ORAL ARGUMENT REQUESTED

Nos. 14-4151 and 14-4165

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

Plaintiff-Appellee,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

Federal Defendants-Appellants,

and

FRIENDS OF ANIMALS,

Intervenor-Defendant-Appellant.

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

APPELLEE'S BRIEF

M. REED HOPPER
JONATHAN WOOD
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
jw@pacificlegal.org

Counsel for Plaintiff-Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee states that it is not a publicly held corporation, does not issue stocks, and does not have any parent corporation.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Statutes

Page

Regulations

Constitution

Rule

Miscellaneous

Page

GLOSSARY OF TERMS

FoA . . . . . Friends of Animals

NFIB . . . . . *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012)

PETPO . . . . . People for the Ethical Treatment of Property Owners

Utah prairie dog regulation . . . . . *Final Rule Revising the Special Rule for the Utah Prairie Dog*, 77 Fed. Reg. 46,158 (Aug. 2, 2012)

STATEMENT OF RELATED CASES

There have been no prior appeals in this case. Aside from these consolidated appeals, Appellee's counsel is not aware of any related cases within the meaning of Tenth Circuit Rule 28.2(C)(1).

STATEMENT OF THE ISSUES PRESENTED

Can a party have standing to challenge a regulation that forbids it from engaging in certain conduct on pain of civil and criminal penalties if it hasn't also challenged another regulation which doesn't apply to its conduct and never has?

Under the Commerce Clause, can the federal government regulate *any* activity—regardless of whether it's economic—with only attenuated and insignificant effects on interstate commerce because it harms a member of a non-commercial species found in only one state?

Alternatively, can the federal government regulate this activity under the Necessary and Proper Clause, even if that regulation isn't necessary to avoid frustrating its ability to regulate the market for a commodity pursuant to a comprehensive regulatory scheme?

STATEMENT OF THE CASE

The Utah prairie dog has been protected under the Endangered Species Act since 1973. Aplt. App. at 47.[1] It's a "keystone species," meaning its tunneling and burrowing has numerous effects on its grassland ecosystem and the species that reside within it. *Id*. at 65, 128. The species is only found in Utah, with approximately 70% of Utah prairie dogs residing on private property. Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158, 46,162 (Aug. 2, 2012).[2] There is no market for Utah prairie dogs. Aplt. App. at 206. Nor are they used in any economic activity or to create any commodity. *Id*. at 200-07. However, the species has attracted some academic interest and the federal government advertises its presence to promote tourism to national parks. *See* Aplt. App. at 170-71; *id*. at 172-81.

Initially, the species was listed as "endangered." *Id*. at 47. But, by 1984, the population had grown to an estimated 23,753 animals and the species was reclassified to "threatened." *Id*.; 77 Fed. Reg. at 46,169-70. Since that time, the population has nearly doubled again, with the U.S. Fish and Wildlife Service's most recent estimate at 40,666. 77 Fed. Reg. at 46,169-70.

---

[1] "Aplt. App." refers to the Appellants' Joint Appendix, and the references are to the page numbers of that appendix.

[2] Reproduced in the Statutory & Regulatory Addendum to Federal Appellant's Opening Brief at 23-65, hereinafter referred to as "Addendum."

The Service recently issued a final rule under Section 4(d) of the Endangered Species Act restricting "take"—any activity that harms or affects a member of the species. 50 C.F.R. § 17.40(g) *reproduced at* Addendum 66-68; *see also* 16 U.S.C. § 1532(19) *reproduced at* Addendum 5 (defining "take"); 16 U.S.C. § 1533(d). Despite the species' population growth, this final rule—the regulation challenged here—restricts take even further than the previous version. In particular, it reduces the total number of takes that can be permitted and restricts these permits to only certain types of property, whereas all private property had been eligible. 77 Fed. Reg. at 46,158-59 (comparing the Utah prairie dog regulation with the prior version). Absent a permit, it's a federal crime to take any of the creatures. *See* 50 C.F.R. § 17.40(g); *see also* 16 U.S.C. § 1540(b)(1).

People for the Ethical Treatment of Property Owners (PETPO) is a nonprofit organization formed by residents of southwestern Utah who have suffered for decades under federal regulations to protect the Utah prairie dog. Aplt. App. at 159-62. Its more than 200 members have been prevented from building homes, *see id*. at 147-150, starting small businesses, *see id*. at 151-54, and, in the case of the local government, from protecting recreational facilities, a municipal airport, and the local cemetery from the Utah prairie dog's maleffects, *see id*. at 142-46. PETPO advocates protecting the prairie dog without imposing such severe burdens on individuals and the community, by moving them from residential and developed neighborhoods to natural areas on

public lands where they can be permanently protected. Aplt. App. at 159-62. Under the regulation, doing so would be a crime. *See* 50 C.F.R. § 17.40(g); 16 U.S.C. § 1532(19).

On April 18, 2013, PETPO filed this challenge to the constitutionality of the Utah prairie dog regulation. Aplt. App. at 14-35. On July 10, 2013, Friends of Animals (FoA) filed a motion to intervene, which was granted on October 31, 2013. *See id*. at 7, 9. PETPO moved for summary judgment on November 18, 2013, arguing that neither the Commerce Clause nor the Necessary and Proper Clause authorize the regulation. *Id*. at 9. Federal Appellants[3] filed a cross-motion for summary judgment on January 17, 2014, arguing that the regulation is constitutional. *Id*. at 9-10. On November 5, 2014, the District Court granted PETPO's motion and denied Federal Appellants', holding that neither the Commerce Clause nor the Necessary and Proper Clause permit the federal government to prohibit the take of a species found in only one state that has no substantial effect on interstate commerce, when that regulation is unnecessary to the government's ability to regulate the market for a commodity. *Id*. at 193-208. It subsequently entered judgment in favor of PETPO and these appeals timely followed. *Id*. at 11-12.

[3] Consistent with their brief, Appellants U.S. Fish and Wildlife Service, et al., will be referred to throughout as "Federal Appellants."

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States' recent decision in *NFIB* sets forth the approach for analyzing these constitutional questions. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*). First, the Court should decide whether the Utah prairie dog regulation is valid under the Commerce Clause. *See id*. at 2585-91. Relevant here, that clause allows the federal government to regulate economic activities that have a substantial and unattenuated effect on interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995). As the court below held, this doesn't encompass the authority that the government asserts here—the power to regulate *any* activity that affects a Utah prairie dog, a species found only in Utah, the take of which has no substantial and direct effect on interstate commerce. Aplt. App. at 202-05.

Next, the Court must decide whether the regulation can be sustained under the Necessary and Proper Clause. *See NFIB*, 132 S. Ct. at 2591-93. This clause allows the federal government to regulate activities otherwise beyond its reach if necessary to regulate commerce—*i.e.*, economic activity or the market for a commodity—pursuant to a comprehensive regulatory scheme. *See NFIB*, 132 S. Ct. at 2591-92; *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). This power also doesn't authorize the Utah prairie dog regulation. Because the Utah prairie dog isn't a commodity or used in economic activity, the regulation's broad prohibition isn't

necessary to avoid frustrating the federal government's ability to regulate any existing market. *See* Aplt. App. at 205-07.

