ORAL ARGUMENT REQUESTED

Nos. 14-4151 and 14-4165

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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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.

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

_____

INTERVENOR-APPELLANT'S REPLY BRIEF

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PROLOGUE

A Prairie Dog Town. Courtesy of Wildlife-Animals.com.

Prairie dogs find their distinct origins in the Pleistocene era. They embody two million years of evolving intelligence.

Prairie dogs have a significant effect on biological diversity in prairie ecosystems. More than 200 species of wildlife have been associated with prairie dog towns, with over 140 species benefiting directly, including bison, pronghorn antelope, burrowing owls, pocket mice, deer mice, ants, black widow spiders, horned larks, and many predators such as rattlesnakes, golden eagles, badgers, bobcats, weasels, foxes, coyotes, and especially black-footed ferrets.

Prairie dogs create diversity.
Destroy them, and you destroy a varied world.

Terry Tempest-Williams
Finding Beauty in a Broken World (2008)
Annie Clark Tanner Scholar in
Environmental Humanities,
University of Utah

The Utah Prairie Dog is one of the six species identified, worldwide, as most likely to become extinct in the twenty-first century.

Niles Eldredge
A Field Guide to the Sixth Extinction
The New York Times Magazine
December 6, 1999

ARGUMENT

A. PETPO And Its Members Cannot Show That Success On The Merits Of Its Facial Challenge To The Special 4(d) Rule For Utah Prairie Dogs Will Likely Redress The Alleged Injuries To Its Members Because PETPO Failed To Challenge Another Regulation That Might Be Construed To Prohibit Take of Utah Prairie Dogs.

After nearly a year of court proceedings, PETPO has finally offered an admission that it has **not** challenged the so-called general 4(d) rule—a regulation that has been in place for decades and makes it illegal to "take" any threatened species for which no special 4(d) rule applies. *See* Appellee's Response Brief at 10-11. PETPO shrugs away this admission, however, by asserting that the district court ruling is broad enough to protect them from any federal regulation of Utah prairie dogs on private land. *Id*. at 9 (the district court's ruling "would preclude the application of the blanket prohibition to this species as a consequence of the decision"). PETPO, however, provides no legal basis for this conclusion. And for good reason. While it is true that the district court ruled that Congress has "no constitutional authority to regulate takes of Utah prairie dogs on private lands," the actual relief that the district court could grant PETPO is restrained by the scope of PETPO's claim. See *Preas v. Phebus*, 195 F.2d 61, 63 (10th Cir. 1952)("One is entitled to the relief made out by the allegations of the complaint."); *Cassidy v. Millers Cas. Ins. Co. of Texa*s, 1 F. Supp. 2d 1200, 1214 (D. Colo. 1998) ("parties are entitled only to such relief as the pleadings support") (internal citations omitted).

Thus, the only possible way for PETPO's position to be true would be for the Court to somehow construe the pleadings below to encompass a challenge of **all** regulation of Utah prairie dogs on private land. But even the most liberal

interpretation of the Complaint under Federal Rule of Civil Procedure 8(e)[1] could not support the granting of the district court's claimed relief for several reasons. First, PETPO's Complaint only alleges a facial challenge to the special 4(d) rule for Utah prairie dogs. Second, again PETPO now disavowals that it has challenged the general 4(d) rule. Third, as set forth in FoA's Opening Brief, the district court cannot construe the Complaint to assert a **facial** challenge to the general 4(d) rule because such a rule is time barred. Finally, the Complaint lacks the necessary allegations to support an **as-applied** challenge to the general rule. *See Reno v. Flores*, 507 U.S. 292, 300 (1993) (an as-applied challenge is limited to review of how the regulation or statute has been "applied in a particular instance"); *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007) (an as-applied challenge is limited to testing "the application of [a regulation or statute] to the facts of a plaintiff's concrete case"). While PETPO alleged numerous generalized harms inflicted upon its members as a result of federal restrictions on Utah prairie dog take, nowhere in the pleadings did PETPO plead that any particular member has sought, but been denied, the right to take Utah prairie dogs under the Endangered Species Act ("ESA"). *See* FoA's Opening Brief at 13-16. Likewise, the pleadings below are insufficient to show that application of any take

[1] FoA acknowledges that under Rule 8(e), "the district court is obligated to make a determined effort to understand what the pleader is attempting to set forth and to construe the pleading in his or her favor. . .." 5 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1286 (3d ed. 2009); *see also*, *Gulf Coast W. Oil Co. v. Trapp*, 165 F.2d 343, 347 (10th Cir. 1948) ("[T]he allegations of the complaint will be liberally construed in determining its adequacy to state a cause of action.").

prohibition has resulted in a precise harm to a particular individual or her property. *Id.*

In an attempt to divert attention away from the deficiencies of its pleadings below, PETPO asserts that if FoA's position regarding redressability was correct, "one would expect to find numerous cases supporting it." Well, there are numerous cases supporting it. *See, e.g.*, *KH Outdoor, LLC v. Clay County,* 482 F.3d 1299, 1303-05 (11th Cir. 2007) (dismissing an outdoor advertiser's constitutional challenge to a county billboard prohibition on redressability grounds, because the advertiser's proposed billboards did not comply with other statutes and regulations that the advertiser had not challenged); *Clark v. City of Lakewood*, 259 F.3d 996, 1009 (9th Cir. 2001) (reasoning that because plaintiff did not challenge "an additional barrier" to his adult-entertainment license application, "the district court could not redress his alleged injury in this lawsuit"); *Doe v. Wilson*, 1997 U.S. Dist. LEXIS 21137, *19 (N.D. Cal. Dec. 15, 1997) ("The Court finds that plaintiffs have failed to establish that the remedy sought would likely redress plaintiffs' injuries[, because if] section 411(d) in its entirety were found unconstitutional, section 411(a) would remain in effect and plaintiffs would still be denied access to the state-funded prenatal care services they seek."); *cf. Renne v. Geary*, 501 U.S. 312, 319 (1991) (finding a dispute nonjusticiable where another unchallenged statute "might be construed" to prohibit the same conduct as the challenged statute); 13 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3531.5.

