Case Nos. 14-4151, 14-4165

IN THE 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.,
Defendant-Appellants,

FRIENDS OF ANIMALS,
Defendant-Intervenor-Appellant.

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

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL LAW PROFESSORS

Daniel H. Lutz
Hope M. Babcock
INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey Avenue NW, Suite 312
Washington, DC 20001
Tel: (202) 662-9535
Fax: (202) 662-9634
daniel.lutz@law.georgetown.edu

Counsel for Amici Curiae Environmental Law Professors

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IDENTITIES AND INTERESTS OF THE *AMICI*[1]

Amici are forty-two professors of environmental law. *Amici*'s expertise includes the Endangered Species Act, Commerce Clause jurisprudence, federalism, and natural resources management, among other areas of law. Combined, *amici* have over six hundred years of experience teaching these topics, and have litigated numerous Endangered Species Act cases in many courts, including in the Supreme Court. *Amici* have an interest in ensuring that the federal government retains its authority to use the Endangered Species Act to protect all listed species as well as the nation's biodiversity. The list of *amici* and their school affiliations is located in the Addendum.

This brief is filed with all parties' consent.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored this brief in whole or in part. No party, nor any party's counsel, nor any person other than the amici curiae or their counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

By striking down Congress's ability to regulate take of the Utah prairie dog on non-federal land, the district court called into question the Endangered Species Act's ("ESA") ability to protect biodiversity in the United States. The district court's reasoning contravenes Supreme Court precedent, and its holding contradicts every circuit court to have considered a Commerce Clause challenge to the ESA.[2]

The Supreme Court's Commerce Clause jurisprudence does not prohibit Congress from using its power to regulate a class of activities containing both economic and non-economic components, such as the "take" of ESA listed species. To the contrary, under the Commerce Clause, in conjunction with the Necessary and Proper Clause, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring); U.S. Const. art. I, § 8, cl. 3.

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[2] *Nat'l Ass'n of Home Builders v. Babbitt ("NAHB")*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom., Gibbs v. Norton*, 531 U.S. 1145 (2001); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton ("GDF Realty")*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F. 3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008) ("*ATRC*"); and *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1167 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 498 (2011) ("*San Luis*").

Moreover, it is irrelevant whether the Utah prairie dog inhabits one state or fifty states because the ESA protects species by regulating economic activities that substantially affect interstate commerce. This Court need not look at where the Utah prairie dog lives or what it does, but instead should consider the activities that the ESA regulates to protect the species. Several members of People for the Ethical Treatment of Property Owners ("Appellee") claimed injury from the rule's restriction of economic activity, yet the district court ignored these activities, wrongly believing its review should include only the economic activities generated by the Utah prairie dog. *See* Appellants' Joint Appendix at 203-05 ("App'x").

But even if this Court were to conclude that the Utah prairie dog rule does not meet *Lopez*'s requirement that the rule regulate economic activities that substantially affect interstate commerce, the court should still find the rule constitutional under *Raich*. Because the ESA is a comprehensive regulatory scheme that substantially affects interstate commerce, under *Raich* it may regulate the take of intrastate listed species because doing so is essential to achieving its goal of protecting listed species and their ecosystems. The Supreme Court has acknowledged that the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) ("*TVA*"). The power to protect listed intrastate species is essential to this comprehensive legislative scheme.

Given that the ESA is a comprehensive regulatory scheme, the task before the district court was a "modest" one. *Raich*, 545 U.S. at 22. It had only to resolve whether Congress had any rational basis for determining that the ESA's comprehensive regulatory scheme could be undercut if it did not regulate activities, including non-economic ones, that "take" intrastate species like the Utah prairie dog. *See id.* at 42 (Scalia, J. concurring). The United States Fish and Wildlife Service ("FWS") has estimated that 68% of all ESA-listed species reside within one state. Docket Entry ("D.E.") 56 at 1. The district court offered no limiting principle in striking down the rule, calling into question the ESA's ability to protect all intrastate listed species. Protecting these species is essential for the ESA to achieve its goal of protecting threatened and endangered species and the ecosystems upon which they rely; holding that the comprehensive regulatory scheme of the ESA may not regulate take of the Utah prairie dog would significantly undermine this purpose. This Court should reverse the district court and uphold the constitutionality of the Utah prairie dog rule.