Federal Appellants and FoA disagree, relying heavily on decisions from five other circuits.[4] These decisions—all of which predate *NFIB*—conflict with both each other and precedent from this Court and the Supreme Court. Consequently, this Court should not find them persuasive. At heart, the defect in these decisions is that they embrace interpretations of the Commerce and Necessary and Proper Clauses that admit of no limit. The reasoning would authorize federal regulation of any activity—regardless of its nature—for any reason provided that it affects something in some way or is a rational means to accomplish any public policy the federal government might pursue through a comprehensive regulatory scheme. This result plainly conflicts with this Court's and the Supreme Court's repeated admonitions that the federal government's powers cannot be all encompassing or supplant the states' police power. *See, e.g.*, *Morrison*, 529 U.S. at 618-19; *United States v. Patton*, 451

[4] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kepthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

F.3d 615, 628-30 (10th Cir. 2006). Because no enumerated power gives the federal government authority to regulate any sort of activity simply because it affects a Utah prairie dog, the regulation is unconstitutional. The decision below should be affirmed.

STANDARD OF REVIEW

This Court reviews constitutional claims, like the one at issue here, *de novo*. *See Patton*, 451 F.3d at 620.

ARGUMENT

I

PETPO HAS STANDING TO CHALLENGE THE UTAH PRAIRIE DOG REGULATION

To have standing, a party must show an injury in fact resulting from a challenged action which could likely be redressed by a favorable decision. *See WildEarth Guardians v. Public Service Co. of Colorado*, 690 F.3d 1174, 1182 (10th Cir. 2012). PETPO challenges a federal regulation that forbids its members from engaging in any activity that results in take of a Utah prairie dog. 50 C.F.R. § 17.40(g). The decision below remedies this injury by declaring that the federal government has no constitutional authority to regulate take on private property and eliminating the threat of federal civil and criminal punishment. Aplt. App. at 193-208. Consequently, PETPO has standing to challenge the Utah prairie dog regulation.

FoA argues otherwise, claiming that PETPO cannot obtain relief because it doesn't challenge another federal regulation—the general prohibition against taking threatened species. *See* 50 C.F.R. § 17.31(c). In effect, FoA would deny PETPO its day in court because it doesn't challenge a regulation which has never applied to its members' activities, didn't apply when this case was filed, and doesn't apply now in light of the decision below. *See* 50 C.F.R. § 17.31(c) (prohibiting take of threatened species unless the species is subject to a species-specific regulation); 50 C.F.R. § 17.40(g) (species-specific regulation for the Utah prairie dog); *see also* Fed. Appellants' Opening Br. at 13 (explaining that the Utah prairie dog has been subject to species-specific regulations since it was originally listed as threatened). Since the general take provision has never caused PETPO's members any harm, nor does it do so today, PETPO didn't challenge it nor would it have had standing to do so. But this provides no basis to deny standing to challenge the regulation which does apply—the Utah prairie dog regulation. *See WildEarth Guardians*, 690 F.3d at 1182.

FoA cites no authority for its catch-22. If FoA's argument was correct, one would expect to find numerous cases supporting it. Since, in FoA's view, striking down a species-specific regulation inevitably triggers the general prohibition, no injury suffered by a regulated party due to a species-specific regulation could ever be redressable. In effect, such rules would be unreviewable. *But see, e.g.*, *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation MDL No. 1993*,

720 F.3d 354 (D.C. Cir. 2013); *Alsea Valley Alliance v. Lautenbacher*, 319 Fed. Appx. 588 (9th Cir. 2009) (unpublished); *cf. Sackett v. EPA*, 132 S. Ct. 1367, 1372-73 (2012) (presumption that agency actions are judicially reviewable).

Further, the decision below demonstrates that FoA's argument rests on a faulty assumption: that the court's relief would necessarily result in the general prohibition against the take of threatened species applying to PETPO's members. That isn't true here for two reasons. First, the court below ruled that the federal government has *no* constitutional authority to regulate takes of Utah prairie dogs on private lands, which would preclude the application of the blanket prohibition to this species as a consequence of the decision. *See* Aplt. App. at 208. Second, the general take prohibition doesn't apply according to its own terms because, under the District Court's ruling, the Utah prairie dog's species-specific regulation continues in force on federal property. *See id.*; 50 C.F.R. § 17.31(c). FoA's argument could only succeed if the mere possibility that a plaintiff might not obtain relief was sufficient to deny standing. This Court's precedent makes clear, however, that "likely" relief is all that is required. *See WildEarth Guardians*, 690 F.3d at 1182. PETPO more than satisfies this requirement since it actually obtained relief in the court below. *See* Aplt. App. at 208.

FoA's statute of limitations argument should also be rejected. PETPO challenged the Utah prairie dog regulation under both the Administrative Procedure

Act and the Tenth Amendment.[5] *See* Aplt. App. at 14-35. The statute of limitations for that challenge is six years from when the regulation was final—August 2, 2018. *See* 28 U.S.C. § 2401 (6 year statute of limitations for Administrative Procedure Act claims); 77 Fed. Reg. 46,158. FoA seems to argue that this timely challenge shouldn't be heard because, if PETPO is right, the Utah prairie dog regulation is only the latest in a series of regulations that may have exceeded constitutional authority. *See* FoA's Opening Br. at 15-16.[6] It cites no precedent for its novel argument that prior illegal agency actions can insulate subsequent ones from judicial review. And its argument finds no support in the text of the Administrative Procedure Act. *See* 5 U.S.C. § 704 (authorizing challenges to any final agency action for which there is no other adequate remedy); 5 U.S.C. § 706 (providing the grounds for challenging final agency actions); *cf. Sackett*, 132 S. Ct. at 1372-73 (presumption that agency actions are judicially reviewable).

Finally, FoA's remaining arguments about the blanket regulation would only be relevant if PETPO's suit challenged that regulation, *i.e.*, sought to remove

---

[5] There's no reason for this Court to decide whether a constitutional challenge like this can *only* be brought under the Administrative Procedure Act. *See* FoA's Opening Br. at 14. Because this challenge was brought under that act, the resolution of that question will have no bearing on this case.

[6] "[T]he prohibitions on take of Utah prairie dogs—on both private and public land—attached at the time of the listing (May 29, 1984). Certainly the government (and the public generally) have an interest in the finality of regulatory actions that took place three decades ago." FoA's Opening Br. at 15-16.

protection from take for all threatened species which—unlike the Utah prairie dog—aren't subject to a species-specific rule. It doesn't. *See* Aplt. App. at 14-35.

II

THE COMMERCE CLAUSE DOESN'T AUTHORIZE THE UTAH PRAIRIE DOG REGULATION

The Commerce Clause is admittedly a very broad power, but it is not without limit. *See NFIB*, 132 S. Ct. at 2589. Though it once seemed like a" '[h]ey, you-can-do-whatever-you-feel-like Clause,' " it isn't. *See* Alex Kozinski, *Introduction to Volume Nineteen*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995). The Supreme Court and this Court have repeatedly emphasized that it can't be interpreted to encompass unlimited federal power. *See, e.g.*, *Morrison*, 529 U.S. at 618-19 ("'[W]e *always* have rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power' " (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)); *Patton*, 451 F.3d at 628-30 ("If any activity with any effect on interstate commerce, however attenuated, were within congressional regulatory authority, the Constitution's enumeration of powers would have been in vain."). Pursuant to this power, the federal government may regulate the objects of interstate commerce, channels of interstate commerce, and—relevant here[7]—economic activities that have an unattenuated and substantial effect on interstate commerce. *See Lopez*, 514 U.S.

[7] FoA apparently disagrees that only this third category is at issue. *See* FoA's Opening Br. at 19. Yet, it only argues that category in its Opening Brief.

at 567;[8] *see also United States v. Riccardi*, 405 F.3d 852, 866 (10th Cir. 2005) (any regulation of intrastate, noneconomic activity is likely unconstitutional).

