fairbanks
Bridget K. Romano
*Counsel for Amicus State of Utah*

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,815 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 word processing program, with 14 point font, and Times New Roman type style.

2. I certify that all privacy redactions have been made.

3. I further certify that all paper copies submitted to this Court are exact copies of this version, which is being submitted electronically via the Court's EM/ECF system.

4. I further certify that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

DATED this 26th day of May, 2015.

/s/ Anthony L. Rampton

## CERTIFICATE OF SERVICE

I certify that on May 26, 2015, I electronically filed a copy of *Amicus Curiae's* Brief with the Clerk of Court for the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case. Service will be mailed to the following counsel:

Hope M. Babcock
National Audubon Society
645 Pennsylvania Ave. S.E.
Washington, D.C. 200008

/s/ Anthony L. Rampton