ARGUMENT

I. The ESA is a legitimate exercise of Congress's Commerce Clause authority because its application regulates economic activities that substantially affect interstate commerce.

Congress's legislative authority under the Commerce Clause is broad, but not without limit. *United States v. Lopez*, 514 U.S. 549, 558, 567 (1995) (striking

down the Gun-Free School Zones Act because the regulated activity was non-economic and could only become economic after piling "inference upon inference"). In contrast to the statute at issue in *Lopez*, the ESA directly relates to economic activity. The district court held that the Utah prairie dog itself did not generate substantial commercial activity, *see* App'x at 203, but this has no bearing on the ESA's constitutionality because the ESA does not regulate the Utah prairie dog or any other species. Instead, it regulates economic activities that substantially affect interstate commerce, placing it squarely within Commerce Clause authority.

a. The ESA's take provision regulates economic activities that substantially affect interstate commerce.

Congress can regulate three categories of activity under the Commerce Clause: the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. All parties agree that the relevant *Lopez* category here is the third, App'x at 202. To determine whether a statute satisfies this category, the Supreme Court looks to whether it concerns "commerce or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561; *accord United States v. Morrison*, 529 U.S. 598, 610 (2000). Contrary to the district court's ruling, *see* App'x at 202-3, the *Lopez* court considered a statute that had "nothing to do with 'commerce' or any sort of economic enterprise," so its holding does not imply that a statute that regulates both

economic and non-economic activity is unrelated to commerce. *See Lopez*, 514 U.S. at 561.

The key to the Supreme Court's "substantial effects" inquiry is whether the regulated activity substantially affects commerce, not whether the beneficiaries of the regulation do. *Lopez*, 545 U.S. at 558; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585-87 (2012) (emphasizing that the focus of a Commerce Clause inquiry is on the regulated activity). Thus, just as the *Lopez* court assessed the commercial effect of possessing a gun in a school zone, rather than the commercial effect of those benefitting from such a ban on possession, here the Court must consider only how the regulated activities affect interstate commerce, not how each listed species might. *See Lopez*, 545 U.S. at 563-64, 567; *accord Morrison*, 529 U.S. at 613 (noting that the regulated activity, gender motivated violence, was not economic).

The D.C. Circuit has twice applied this analytical framework to evaluate and uphold the constitutionality of the ESA. *See Rancho Viejo*, 323 F.3d at 1072 (treating 280-home residential development as the regulated activity); *NAHB*, 130 F.3d at 1058-59 (Henderson, J., concurring) (upholding ESA section 9 application because it regulated commercial development that would degrade the habitat of a listed species). The district court agreed that the focus of its "substantial effects" analysis should be the "regulated activity," yet found it "irrelevant to the

Commerce Clause analysis" that Appellee members claimed that the rule was preventing them from engaging in commercial activity. App'x at 203-4. Other circuit courts, when reviewing such challenges, also viewed the regulated activity as relevant. *See, e.g., Gibbs*, 214 F.3d at 495 (considering as part of its Commerce Clause analysis the fact that an ESA rule impeded economic activities like ranching and farming). This suggests that the district court incorrectly applied the "substantial effects" test to the economic consequences flowing from harm to the Utah prairie dogs rather than on the regulated activities themselves.