A. The Utah Prairie Dog Regulation Isn't a Regulation of Economic Activity

The Supreme Court has explained that determining whether a challenged regulation is a regulation of economic activity is "central" to the constitutional question. *See Morrison*, 529 U.S. at 610. This Court has agreed, explaining that, if a regulation is a regulation of economic activity, it's almost certainly constitutional and, if not, it likely isn't. *See Patton*, 451 F.3d at 623 (heavy presumption of constitutionality for regulations of economic activity); *Riccardi*, 405 F.3d at 866 (the Court is likely to find regulation of intrastate, non-economic activity unconstitutional).

Whether a challenged regulation is a regulation of economic activity is judged on its face. *See Patton*, 451 F.3d at 624-25 (measuring whether a statute is a regulation of economic activity on its face).[9] The Supreme Court has explained that,

---

[8] In *Lopez*, the Supreme Court identified two other factors to inform the inquiry: whether there is a jurisdictional hook to limit the regulation to its constitutional applications; and whether there are express congressional findings demonstrating substantial effect. 514 U.S. at 560-66. Both of these also weigh against the Utah prairie dog regulation's constitutionality. Aplt. App. at 203.

[9] The Fourth and D.C. Circuits rejected somewhat similar challenges by looking only to the challengers' proposed activities. *See Rancho Viejo*, 323 F.3d at 1072; *Gibbs*, 214 F.3d at 495. Because those particular instances of take would result from economic activity, the courts determined that a prohibition against take is a regulation of economic activity. *See Rancho Viejo*, 323 F.3d at 1072; *Gibbs*, 214 F.3d at 495;
(continued...)

for these purposes, economic activity refers to the "'production, distribution, and consumption of commodities.'" *See Raich*, 545 U.S. at 24-26 (quoting Webster's Third New International Dictionary 720 (1966)).

The Utah prairie dog regulation is not a regulation of economic activity. It prohibits *any* activity—regardless of its nature—that effects any Utah prairie dog, unless exempt or authorized by a federal permit. 50 C.F.R. § 17.40(g). Thus, the regulated activity is take of the Utah prairie dog.[10] *See id*. This isn't the production, distribution, or consumption of a commodity. *See Home Builders*, 130 F.3d at 1064 (Sentelle, J., dissenting). In many ways, the Utah prairie dog regulation is similar to the provision struck down in *Morrison*. Each forbids violent activities, only against different objects. *See Morrison*, 529 U.S. at 610; *see also* 16 U.S.C. § 1532(19) (defining "take" to include "harm," "shoot," and "kill"). Because the Utah prairie dog regulation applies to *anyone* who does *anything* that results in take, " 'neither the

---

(...continued)
see also Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) ("Such an approach seems inconsistent with the Supreme Court's holdings . . . ."). The Fifth Circuit expressly rejected this reasoning as inconsistent with Supreme Court precedent. *See GDF Realty*, 326 F.3d at 634. It also conflicts with this Court's precedent. *See Patton*, 451 F.3d at 624-25.

[10] FoA objects to this characterization of the activity regulated by the Utah prairie dog regulation. FoA's Opening Br. at 20-22. But it offers no other way to characterize *the activity* that is being regulated.

actors nor their conduct has a commercial character.'" *See Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

The Utah prairie dog regulation is thus readily distinguishable from the statutes upheld in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), *Hodel v. Indiana*, 452 U.S. 314 (1981), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). On its face, the statute at issue in both *Hodel* cases regulated surface mining—an economic activity—by requiring those engaging in it to mitigate the environmental impacts of this mining. *See Virginia Surface Min.*, 452 U.S. at 269-70 (describing the restoration requirements); *see also* 30 U.S.C. § 1265 (requirements for surface coal mining permits). The statute challenged in *Heart of Atlanta* regulated the provision of services at places of public accommodation—an economic activity—by forbidding the denial of service on racial grounds. *See* 379 U.S. at 247 (reproducing the relevant provisions of the Civil Rights Act). Unlike the Utah prairie dog regulation, the challenged provisions in these cases expressly regulated economic activity. *See Home Builders*, 130 F.3d at 1065-66 (Sentelle, J., dissenting); *see also Riccardi*, 405 F.3d at 866.

Because of the Utah prairie dog regulation's sweeping breadth, some economic activity is regulated by it, as are many noneconomic activities. 50 C.F.R. § 17.40(g). It forbids, for example, exterminators from harming Utah prairie dogs for a fee. *See id*. But it also applies to a rowdy child throwing a rock at a Utah prairie dog, a driver

whose car strikes one scampering across a street, a homeowner moving one that had been run over in front of her house, and someone who catches one to relocate it to a conservation area. *See id*.; 16 U.S.C. § 1532(19) (defining take to include killing, harming, capturing, or collecting); *see also Home Builders*, 130 F.3d at 1064 (Sentelle, J., dissenting).

In this respect, the Utah prairie dog regulation is indistinguishable from the statutory provision at issue in *Lopez*. The Gun Free School Zone Act's prohibition against anyone possessing a gun near a school was also broad enough to apply to economic activity. *See* 514 U.S. at 551 (quoting the challenged provision). In fact, the defendant in that case was paid to carry a gun to school to deliver it to a classmate. *See* 2 F.3d 1342, 1345 (5th Cir. 1993). Nevertheless, the Supreme Court did not engage in the sort of speculation that Appellants and their *amici* ask this Court to engage in. *See, e.g.*, Brief of Constitutional Law Professors at 4, 6, 12 (inconsistently arguing that a regulation is a regulation of economic activity if it regulates any economic activity, "usually" regulates economic activity, or "primarily" regulates economic activity). In *Lopez*, the Supreme Court didn't hazard a guess as to how often a gun might be possessed near a school during the course of economic activity. *See Lopez*, 514 U.S. at 565; *Home Builders*, 130 F.3d at 1063 (Sentelle, J., dissenting) (this approach would "improperly invert[] the third prong of *Lopez* and extend[] it without limit"). It didn't, for example, opine on how often people possess guns near

schools related to the illegal sale of narcotics, even though numerous other sections of the Crime Control Act of 1990, P.L. No. 101-647, 104 Stat. 4789 (1990),[11] addressed drug possession and distribution near schools. *See GDF Realty*, 326 F.3d at 634-35 (this reasoning would " 'effectually obliterate' " limits on the Commerce Clause (quoting *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))); *cf. Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc) (criticizing the D.C. Circuit's approach on this basis).[12] In resolving whether the Gun Free School Zone Act's prohibition was a regulation of economic activity, the Supreme Court looked to the face of the challenged statutory provision. *See Lopez*, 514 U.S. at 560. This Court should do the same here. *See Patton*, 451 F.3d at 624-25. Because the Utah prairie dog regulation broadly forbids take of the species, it isn't a regulation of economic activity.

---

[11] Though referred to as the Gun Free School Zones "Act," the statutory provision at issue in *Lopez* was but a small part of a comprehensive crime bill—the Crime Control Act of 1990. P.L. No. 101-647.

[12] For the same reason, the substantial effects test should be applied to take of the Utah prairie dog, not by identifying all of the ways that the regulation could be violated by economic activity, aggregating all of the industries associated with those activities, and asking whether this substantially affects interstate commerce. If that was the proper test, the Supreme Court would have identified the many economic activities that could result in possession of a gun near a school, *e.g.*, gun trafficking, illegal drug sales, security, etc., and asked whether the related industries in toto affect interstate commerce. It didn't. *See Lopez*, 514 U.S. at 563-68.

Legislative history indicating that economic activity may raise the most serious threats of extinction doesn't change this analysis for several reasons. *See* FoA's Opening Br. at 20-25 (discussing legislative history); *see also* 16 U.S.C. § 1531(a)(1). First, as explained above, precedent from the Supreme Court and this Court establish that whether a regulation is a regulation of economic activity must be judged from its face. *See Patton*, 451 F.3d at 624-25. Though legislative history suggests that Congress was concerned about economic activity's effects on species, the government ultimately chose not to adopt a regulation of economic activity. 50 C.F.R. § 17.40(g). Second, Congress' findings don't imply that all—or even most—takes will occur as a result of economic activity. For instance, the seriousness of take violations varies based on the type of harm at issue. 16 U.S.C. § 1532(19) (defining take to include such things as "kill," "collect," and "harass"). That the most serious of these are likely to be the result of economic activity doesn't imply anything about the nature of activities causing take generally. Third, congressional findings as to economic impacts are not binding. The Court must make the determination itself. *See Morrison*, 529 U.S. at 615 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (quoting *Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring)). Finally,

Congress' findings about threats to species generally says nothing about the causes of takes of Utah prairie dogs.

B. Take of Utah Prairie Dogs Has Only Attenuated and Insubstantial Effects on Interstate Commerce

A regulated activity's effect on interstate commerce must be both direct and substantial to withstand scrutiny under the Commerce Clause. *Patton*, 451 F.3d at 625 ("[W]here the regulated activity is not commercial in nature, Congress may regulate it only where there are 'substantial' and not 'attenuated' effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce." (quoting *Morrison*, 529 U.S. at 614-16)). This Court has explained that this standard is unlikely to be satisfied when the regulation regulates intrastate—*i.e.*, activity that occurs wholly within a single state—noneconomic activity. *See Riccardi*, 405 F.3d at 852.

Substantial effects are not analyzed by looking at a particular activity in isolation. Rather, courts look to whether the class of economic activities in the aggregate has such an affect. For instance, in *Wickard v. Filburn*, the Supreme Court did not look to the particular farmer's local wheat production and harvesting in isolation but considered the impact of these same activities as performed by farmers across the country. *See* 317 U.S. 111, 127-28 (1942). However, courts must be

careful not to aggregate too liberally lest they convert the Commerce Clause into an unlimited federal power. *See Patton*, 451 F.3d at 622 ("If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless."). In particular, the government can't rely on piling inference upon inference or reasoning with no logical stopping point. *Lopez*, 514 U.S. at 567.

Since the Utah prairie dog regulation is not a regulation of economic activity, aggregation is inappropriate. *See Morrison*, 529 U.S. at 611 n.4 (explaining that the Supreme Court has only applied the aggregation principle when "the regulated activity was of an apparent commercial character"). But even if aggregation was appropriate, the Utah prairie dog regulation could not be sustained because the effects of Utah prairie dog takes on interstate commerce are too attenuated to withstand scrutiny. *Cf. Gibbs*, 214 F.3d at 507-08 (Luttig, J., dissenting).

Federal Appellants, FoA, and their *amici* have asserted four arguments how take of the Utah prairie dog could have some effect on interstate commerce. These are: (1) that a species can affect its ecosystem or the environment which, in the aggregate, substantially affect interstate commerce; (2) that the Utah prairie dog could become the subject of commerce someday; (3) that take of the Utah prairie dog may affect interstate tourism which, in the aggregate, substantially affects interstate commerce; and (4) that the Utah prairie dog has garnered academic interest. However, these

effects are so attenuated and insubstantial that, if they were sufficient, they'd eviscerate any limitation on federal power. *See Morrison*, 529 U.S. at 615-16 (denying that attenuated causal chains can sustain a regulation under the Commerce Clause).

In addition to the asserted effects on interstate commerce, FoA objects to the focus on commercial values because species have "value" in many other senses. *See* FoA's Opening Br. at 3. Though true, the focus on commerce is proper because this Court is being asked to interpret the scope of the Commerce Clause, on which the challenged regulation relies. Under our constitutional system, addressing amorphous public "values," including ethical and environmental considerations, is the responsibility of state governments exercising the police power. *See NFIB*, 132 S. Ct. at 2577. If, as PETPO contends, the federal government does not have constitutional authority to regulate all take of the Utah prairie dog, this does not mean that the species won't be protected. The state, which isn't subject to these constitutional limits, can continue to protect them. *See* Fed. Appellants' Opening Br. at 2 n.2 (discussing Utah's plan to regulate take).

Relatedly, Federal Appellants argue that protecting wildlife is not an area of traditional state authority because power is shared when the federal government regulates in this area pursuant to its enumerated powers. But this argument is mere question-begging. Whether a federal regulation intrudes into an area of traditional

state authority informs whether it is a valid exercise of the Commerce Clause. *See Lopez*, 514 U.S. at 580-81. One can't assume that a regulation is valid under the Commerce Clause in order to justify federal invasion of an area of traditional state authority. Regulation of wildlife *is* an area of traditional state authority. *See Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896); *see also Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979) (rejecting state ownership of wildlife, but "preserving, in ways not inconsistent with the Commerce Clause,[13] the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership"); *GDF Realty Invs. v. Norton*, 362 F.3d 286, 292 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc) (the Fifth Circuit's approach would " 'result in a significant impingement of the States' traditional and primary power over land and water use' " (quoting *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001))).[14]

---

[13] *Hughes* was a dormant Commerce Clause challenge to state regulations that burdened interstate commerce in wild game. *See* 441 U.S. at 336.

[14] The federal government also has a long history of regulating other areas of traditional state authority, like crime, under its enumerated powers. *See, e.g.*, *Kann v. United States*, 323 U.S. 88, 94 (1944) (discussing one longstanding example of federal regulation of crime—the federal mail fraud statute). Yet this didn't stop the Supreme Court from recognizing that regulating crime is an area of traditional state authority. *See Lopez*, 514 U.S. at 566.

1. Impacts of the Environment and Ecosystems Generally on Interstate Commerce Are Attenuated from Utah Prairie Dog Takes

The Utah prairie dog, like all species, affects its ecosystem and the environment. Aplt. App. at 36-137. In the food chain, every species is predator, prey, or both. And ecosystems and the environment can, broadly speaking, affect interstate commerce. But this cannot be sufficient to bring any activity that affects the Utah prairie dog, or any other creature, within Congress' Commerce Clause power. According to Appellants' argument, protecting the Utah prairie dog is necessary to protect biodiversity; biodiversity is necessary for life; life is necessary for commerce. Though there admittedly would be no commerce if there were no life on Earth, this line of reasoning is too attenuated to withstand scrutiny because it admits of no limit. *See Patton*, 451 F.3d at 622.[15]

Federal Appellants' ecosystem and environment rationales are strikingly similar to the "costs of crime" and education rationales that the Supreme Court rejected in *Lopez*. *See* 514 U.S. at 563-64. In that case, the government defended the ban on possessing guns near schools on the grounds that this activity affects violent crime and

[15] For an example of how many inferences must be piled up to find substantial effects under this theory, *see Alabama-Tombigbee*, 477 F.3d at 1275 ("An insect with no apparent commercial value may be the favorite meal of a spider whose venom will soon emerge as a powerful and profitable anesthetic agent. That spider may in turn be the dietary staple of a brightly colored bird that people, who are notoriously biased against creepy crawlers and in favor of winsome winged wonders, will travel to see as tourists.").

threatens to undermine the educational process. *See id*. Like the environment, violent crime and education, and all that those things entail, have substantial effects on interstate commerce. *See id*. Nevertheless, the Court rejected these rationales, recognizing that they are so attenuated that, if accepted, the federal government could regulate any activity. *See id*. at 564.

The same analysis compels the conclusion that the ecosystem and environment rationales are too attenuated. For instance, humans substantially affect ecosystems and the environment. *See* H.R. Rep. No. 93-412, at 143 (1973).[16] Under the ecosystem and environment rationales, this would mean that the federal government may regulate *any* activity affecting *any* person. *But see* 514 U.S. at 563-64.[17]

Amici contend that judicial scrutiny of these theories "places courts in the untenable position of making scientific and economic judgments about the impact of takes of individual species on interstate commerce." *See* Defenders of Wildlife Br. at 22. However, recognizing that these rationales are too attenuated actually avoids

---

[16] Reproduced in Addendum B of FoA's Opening Brief.