The terms of ESA section 9 regulate "take," a class of activities that differ fundamentally from the regulated activities at issue in *Lopez* and *Morrison*. Unlike the prohibition on gun possession in school zones or the provision of a federal claim for gender-based violence, the ESA's "take" provision regulates a range of economic activities, including livestock grazing, agriculture, housing construction, timber harvesting, commercial development, and energy production, which substantially affect interstate commerce. Economic activities are those that relate to the production, distribution, and consumption of commodities. *Raich*, 545 U.S. at 25-26 (quoting Webster's Third New International Dictionary 720 (1966)). ESA litigation over activity within these industries illustrates that the "regulated

activity" causing take of ESA listed species is predominantly economic.[3] *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 692 (1995) (concerning logging activities that would cause take of the northern spotted owl and red cockaded woodpecker); *see also Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding that United States Forest Service practice of clearcutting caused take of red cockaded woodpeckers); *Strahan v. Coxe*, 127 F.3d 155, 165-66 (1st Cir. 1997) (holding that Massachusetts licensing plan allowed for use of commercial fishing equipment that caused take of North Atlantic Right Whale); *San Luis*, 638 F. 3d at 1175 (holding that the Bureau of Reclamation may divert water from appellants' orchards and farms to protect the delta smelt); *Safari Club Int'l v. Jewell*, 960 F. Supp. 2d 17, 67-68 (D.D.C. 2013) (discussing purpose of ESA to assist in prohibiting trade of endangered species parts); *Animal Welfare Inst. v. Beech Ridge Energy L.L.C.*, 675 F. Supp. 2d 540, 581 (D. Md. 2009) (enjoining construction of wind turbines to prevent future taking of the Indiana bat).

Members of industries, such as timber production, housing construction, and energy development, report that they modify or forego planned economic activities in response to actual and anticipated ESA regulation. *See, e.g.*, U.S. Gov't Accountability Office, GAO/RCED-98-58, Forest Service: Barriers to Generating

[3] The ESA defines "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

Revenue or Reducing Costs 111-15 (2002) (describing how International Paper, a company that generates most of its revenue from timber sales, has had to dedicate certain lands to the protection of listed species and, on other lands, has found ways to "mitigate the impact of timber operations on the species" and habitat of the red cockaded woodpecker); Gardner M. Brown, Jr. & Jason F. Shogren, *Economics of the Endangered Species Act*, 12 J. Econ. Persp. 3, 7 (1998) ("Since owning land which is hospitable to endangered species can dramatically circumscribe any development plans for that land, owners have an incentive to destroy the habitat before listing occurs, sometimes known as the 'shoot, shovel, and shut-up' strategy."); Nat'l Ass'n of Home Builders, Developer's Guide to Endangered Species Regulation (1996) (providing developers with extensive advice on action to take in response to the presence of a listed species on property they want to develop). Agriculture, timber harvesting, construction, and other economic activities prominently regulated by the ESA are integrally connected to large interstate markets. *See, e.g.*, U.S. Census Bureau, Statistical Abstract of the United States 2012 563 (2012) (providing data which shows that the agriculture industry, regulated by the ESA, contributed $104 billion dollars to the United States gross domestic product in 2009).

Thus, the ESA's protection of listed species against "take" directly regulates economic activities that substantially affect interstate commerce, placing the statute well within Congress's Commerce Clause authority.

b. The ESA's language need not include economic terms to be within Congress's Commerce Clause authority.

The Supreme Court has repeatedly held that Congress may use its Commerce Clause authority to achieve non-commercial goals. *Hodel v. Va. Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 281-83 (1981); *United States v. Darby*, 312 U.S. 100, 113 (1941). In *Darby*, Congress legislated with the goal of influencing labor practices, not commerce, when it prohibited shipping goods manufactured by workers who were not earning the prescribed wage. *Id.* at 113-14. Similarly, the Supreme Court upheld Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) ("CRA") under the Commerce Clause even though the CRA's purpose was to prevent discrimination. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243-44, 258 (1964) (demonstrating that racial discrimination, outlawed by the Civil Rights Act, negatively affected interstate commerce where it caused motel owners to deny accommodation on the basis of race)*; see also Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that racial discrimination at a restaurant burdened interstate commerce).