[17] The Fifth Circuit rejected a similar challenge on the grounds that any activity that affects a member of a species inevitably affects the "interdependent web" of all species. *See GDF Realty*, 326 F.3d at 640. Although the court asserted that its reasoning was limited, that limit—the federal government can regulate any activity that affects a plant or animal—is illusory. *See id*. The D.C. Circuit has embraced similar reasoning. *See Home Builders*, 130 F.3d at 1052-54 (holding that any activity that affects any species affects biodiversity, which substantially effects interstate commerce); *see also id*. at 1065 (Sentelle, J., dissenting).

this potential problem. To do so requires no more scientific expertise than the Supreme Court's rejection of the "costs of crime" and education rationales required the Justices to be experts on criminology or sociology. This Court would only have to delve into the underlying science if it rejects PETPO's argument that these effects are too attenuated. Then it would have to analyze these effects for significance. *See Morrison*, 529 U.S. at 614-16. In any event, *Amici*'s policy argument is foreclosed by *Lopez* which requires courts to analyze the significance and degree of attenuation of alleged substantial effects. *See* 514 U.S. at 563-64.

2. The Mere Possibility That the Utah Prairie Dog Could Be the Subject of Future Economic Activity Can't Justify Regulation Under the Commerce Clause

That the Utah prairie dog *could* become the subject of substantial commerce at some indefinite time in the future—if, for example, it's discovered to hold the cure for cancer—can't justify federal authority under the Commerce Clause without eviscerating any limit on that power. *See Tennessee Valley Auth. (TVA) v. Hill*, 437 U.S. 153, 178 (1978) (" 'Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?' " (quoting H.R. Rep. No. 93-412, at 4 (1973)) Literally anything could conceivably become an object of commerce at some point in the future. *See Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring). Yet this can't mean that the federal government has the authority to regulate any

activity that affects any thing. *See GDF Realty*, 326 F.3d at 638; *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting); *cf. NFIB*, 132 S. Ct. at 2590.

And just as the federal government can't know what species may hold cancer's cure, it also can't know which person will discover it. Nonetheless, it can't generally regulate activities that harm any person based on speculation that the victim could discover that cure. *See Morrison*, 529 U.S. at 613-19; *Lopez*, 514 U.S. at 560; *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821) ("Congress cannot punish felonies generally . . . ."). For the same reason, mere speculation that the prairie dog may someday become the subject of commerce must be rejected as too attenuated to withstand scrutiny. Aplt. App. at 204.

3. The Eco-tourism Rationale Can't Justify Regulation of Every Activity That Affects the Utah Prairie Dog

As the court below recognized, there is no evidence that take of Utah prairie dogs on private lands has any affect on the federal government's promotion of tourism. Aplt. App. at 204. Federal Appellants submitted evidence showing that the federal government references the Utah prairie dog on various government websites to draw tourists to national parks, forests, and other federal lands. *Id*. at 170-71. Activities affecting Utah prairie dogs on federal land continue to be regulated under the district court's decision and are within the federal government's power under the Property Clause. U.S. Const. art. IV, § 3, cl. 2. There is no evidence that the

government's promotion has led to substantial eco-tourism related to the Utah prairie dog. Rather, the government has only pointed to evidence showing that nature and wildlife generally is the subject of such tourism. *See* Fed. Appellant's Opening Br. at 12.

Furthermore, these impacts are too attenuated to withstand scrutiny under *Lopez* and *Morrison*. *See Morrison*, 529 U.S. at 615-16 (denying that attenuated causal chains can sustain a regulation under the Commerce Clause). It requires this Court to infer that take on private property will significantly affect populations on federal lands, and that these effects will appreciably affect ecotourism in such a way that will substantially affect interstate commerce related to that tourism. At most, this evidence may demonstrate that ecotourism may have a substantial effect on interstate commerce and might be within the Commerce Clause power. But take of Utah prairie dogs is several steps removed and thus too attenuated. *See id.*

4. The Commerce Clause Can't Be Stretched To Authorize Federal Regulation of Any Activity That Affects Anything That Has Garnered Academic Interest

The court below correctly rejected Federal Appellants and FoA's argument relying on the attenuated effects that take of Utah prairie dogs can have on interstate commerce because the species is a subject of academic research.[18] Aplt. App. at 204-

[18] FoA also argues that the decision below should be reversed because the court considered evidence outside the administrative record. Neither this Court nor the (continued...)

05. If this line of reasoning was accepted, it would stretch the Commerce Clause beyond any limit and mean that *Lopez* and *Morrison* were wrongly decided. Everything can be the subject of academic interest. As the court below noted, academics have long studied guns and women. *See id*. Yet this cannot mean that the federal government has the authority to regulate any activity that affects either of them. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561; *Home Builders*, 130 F.3d at 1063 (Sentelle, J., dissenting). Consequently, this Court should reject this academic interest rationale as too attenuated to justify the exercise of federal power. *See Morrison*, 529 U.S. at 615-16.

C. All Species Cannot Be Aggregated To Measure Whether the Utah Prairie Dog Regulation Has a Substantial Effect on Interstate Commerce

Federal Appellants and FoA also argue that the constitutional test shouldn't be applied to the challenged regulation but the Endangered Species Act as a whole. They base this argument on the discussion in both *Lopez* and *Raich* that particular

---

[18] (...continued)
Supreme Court has ever held such evidence is improper. Since constitutional challenges, like this one, don't question an agency's reasoning or the adequacy of the evidence supporting its decision, the record is unlikely to contain the evidence required to resolve these disputes. *See* Defenders of Wildlife Br. at 22. If the Court were inclined to create such a rule, this is not the proper case to do so. No party objected to the introduction of this evidence below and the only party that does so on appeal is the party that submitted it. Although PETPO submitted declarations demonstrating its standing, this would be appropriate even if review was limited to the administrative record. *See* Aplt. App. at 138-166.

applications should not be excised from a statute when applying the substantial effects test. *See Raich*, 545 U.S. at 17; *Lopez*, 514 U.S. at 558.

However, the Supreme Court's decision cannot bear the interpretation given to it. It explains that courts should look to the language of the challenged regulation or provision rather than the challenger's particular activity. *Raich*, 545 U.S. at 17. Since all classes of activities can be subdivided to find that they don't substantially affect interstate commerce, excising a particular party's activity could potentially subject the Commerce Clause power to death by a thousand cuts. *See id.* At the same time, aggregating too broadly risks eviscerating the limits on federal power. *See Lopez*, 514 U.S. at 565 ("[D]epending on the level of generality, any activity can be looked upon as commercial."); *Patton*, 451 F.3d at 622.

The Supreme Court has distinguished facial challenges, like those in *Lopez* and *Morrison*, from challenges to an application to a particular subset of activity, as in *Raich*. *See Raich*, 545 U.S. at 23 ("[R]espondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute *or provision* fell outside Congress' commerce power in its entirety." (emphasis added)). PETPO's claim is of the former variety. True, in this case, the activity is regulated under a regulation rather than a statutory provision. But under the Supreme Court's reasoning, this is a distinction without a difference.

No case supports applying these constitutional tests to an enactment as a whole, rather than a particular challenged provision. In every Supreme Court case applying aggregation, the Court aggregated only those activities regulated by a challenged provision or a subset of those activities affecting a common object. *See, e.g.*, *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 561. For example, in neither *Lopez* nor *Morrison* did the Supreme Court apply the constitutional test to the omnibus crime bill of which each challenged provision was but a small part.[19] In *Raich*, the Supreme Court only considered the impact of intrastate cultivation of marijuana on the interstate market for marijuana. *See* 545 U.S. at 22. It didn't consider whether all activities relating to any drug regulated under the Controlled Substances Act have a substantial effect on interstate commerce in the aggregate. *See id.*[20] This Court's precedents are in accord. For instance, in *Patton*, the Court applied the constitutional test to a single provision forbidding felons from possessing body armor, not the entire

---

[19] The Gun Free School Zones Act wasn't a standalone bill but a small part of the Crime Control Act of 1990, which regulated a host of criminal acts, including money laundering, child abuse, drug trafficking, juvenile offenses, and gun possession near school zones. *See* Crime Control Act of 1990, P.L. No. 101-647, 104 Stat. 4789 (1990). Similarly, the Violence Against Women Act was a small part of the Violent Crime Control and Law Enforcement Act of 1994. *See* Violent Crime Control and Law Enforcement Act of 1994, P.L. No. 103-322, 108 Stat. 1796 (1994).

[20] In light of this, it would arguably be appropriate to consider only the effect of take of the Utah prairie dog on interstate commerce even if the species was regulated under a general regulation or statutory provision. *See Raich*, 545 U.S. at 22. But, since it isn't, this Court doesn't have to address that issue. 50 C.F.R. § 17.40(g) (species specific regulation for the Utah prairie dog).

21st Century Department of Justice Appropriations Authorization Act in which it was enacted. *See* 451 F.3d at 622-30; *see also* P.L. No. 107-273, 116 Stat. 1758 (2002). This makes sense because the constitutional test is whether the *activity* being regulated has a direct and substantial effect on interstate commerce. In *Raich*, that activity was the intrastate cultivation of marijuana. *See id*. Here, the regulated activity is take of the Utah prairie dog.

Federal Appellants attempt to characterize this case as similar to *Raich* by implying that PETPO is trying to excise its activities from the class of activities being regulated. *See* Fed. Appellants' Opening Br. at 40 ("Accordingly, a plaintiff cannot circumscribe the scope of the effects analysis simply by crafting a narrow as-applied challenge."). But this characterization is baseless. PETPO isn't asking the Court to look at a particular person's activity in isolation. Nor is it asking the Court to look at only a subset of activities based on the purpose behind them or their status under state law, *e.g.*, take resulting from capturing a Utah prairie dog to move it to a conservation area. *See Raich*, 545 U.S. at 30-32 (refusing to focus only on marijuana production *to be used for medical purposes*). It asks this Court to judge the regulation on its face. Federal Appellants, not PETPO, defined the scope of the Utah prairie dog regulation. *See* 77 Fed. Reg. 46,158. And the Utah prairie dog is treated separately from other species protected by the Endangered Species Act because Congress chose to limit the statute's take prohibition to endangered species. *See* 16 U.S.C. § 1538. PETPO's

argument that only takes of Utah prairie dogs can be aggregated is entirely consistent with Supreme Court precedent.

III

THE NECESSARY AND PROPER CLAUSE DOESN'T AUTHORIZE THE UTAH PRAIRIE DOG REGULATION

To aid in the exercise of the federal government's other powers, the Necessary and Proper Clause authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying [them] into Execution." U.S. Const. art. I, § 8, cl. 18. Though this power too is broad, it's also not without limits. In *McCulloch v. Maryland*, Chief Justice Marshall explained the clause this way:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

17 U.S. (4 Wheat.) 316, 421 (1819). This gives the federal government great latitude in choosing its means, but limits its ends to only the execution of the other enumerated powers. *See id*.; *see also Burroughs v. United States*, 290 U.S. 534, 547-48 (1934); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 161 (1824). The Necessary and Proper Clause doesn't give the federal government whatever power it might need to pursue any general public policy goal. *See Reid v. Covert*, 354 U.S. 1, 66 (1957) (Harlan, J., concurring) ("[T]he constitutionality of the statute . . . must be tested, not by abstract notions of what is reasonable 'in the large,' so to speak, but by whether the statute, as

applied in these instances, is a reasonably necessary and proper means of implementing a power granted to Congress by the Constitution."). Such power—the police power—is reserved to the states. *See Morrison*, 529 U.S. at 617.

A. The Necessary and Proper Clause Authorizes Regulation of Activities Necessary To Avoid Frustrating the Federal Government's Ability To Regulate the Market for a Commodity Pursuant to a Comprehensive Regulatory Scheme

The Necessary and Proper Clause supplements the federal government's Commerce Clause authority by permitting it to regulate any activity which, if beyond its grasp, would frustrate a comprehensive regulatory scheme's ability to function as a regulation of commerce. *See NFIB*, 132 S. Ct. at 2591-92; *Raich*, 545 U.S. at 22; *United States v. Carel*, 668 F.3d 1211, 1219 (10th Cir. 2011) (construing *Raich* as a Necessary and Proper Clause case). This means that, if the challenged regulation were unconstitutional, the federal government's ability to regulate economic activity or the market for a commodity pursuant to a comprehensive scheme would be undermined. *See Patton*, 451 F.3d at 626 ("[P]ossession of a good is related to the market for that good, and Congress may regulate possession as a necessary and proper means of controlling its supply or demand."); *see also United States v. Jeronimo-Bautista*, 425 F.3d 1266, 1273 (10th Cir. 2005) (federal government can regulate local production and possession of child pornography as a necessary and proper component of its regulation of the national market for it); *United States v. Haney*, 264 F.3d 1161, 1168-

69 (10th Cir. 2001) (federal regulation of possession of a machine gun is necessary and proper to a comprehensive scheme to regulate the market for that commodity).

Though Congress may generally pursue any proper ends when regulating economic activity under the Commerce Clause, it can't rely on these to extend its power under the Necessary and Proper Clause. *See McCulloch*, 17 U.S. (4 Wheat.) at 421. It may, for instance, regulate economic activity to stamp out racial discrimination. *See Heart of Atlanta*, 379 U.S. at 257.[21] And it may regulate economic activity to mitigate its environmental impacts. *See Indiana*, 452 U.S. at 329. But it can't pursue these goals generally, outside the context of regulating economic activity, regardless of whether it attempts to do so "comprehensively."[22]

---

[21] Similarly, the federal government can regulate public morality by regulating the mails. *See, e.g.*, *Ex parte Jackson*, 96 U.S. (6 Otto) 727, 736 (1877) (federal government may forbid materials from being mailed that are "injurious to the public morals"). But it can't use this as a bootstrap to regulate public morality generally.

[22] The Fourth and Ninth Circuits have concluded otherwise in somewhat similar challenges, holding that, because the Endangered Species Act is "comprehensive," any activity can be regulated so long as it's a rational means of accomplishing some purpose. *See San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1175-77; *Gibbs*, 214 F.3d at 498-99. In effect, these courts applied a test indistinguishable from the weak limits that the Due Process Clause places on the exercise of the states' police power. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955) (Under the Due Process Clause, a state law need only be a rational means of advancing a legitimate legislative goal.). To follow their lead would render federal power coextensive with the police power by subjecting them to the same meager limit.

In *Lopez* and *Morrison*, for instance, the Supreme Court invalidated provisions regulating noneconomic activity, notwithstanding that each was enacted as part of a broad comprehensive scheme to regulate crime. *See* P.L. No. 101-647; P.L. No. 103-322. It did so because neither was necessary to avoid frustrating Congress' ability to regulate commerce—even though the gun in *Lopez* was an actual commodity. *See* 514 U.S. at 561 ("Section 922(q) is not an essential part of a larger regulation *of economic activity*, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." (emphasis added)). The prohibition was only relevant to the government's anti-crime goals. *See id.*; *see also Raich*, 545 U.S. at 22 (upholding a regulation as necessary to avoid frustrating the federal government's ability to regulate the market for a commodity).