The ESA also has purposes that are not by their terms economic, but that does not mean the ESA exceeds Congress's Commerce Power. *See* 16 U.S.C. §

1531(b) ("to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species"). Just as Congress may regulate interstate commerce to prohibit discrimination, it may also regulate interstate economic activities to achieve the ESA's goals. *See Darby*, 312 U.S. at 108 ("The suggestion that Congress cannot regulate interstate commerce for ends which do not concern commerce itself is also unavailing"); *Heart of Atlanta Motel*, 379 U.S. at 258 (observing that Congress may legislate against moral and social wrongs using Commerce Clause authority).

By acknowledging that species have been rendered extinct "*as a consequence of economic growth and development* untempered by adequate concern and conservation," the ESA's findings section makes clear that Congress intended that the "take" provision would prohibit economic activities that harm listed species. 16 U.S.C. § 1531 (emphasis added); *see also* H.R. Rep. No. 93-412, at 4-5 (1973) (noting the tight connection between economic activity and its effects on species viability: "As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in position to supply (usually unwillingly) we threaten their—and our own—genetic heritage"). Thus, even though Section 9's language does not specifically reference

economic activity, Congress intended to sweep such activity into Section 9 regulation. *See* 16 U.S.C. § 1538 (a)(1)(B).

Therefore, because Congress has clearly indicated its intent to regulate economic activity, Supreme Court precedent establishes that the ESA's non-commercial goals do not preclude Congress from using the Commerce Clause to achieve them.

c. Economic activities that significantly affect interstate commerce take Utah prairie dogs and other intrastate species.

Congress may regulate activities significantly affecting interstate commerce even when those activities themselves concern intrastate species. *Cf. Raich*, 545 U.S. at 17 (noting that precedent establishes Congress's power to regulate local activity when the broader class of activities substantially affects interstate commerce). *See also* discussion in Part II. FWS frequently cites habitat destruction resulting from economic activity as a factor in listing intrastate species under the ESA. *See* Determination of Endangered Status for the Arroyo Southwestern Toad, 59 Fed. Reg. 64859, 64862 (Dec. 16, 1994) (codified at 50 C.F.R. pt. 17) (referencing dam construction, agriculture, urbanization, and mining as threats to remaining arroyo toad habitat); Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 12854, 12859 (Mar. 5, 1993) (codified at 50 C.F.R. pt. 17) (describing water diversion for agriculture and presence of toxic agricultural and industrial chemicals as causes of destruction of delta smelt habitat); Determination

of Endangered Status for the Delhi Sands Flower-Loving Fly, 58 Fed. Reg. 49881 (Sept. 23, 1993) (codified at 50 C.F.R. pt. 17) (listing the primary threats to the habitat of the Delhi Sands Flower-Loving Fly habitat as agricultural, residential, and commercial development). Multiple other circuits have used such effects to support determinations that the ESA may regulate activities taking intrastate species. *See Rancho Viejo*, 323 F.3d 1062 (upholding protection of the southwestern arroyo toad); *San Luis*, 623 F. 3d 1163 (upholding protection of the delta smelt); *NAHB*, 130 F.3d 1041 (upholding protection of Delhi Sands Flower-Loving Fly). Thus, the fact that a species resides in a single state is irrelevant to a Commerce Clause analysis when, as the Fifth Circuit has remarked, "it is obvious that the majority of takes would result from economic activity." *GDF Realty*, 326 F.3d at 639.

Similar to the cases listed above, economic activity affects the habitat of the Utah prairie dog, resulting in conditions that violate the no-take provisions of the ESA. When considering re-listing the Utah prairie dog as endangered, FWS found that agriculture, urban land development, livestock grazing, and oil and gas development threatened the Utah prairie dog. Revised 90-Day Finding on a Petition To Reclassify the Utah Prairie Dog From Threatened to Endangered, 76 Fed. Reg. 36053, 36037 (June 21, 2011) (to be codified at 50 C.F.R. pt. 17); *see also* App'x at 66-72 (FWS's revised recovery plan discussing the primarily

economic threats to Utah prairie dog habitat); App'x 2 at 25-30 (allegations by several Appellee members that the Utah prairie dog rule has thwarted economic activities on their property).