The same rule governs the Necessary and Proper Clause's application in other contexts. For instance, the Military Regulations Clause permits the federal government to regulate servicemen for essentially any reason, including protecting the public from their immoral and violent acts. *See United States v. Kebodeaux*, 133 S. Ct. 2496, 2503-05 (2013) (upholding the federal government's power to punish a former service member for failing to update his sex offender registration). However, the government can't rely on the Necessary and Proper Clause to pursue its goal of protecting the public from immoral or violent acts by regulating anyone outside the military. *See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960);

Reid, 354 U.S. at 20-21. Although the Necessary and Proper Clause gives the federal government all the powers it needs to effectively regulate servicemen, it gives no additional authority to accomplish the ultimate purpose underlying the regulation.

The same is true when the Necessary and Proper Clause supplements the Commerce Clause power. It ensures that the federal government has the powers required to regulate economic activity and commodity markets. *See Raich*, 545 U.S. at 22. But it doesn't give it whatever powers are required to pursue any public policy goal it wants. That is the police power which is reserved to the states.

B. The Federal Government's Ability To Regulate the Market for Any Commodity Is Not Frustrated by Restrictions on Its Ability To Regulate the Take of Utah Prairie Dogs

There's no reasonable basis to conclude that, if the federal government couldn't regulate *every* activity that affects a Utah prairie dog, this would frustrate the government's ability to regulate the market for any commodity. *See* Aplt. App. at 206-07. Because the Utah prairie dog isn't a commodity bought and sold in any interstate market, this case is readily distinguishable from *Raich* and *Andrus v. Allard*. *See Raich*, 545 U.S. at 22; *Andrus*, 444 U.S. 51, 54-56 (1979). In each of those cases, the federal government was regulating noneconomic activity that impacted the supply and demand of a good for which there was an existing (though illegal) interstate market. *See, e.g.*, *Raich*, 545 U.S. at 22 (allowing the federal government to prohibit mere possession of marijuana as part of "comprehensive legislation to regulate the

interstate market in a fungible commodity"). In *Andrus*, for instance, the Supreme Court upheld a federal prohibition against the take of bald eagles, recognizing that this was part of a comprehensive regulation of a species and its byproducts for which there was an existing interstate market. *See* 444 U.S. at 54-56; *see also Patton*, 451 F.3d at 626 (describing *Andrus* as upholding the take prohibition as necessary to the regulation of the market for a commodity).

This case, however, concerns a regulation that only applies to the Utah prairie dog, a species which is found in only one state and for which there's no interstate market. *See* Aplt. App. at 208-09. Nor is there any evidence that the animals are necessary to any economic activity. *See id.*; 49 Fed. Reg. 22,330 (May 29, 1984) (explaining that overutilization for commercial purposes is not a threat to the Utah prairie dog). The federal government's ability to regulate trade in endangered species, for instance, is not frustrated if it can't regulate the Utah prairie dog, a species for which there is no such trade. *See* Aplt. App. at 208-09; *see also* 16 U.S.C. § 1538(a)(1)(E) (forbidding interstate trade in endangered species). Since, unlike wheat, bald eagles, and marijuana, Utah prairie dogs are not a commodity, holding that the federal government has no authority to forbid its take will not frustrate federal regulation of economic activity or an existing market.

The only argument Federal Appellants or FoA raise to the contrary is the general speculation that any species *could* become the subject of substantial commerce

at some indefinite time in the future.[23] *See* H.R. Rep. No. 93-412, at 4 (1973). But the mere possibility of future economic activity or an interstate market cannot justify federal regulation of noneconomic activity. *See NFIB*, 132 S. Ct. at 2590 ("[W]e have said that Congress can anticipate the *effects* on commerce of an economic activity. But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases . . . involved preexisting economic activity." (citations omitted)); *United States v. Comstock*, 560 U.S. 126, 146 (2010) (authority under the Necessary and Proper Clause cannot be justified by piling inference upon inference).

Anything could conceivably become the subject of commercial activity in the future. Nonetheless, the federal government doesn't have the authority to regulate all activities that affect any substance. *See Lopez*, 514 U.S. at 560. If it did, its power would not be subject to any limits. *See Morrison*, 529 U.S. at 613-19. Consequently, this mere speculation about future commerce must be rejected as insufficient to justify federal authority under the Necessary and Proper Clause.

---

[23] The Fifth and Eleventh Circuits rejected challenges somewhat similar to this one using this reasoning. *See Alabama-Tombigbee*, 477 F.3d at 1274-76; *GDF Realty*, 326 F.3d at 639-40. This Court should not find those decisions persuasive because they conflict with Supreme Court precedent and would eviscerate any limit on the Necessary and Proper Clause.

C. The Federal Appellants' and Friends of Animals' Interpretation Would Eviscerate Any Limit on the Necessary and Proper Clause

Federal Appellants and FoA reject these limits on *Raich*'s comprehensive regulatory scheme test. They argue that *Raich* recognizes federal authority to regulate any activity so long as it's regulated pursuant to a comprehensive regulatory scheme. The only limit either sees on this shockingly broad authority is that the comprehensive regulatory scheme must, as a whole, substantially affect interstate commerce. But, given that the regulatory scheme must be "comprehensive," this meager limit will always be satisfied. Consequently, the federal government's purported authority under this theory is in no way narrow in scope or incidental to the exercise of the Commerce Clause power. *See NFIB*, 132 S. Ct. at 2592 (rejecting purchase mandate as part of comprehensive regulation of the national healthcare market because the power isn't "narrow in scope" or "incidental" to the exercise of another enumerated power). Ironically, this interpretation of *Raich* would hold that minor federal intrusions into areas of state authority are unconstitutional but wholesale invasions are not. *See* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. 174, 199-200 (1998).

The Endangered Species Act is a comprehensive scheme to provide for environmental conservation, not regulate a market. *See* 16 U.S.C. § 1531(b). That the statute aims to accomplish environmental goals is apparent from the text and the

legislative history. *See, e.g.*, S. Rep. 93-307, at 1 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990; *see also TVA*, 437 U.S. at 178-79; *Home Builders*, 130 F.3d at 1052 n.11. The statute's legislative findings evince that the statute is a comprehensive means to protect "esthetic, ecological, educational, historical, recreational, and scientific value[.]" *See* 16 U.S.C. § 1531(a). Its purpose is "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, and to [effectuate treaties]." *See* 16 U.S.C. § 1531(b); *see also Village of Kaktovik v. Watt*, 689 F.2d 222, 233 n.4 (D.C. Cir. 1982) ("Environmental protection is the sole objective of the Endangered Species Act[.]"). According to Appellants' theory, the Endangered Species Act is a comprehensive regulatory scheme, the conservation goals of which would be undermined if any activity affecting any member of any species were beyond the federal government's grasp. But as explained above, the Necessary and Proper Clause does not encompass all the authority the federal government might want in order to accomplish any goal.