The fact that the ESA regulates economic activity, even when protecting intrastate species, makes this case distinguishable from *Lopez*. As Appellee noted before the district court, *see* D.E. 55 at 26, the Gun-Free School Zones Act in *Lopez* reached economic activity only "coincidentally." In sharp contrast, the ESA's purpose and language of Section 9 indicate that Congress intended it would reach economic activity. 16 U.S.C. § 1531 (observing that economic growth has caused various species to become extinct). Similarly, FWS was fully aware that economic activities were taking the Utah prairie dog, and that the new rule would continue to regulate those activities. *See* Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46158, 46167 (Aug. 2, 2012) (codified at 50 C.F.R. pt. 17) ("Many private properties are likely to be developed, particularly in the urban areas. Development of private lands results in the permanent loss of prairie dog habitats and populations."); Revised 90-Day Finding, 76 Fed. Reg. at 36037.

II. The Necessary and Proper Clause in conjunction with the Commerce Clause gives Congress the authority to regulate activities that harm species residing in a single state.

Even if this Court were to conclude that the Utah prairie dog rule does not regulate activities that substantially affect interstate commerce, there is another

basis on which to reject the district court's holding. Under *Raich*, this Court must uphold FWS's regulation of activities that take the Utah prairie dog so long as Congress had a rational basis for concluding that failure to regulate the take of intrastate species like the Utah prairie dog would "leave a gaping hole" in the ESA. *See Raich*, 549 U.S. at 22; *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (holding that Congress may regulate intrastate, non-commercial activity where not doing so would obstruct and defeat the purposes of the law).

a. The ESA is a comprehensive regulatory scheme that substantially affects interstate commerce in order to protect listed species.

The Necessary and Proper Clause and the Commerce Clause, U.S. Const. art. I, § 8, cls. 3 and 18, respectively, operate to allow Congress to use the ESA to regulate non-economic activity that harms intrastate species like the Utah prairie dog because "that regulation is a necessary part of a more general regulation." *Raich*, 545 U.S. at 37 (Scalia, J., concurring). In *Raich*, the Supreme Court explicitly acknowledged Congress's ability to regulate local, non-economic activity where it is part of a comprehensive regulatory scheme that substantially affects interstate commerce.[4] *Id*., 549 U.S. at 23-25 ("Where the class of activities

[4] Multiple courts have applied this reasoning to the ESA. *See e.g. Gibbs*, 214 F.3d at 498 ("Given that Congress has the ability to enact a broad scheme for the conservation of endangered species, it is not for the courts to invalidate individual regulations"); *GDF Realty*, 326 F.3d at 644 (Dennis, J., concurring) (stating that FWS may protect an intrastate species because such a regulation is essential to the ESA's comprehensive scheme).

is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class") (quotation omitted); *see also United States v. Croxford*, 170 Fed. Appx. 31, 36 (10th Cir. 2006) (employing *Raich* to uphold a statute criminalizing intrastate production of child pornography).

Like the Controlled Substances Act, Pub. L. No 91-513, 84 Stat. 1242 (1970) (the "CSA") in *Raich*, the ESA is a comprehensive regulatory scheme. *Cf. San Luis*, 638 F.3d at 1177 (rejecting the argument that *Raich*'s holding applies only to "comprehensive economic regulatory scheme[s]"). According to *Raich*, the CSA is a comprehensive scheme affecting interstate commerce due to a variety of factors. *Raich*, 549 U.S. at 27. First, the CSA repealed earlier anti-drug laws to create a more comprehensive approach to combatting drug abuse and drug trafficking. *Id.* at 12. Second, the CSA "devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess" regulated substances, except as provided by the CSA. *Id.* at 13. Third, the CSA's thorough regulatory system placed drugs within schedules according to the harms they can cause, and enacted controls based on a substance's schedule. *Id.* at 14.