Appellants' interpretation of the Necessary and Proper Clause must be rejected because it admits of no limit. It would allow the federal government to forbid any crime so long as it did so as part of a comprehensive criminal statute. *But see Morrison*, 529 U.S. at 613-19; *Lopez*, 514 U.S. at 560; *Cohens*, 19 U.S. (6 Wheat.) at

428. Such a broad federal criminal program would obviously impact interstate commerce due to its breadth. *Cf.* Daniel J. Lowenberg, *The Texas Cave Bug and the California Arroyo Toad "Take" on the Constitution's Commerce Clause*, 36 St. Mary's L.J. 149, 177 (2004) (arguing that the Fifth Circuit's "interdependent web of species" rationale would justify comprehensive schemes to regulate crime). The federal government wouldn't have to limit itself to crime, of course. It could comprehensively regulate any activity that affects any living thing. *See* Nagle, *supra*, at 198-99 (arguing that, because anything could be a potential resource, this theory would authorize unlimited federal power). If it was feeling particularly cheeky, Congress could even adopt a statute called "The Federal Police Power Act" purporting to comprehensively regulate society to protect public health, safety, and welfare. *But see Morrison*, 529 U.S. at 618-19; *cf. GDF Realty Invs. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc). Since the entire economy, in addition to all other human interaction, would be subject to such a scheme, it would be constitutional under Appellants' theory.

That neither the Utah prairie dog regulation nor the Endangered Species Act go as far as any of the above examples is of no moment because the constitutional question isn't whether the challenged regulation completely co-opts the states' police power. *Cf. NFIB*, 132 S. Ct. at 2591 (rejecting exceptions to the Constitution based on the uniqueness of a statute's subject matter). Obviously, that wasn't the case in

Lopez or *Morrison*. *See Morrison*, 529 U.S. at 605-06; *Lopez*, 514 U.S. at 561-62. The question is whether the interpretation that must be given to the enumerated power is such that it would admit of no limit. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 407 ("[W]e must never forget that it is a *constitution* we are expounding."). Consequently, the unconstitutionality of the Utah prairie dog regulation can't be avoided by relying on the fact that the Endangered Species Act only applies to approximately 1500 endangered and threatened species. Under Federal Appellants' interpretation of the Commerce and Necessary and Proper Clauses, this was an act of legislative grace. Nothing in the Constitution would limit the federal government to regulating only these species under this interpretation. If a comprehensive regulation of these species sufficiently relates to commerce, a comprehensive regulation of all life would necessarily do so as well.

IV

WYOMING DID NOT ADDRESS THE ISSUES RAISED IN THIS CASE

Federal Appellants also fault the district court for not addressing *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006), and suggest that case held the Endangered Species Act and, presumably, any regulations adopted under it

are valid Commerce Clause regulations.[24] Fed. Appellants' Opening Br. at 28. Federal Appellants' argument misses the mark because this Court's *Wyoming* decision had *nothing* to do with the scope of the Commerce Clause. Wyoming didn't argue that the federal government exceeded its powers by regulating take of gray wolves. Instead, that case concerned a very different type of Tenth Amendment claim: whether the Service's offer to cede authority to the state if it took certain steps unconstitutionally commandeered the state's government. *See Wyoming v. U.S. Dep't of Interior*, 360 F. Supp. 2d 1214, 1238-39 (D. Wyo. 2005) ("The Plaintiffs assert that FWS is attempting to commandeer the legislative process of Wyoming . . . ."); *see also New York v. United States*, 505 U.S. 144, 151 (1992) (the federal government can't commandeer the legislative process of the states).

The district court rejected the commandeering claim because the federal government didn't force the state to do anything. *See* 360 F. Supp. 2d at 1241. If its *quid pro quo* was rejected, the federal government would continue to regulate as it had been. *See id*. In a terse *per curiam* opinion, this Court affirmed the judgment "for substantially the same reasons." *Wyoming*, 442 F.3d at 1264. From this, Federal

---

[24] Federal Appellants also "note" that both this Court and the Supreme Court have heard numerous Endangered Species Act cases without suggesting that either the statute or regulations like the Utah prairie dog regulation may be unconstitutional. *See* Fed. Appellants' Opening Br. at 27-28. This isn't particularly noteworthy, however, given that courts don't generally address constitutional issues not presented to them. *Cf. NFIB*, 132 S. Ct. at 2593 (courts should avoid constitutional issues when possible).

Appellants attribute to this Court dicta from the decision below unrelated to the arguments made in that case. *See Wyoming*, 360 F. Supp. 2d at 1242 (hypothesizing a Commerce Clause challenge to federal authority to regulate gray wolves and "not[ing] that," in the district court's view, such a challenge would be meritless).

CONCLUSION

PETPO's argument and the decision below are consistent with all of this Court's and the Supreme Court's precedents. Federal Appellants', FoA's, and their *Amici*'s arguments are not. Their exceedingly broad interpretations of the Commerce and Necessary and Proper Clauses would dictate that the laws declared unconstitutional in *Lopez* and *Morrison* should have been upheld. The primary support for these arguments are decisions from other circuits which are not binding on this Court and inconsistent with each other and Supreme Court decisions.

Neither the Commerce Clause nor the Necessary and Proper Clause can be stretched to encompass unlimited power without pushing the principle of enumerated powers beyond the breaking point. *See Patton*, 451 F.3d at 618-19. Federal Appellants' and FoA's theories would mean that the Commerce Clause allows the federal government to regulate *any* activity that affects *any* living thing or the environment in some way. But this would stretch the substantial effects test too far. *See id.* at 622 (cautioning that an expansive understanding of effects would render federal power limitless). Their interpretation of the Necessary and Proper Clause

would similarly empower the federal government to regulate anything for any reason so long as it does so "comprehensively." Since this too would be an unlimited federal power, it must also be rejected. The court below correctly applied the limits of the Commerce and Necessary and Proper Clauses in striking down the Utah prairie dog regulation and its decision should be affirmed.

REQUEST FOR ORAL ARGUMENT

Oral argument would benefit the Court given the significance of the issues presented, which this Court has never previously addressed.

DATED: May 18, 2015.

Respectfully submitted,

M. REED HOPPER
JONATHAN WOOD

By /s/ Jonathan Wood
JONATHAN WOOD

Counsel for Appellee People for the Ethical Treatment of Property Owners

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 10,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 Corel WordPerfect X5 in 14 point, Times New Roman.

Date: May 18, 2015. /s/ Jonathan Wood
JONATHAN WOOD

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec, last updated May 10, 2015, and according to the program are free of viruses.

Date: May 18, 2015.

/s/ Jonathan Wood
JONATHAN WOOD

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2015, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following:

Jennifer Barnes
Friends of Animals
7500 East Arapahoe Road
Centennial, CO 80112
jenniferbarnes@friendsofanimals.org

Jared C. Bennett
Office of the U.S. Attorney
185 South State Street, Room 300
Salt Lake City, UT 84111
jared.bennett@usdoj.gov

David Driesen
Syracuse University
College of Law
950 Irving Avenue, Dineen Hall
Syracuse, NY 13244-6070
ddriesen@law.syr.edu

Michael R. Harris
Wildlife Law Program
7500 East Arapahoe Road, Suite 385
Englewood, CO 80112
michaelharris@friendsofanimals.org

Anna Katselas
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7415
L'Enfant Plaza Station
Washington, DC 20044
anna.katselas@usdoj.gov

Daniel H. Lutz
Institute for Public Representation
Georgetown University, Law Center
600 New Jersey Avenue, NW, Suite 312
Washington, DC 20001
dhl@law.georgetown.edu

Karimah Schoenhut
Defenders of Wildlife
1130 17th Street NW
Washington, DC 20036
kschoenhut@defenders.org

Matt A. Munson
970 South Sage Drive, Suite 109
Cedar City, UT 84720
matt@mamunsonlaw.com

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

Hope M. Babcock
National Audubon Society
645 Pennsylvania Avenue S.E.
Washington, DC 20008

Mary Hollingsworth
U.S. Department of Justice
Wildlife & Marine Resource Section
601 D Street NW
Washington, DC 20004

/s/ Jonathan Wood

JONATHAN WOOD
Attorney for Appellee People for the
Ethical Treatment of Property Owners
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
E-mail: jw@pacificlegal.org
Telephone: (916) 419-7111