Like the CSA, the ESA was enacted to replace earlier laws that were not thorough enough to achieve a congressional goal. *TVA*, 437 U.S. at 176. The ESA also created a closed regulatory system that makes illegal all trade in, transport of,

taking of, delivery of, and possession of illegally taken members of protected species. *Id.* at 180; 16 U.S.C. § 1538. Finally, the ESA has a "listing" process that created different controls for species in each listing category, *see* 16 U.S.C. § 1533, analogous to the CSA's regulation of controlled substances based on their potential for abuse. *Raich*, 545 U.S. at 14.

The circuits that have considered post-*Raich* Commerce Clause challenges to the ESA, therefore, have "had little difficulty concluding that 'the Endangered Species Act is a general regulatory statute bearing a substantial relation to commerce.'" *San Luis*, 638 F.3d at 1176 (quoting *ATRC*, 477 F.3d at 1276).

b. Prohibiting Congress from protecting intrastate species would substantially undercut the ESA's comprehensive regulatory scheme and its purpose of protecting the ecosystems upon which protected species rely.

Congress may regulate "take" even though some activities constituting "take" are non-economic and/or local, if that regulation is a necessary part of a more general regulation of interstate commerce. *Raich*, 545 U.S. at 37 (Scalia, J., concurring). In *Raich*, the Supreme Court held that even though growing marijuana for personal consumption is not an economic activity, Congress may still regulate such activity under the CSA because doing so is an appropriate means to achieve the CSA's goal of eradicating scheduled substances from interstate commerce. *Id.* at 40.

Consistent with *Raich*, the ESA may regulate non-economic activity, such as use of municipal recreation areas and cemetery maintenance, in order to eliminate take of the Utah prairie dog. App'x at 22-25. Under *Raich*, the fact that some "take" activities are non-economic is "immaterial as to whether [they] can be prohibited as a necessary part of a larger regulation." *Raich*, 549 U.S. at 40 (Scalia, J., concurring); *see also Morrison*, 529 U.S. at 13 (declining to adopt a categorical rule against aggregating non-economic activity).

Further, regulation of intrastate activity may be essential to regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. *Raich*, 545 U.S. at 37 (Scalia, J., concurring). Congress's "valid statutory scheme" created by the ESA would be "substantially undercut," if it could not also "regulate intrastate [non-commercial] activity." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2592-93 (describing and quoting *Raich*).

In this case, the district court attempted to distinguish *Raich*, contending that the reason it was necessary and proper for the CSA to regulate non-economic intrastate growth of marijuana was that otherwise Congress's "ability to regulate the national market would be frustrated." App'x at 206. But as Justice Scalia explained in his concurring opinion, the Necessary and Proper Clause applies whenever excepting intrastate non-commercial activity from the general scheme of

regulation would undercut Congress's legislative objective. *Raich*, 545 U.S. at 42 (Scalia, J., concurring); *see also Croxford*, 170 Fed. Appx. at 41 (holding that it was rational for Congress to conclude that the inability to regulate the intrastate possession of child pornography would frustrate its goal of eliminating the market for child pornography).

Under the ESA, removing protection of intrastate species against take would undercut the ESA's objective of conserving species through protecting ecosystems. *See* 16 U.S.C. § 1531; *see also* H.R. Rep. No. 93-412, at 10 (1973). Up to one-third of all species protected under the ESA are located within only one county, and approximately 68% of species protected by the ESA are found in only one state. D.E. 56 at 1; A.P. Dobson, et al., *Geographic Distribution of Endangered Species in the United States*, 275 Science 550-553 (1997). Scientists accept that each species has an impact on the others in its ecosystem, and that biodiversity creates a more stable ecosystem. *See NAHB*, 130 F.3d at 1059 (Henderson, J., concurring); *see also* P. Balvanera, et al., *Quantifying the Evidence for Biodiversity Effects on Ecosystem Functioning and Services*, 9 Ecology Letters 1146-56 (2006) (finding that biodiversity acted as a buffer against environmental change due to invasive species and nutrient perturbation); E. O. Wilson, The Diversity of Life 309 (1992) ("In short, an ecosystem kept productive by multiple species is an ecosystem less

likely to fail.").[5] As other circuits have found, "[g]iven the interconnectedness of species and ecosystems it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce." *Gibbs*, 214 F.3d at 497 (quoting *NAHB*, 130 F.3d at 1059 (Henderson, J., concurring)); *NAHB*, 130 F.3d at 1053-54 (holding that species extinction substantially affects interstate commerce because it depletes biodiversity, a natural resource). Further, Congress enacted the ESA after the Supreme Court's holdings in *Darby*, *Heart of Atlanta Motel*, and *Katzenbach*, thus knowing it had the Commerce Clause authority to reach economic activity with deleterious local effects.

If Congress cannot regulate activities taking the Utah prairie dog because it is an intrastate species, then it cannot regulate activities taking hundreds of other ESA-listed intrastate species.[6] Removing protections from one endangered species negatively affects the ecosystem; to remove protections from two-thirds would

[5] Though the ESA does not need to have an economic goal to be within Commerce Clause authority, biodiversity itself is an economic resource of immense value. *See* David Pimentel, et al., *Economic and Environmental Benefits of Biodiversity*, 47 BioScience 747-57 (1997) (estimating that biodiversity generates over $300 billion in economic and environmental benefits *per year* in the United States).

[6] As of March 2015, there are 1,402 total animal species listed under the ESA. If 68% of the listed species are intrastate, the district court's decision, taken to its logical extent, would strip over 950 species of protected status.

degrade the quality of ecosystems comprising listed species. *See* 16 U.S.C. § 1531; *see also* David U. Hooper, et al., *A Global Synthesis Reveals Biodiversity Loss as a Major Driver of Ecosystem Change*, 486 Nature 105-08 (2012) (finding that the ecosystem consequences of local species loss are as quantitatively significant as the direct effects of environmental stressors like ocean acidification, excess CO_2, and climate warming).

The Utah prairie dog contributes to biodiversity in its ecosystem through its own genetic heritage, but also through its connection to other species. It is considered a "keystone" species that other species depend upon. App'x at 65. Utah prairie dogs improve soil quality through burrowing, which also allows plants to increase uptake of certain nutrients. *Id.* To remove protection from the Utah prairie dog and similarly situated species would undercut the purposes for which Congress enacted the ESA by removing the means to conserve the ecosystems upon which protected species rely. 16 U.S.C. § 1531.

Therefore, regulating intrastate, non-economic activity that takes the Utah prairie dog is consistent with *Raich*'s holding, and within Congress's Commerce Clause power, because the ESA itself is a comprehensive regulatory scheme that substantially affects interstate commerce.

CONCLUSION

Congress can protect species under the ESA, including intrastate species, through Commerce Clause authority because the ESA regulates economic activities that substantially affect commerce. Moreover, the ESA may regulate even non-economic activity that takes intrastate species because doing so is essential to the ESA's comprehensive regulatory scheme. For the foregoing reasons, this Court should reverse the district court's ruling and uphold the constitutionality of FWS's Utah prairie dog rule.

ADDENDUM

IDENTITY OF *AMICI CURIAE*

- **Adell Amos**, Associate Professor, James O. and Alfred T. Goodwin Senior Faculty Fellowship, University of Oregon School of Law
- **William L. Andreen**, Edgar L. Clarkson Professor of Law, University of Alabama School of Law
- **Eric Biber**, Law Professor, University of California, Berkeley School of Law
- **Michael C. Blumm**, Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School
- **William Buzbee**, Professor of Law, Georgetown University Law Center
- **David N. Cassuto**, Professor of Law, Director, Brazil-American Institute of Law & Environment, Pace Law School
- **Federico Cheever**, Professor of Law, Director of the Environmental and Natural Resources Law Program, Sturm College of Law, University of Denver
- **Jamison E. Colburn**, Joseph H. Goldstein Faculty Scholar, Professor of Law, Penn State University
- **Kim Diana Connolly**, Professor, Director of Clinical Education, SUNY Buffalo Law School
- **Robin Craig**, William H. Leary Professor of Law, S.J. Quinney College Of Law, University of Utah
- **Myanna Dellinger**, Associate Professor of Law, Director, Institute for Global Law and Policy, Western State College of Law

- **Debra L. Donahue**, Professor of Law, University of Wyoming College of Law

- **Holly Doremus**, James H. House and Hiram H. Hurd Professor of Environmental Regulation, University of California, Berkeley Law School

- **Tim Duane**, Visiting Professor of Law, University of San Diego and Professor of Environmental Studies, University of California, Santa Cruz

- **Myrl L. Duncan**, Professor, Washburn University School of Law

- **Richard M. Frank**, Professor of Environmental Practice, School of Law, University of California, Davis

- **Dale D. Goble**, University Distinguished Professor and Schimke Distinguished Professor of Law, University of Idaho College of Law

- **Jared A. Goldstein**, Distinguished Research Professor of Law, Roger Williams University School of Law

- **Jacqueline P. Hand**, Professor of Law, University of Detroit Mercy School of Law

- **Itzchak Kornfeld**, Thomas Girardi Fellow, Faculty of Law, The Hebrew University of Jerusalem

- **Sam Kalen**, Winston Howard Distinguished Professor of Law, Co-Director, Center for Law & Energy Resources in the Rockies, University of Wyoming College of Law

- **Sarah Krakoff**, Professor of Law, Wolf-Nichol Fellowship, University of Colorado-Boulder Law

- **Albert Lin**, Professor of Law, University of California Davis Law School

- **Linda A. Malone**, Marshall-Wythe Foundation Professor of Law, Founding Director, Human Security Law Center, William and Mary Law School

- **Patrick C. McGinley**, Judge Charles H. Haden II Professor of Law, West Virginia University College of Law

- **Joel A. Mintz**, Professor of Law, Nova Southeastern University Shepard Broad College of Law

- **Fran Ortiz**, Law Professor, South Texas College of Law

- **Dave Owen**, Professor and Associate Dean for Research, University of Maine School of Law

- **Patrick Parenteau**, Professor of Law, Senior Counsel, Environmental and Natural Resources Law Clinic, Vermont Law School

- **Justin Pidot**, Assistant Professor, Sturm College of Law, University of Denver

- **Zygmunt J. B. Plater**, Professor, Boston College Law School

- **Jamie Pleune**, Associate Clinical Professor, Environmental Clinic, University of Utah, S.J. Quinney College of Law

- **Ann Powers**, Associate Professor Emerita of Law, Pace Law School, Global Center for Environmental Legal Studies

- **Kalyani Robbins**, Associate Professor of Law, Florida International University College of Law

- **Irma Russell**, Professor, University of Montana School of Law

- **William J. Snape, III**, Fellow and Practitioner in Residence, American University, Washington College of Law

- **Mark Squillace**, Professor, University of Colorado Law School

- **Stephen Stec**, Adjunct Professor, Department of Environmental Sciences and Policy, Central European University

- **Steph Tai**, Associate Professor, University of Wisconsin Law School

- **Robert R. M. Verchick**, Gauthier-St. Martin Chair in Environmental Law Loyola University New Orleans

- **William Want**, Associate Professor, Charleston School of Law

- **David A. Westbrook**, Louis A. Del Cotto Professor of Law, Director for Global Strategic Initiatives, SUNY Buffalo Law School

CERTIFICATE OF COMPLIANCE PURSUANT TO
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I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7), the attached Brief of *Amici Curiae* Environmental Law Professors is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 4,777 words.

I further certify that all privacy redactions have been made.

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 CM/ECF system.

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.

/s/ Daniel H. Lutz Dated: April 21, 2015

Daniel H. Lutz
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW, Suite 312
Washington, DC 20001
(202) 662-9535
daniel.lutz@law.georgetown.edu

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2015, I electronically filed the foregoing Brief of *Amici Curiae* Environmental Law Professors, with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.

/s/ Daniel H. Lutz Dated: April 21, 2015

Daniel H. Lutz
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW, Suite 312
Washington, DC 20001
(202) 662-9535
daniel.lutz@law.georgetown.edu