Finally, PETPO asserts that even if they wanted to do so, its members cannot bring an as-applied challenge to the general 4(d) rule since that rule has never applied to the Utah prairie dog and thus, "has never caused PETPO's members any harm." PETPO's Response Brief at 8-9. There are also several

problems here. First, even if FoA's argument creates a "catch-22" for PETPO, the answer cannot be for the Court to ignore the redressabilty problem with PETPO's facial challenge to the special 4(d) rule. Second, PETPO fails to explain why it is not possible for it to combine a facial claim, an as-applied claim, or both to the special 4(d) rule **with** an as-applied challenge to the general 4(d) rule. Certainly, federal courts are empowered to issue declaratory and injunctive relief regarding the validity of a regulation that would apply to a plaintiff. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 168 (1967) (finding that there was nothing in the Administrative Procedure Act and the Declaratory Judgment Act that precluded declaratory judgement on regulations prior to enforcement); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (finding injunctive relief appropriate regarding as-applied challenge to portion of the Patient Protection and Affordable Care Act which had not yet taken effect), *affirmed Newland v. Sebelius*, 542 F. App'x 706, 710 (10th Cir. 2013). Finally, with regards to standing to bring such a claim, neither FoA nor the federal government has ever asserted that PETPO and its members do not meet the injury-in-fact prong with regards to federal regulation of Utah prairie dogs on their land. Moreover, there would appear to be a causal connection between the injury and the conduct complained of, that is the injury is fairly traceable to the federal government's regulation of Utah prairie dogs whether under the special or general 4(d) rule. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In short, if PETPO is denied "its day in court," it is not FoA's doing, it is a result of their own failure to appreciate American constitutional standing law. *See, e.g., Investment Co. Institute v. Camp,* 274 F. Supp. 624, 632 (D.D.C. 1967) (noting a "long list of cases where the plaintiff has been denied his day in court because of the lack of standing"); *see also* Sarah A. Robichaud, *Lujan v.*

National Wildlife Federation: The Supreme Court Tightens The Reins On Standing For Environmental Groups., 40 CATH. U.L. REV. 443, 473 (1991) ("Standing determines who is entitled to a day in court and protects against improper plaintiffs."). Indeed, it should come as no surprise to PETPO that the Supreme Court has been especially strict with regard to its application of the standing doctrine to a plaintiff challenging federal environmental and wildlife regulations, whether facially or as applied. *See, e.g.*, *Summers v. Earth Island Institute*, 490 F. 3d 687 (2007); *see also* Christopher Warshaw and Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289, 293 (2011) (discussing the history of the Supreme Court's march toward "'reinvigorated and more restrictive' standing rules [in] environmental cases"); Sam Kalen, *Standing On Its Last Legs: Bennett v. Spear And The Past And Future Of Standing In Environmental Cases*, 13 J. LAND USE & ENVTL. LAW 1 (1997). Because PETPO's members' injuries cannot be redressed, PETPO does not have standing to bring its facial challenge of the special 4(d) rule.

B. Federal Regulation Of Wholly Intrastate Species, Like The Utah Prairie Dog, Has A Substantial Connection To Interstate Commerce.

Reading PETPO's Response Brief, and those of the numerous *amicus curie* on its behalf, one is lead to believe that the regulation of a single subspecies of rodent can literally cripple the rights of private property holders and destroy local economies. With all due respect to PETPO's members (who clearly feel that federal protections under the ESA are aimed directly at them and their community), the protection of endangered and threatened species in this country is a burden that is carried by all Americans. Instead of tossing out

protections for species like the Utah prairie dog,[2] we all need to find ways to adjust our rights in order to better accommodate the other animals that share this planet with us. *See, e.g.,* Jonathon Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 NYU J. LAW & LIBERTY 987, 990 (2005) ("Greater recognition of the role of private landowners in conservation is but one part of the renewed appreciation for private property in environmental policy.").

Moreover, the best available economic data demonstrates that overall, regulation of endangered and threatened species under the ESA has not negatively affected property owners or the economy. As a Defenders of Wildlife report documents:

- Between 1998 and 2004, less than one percent of the 429,533 development projects that underwent Section 7 consultation were temporarily put on hold. Only one project could not proceed; the rest were implemented after modification.
- States with the most listed species have still achieved tremendous economic growth. California, Florida, and Hawaii have among the highest number of federally listed species and were ranked in 2005 as among the states with the 15 highest economic growth rates. California and Florida were also among the four states with the highest gross state product. Both states also have some of the most comprehensive state laws on endangered species whose protections and requirements often go beyond federal ones.

[2] While this case involves the Utah prairie dog, if the district court's decision is upheld, the impact will be widely felt, as it is believed that about a third of all ESA-listed species are only found in one county, let alone one state. *See Geographic Distribution Of Endangered Species In The United States*, Science Vol. 275, No. 5299, 550-553 (Jan. 1997).

- The Act provides millions of dollars each year for local communities. A 2006 study by University of Montana researchers found that the return of wolves to Yellowstone National Park brings an estimated $35 million in tourist revenue and double that once the money filters through the local economy. In Florida, the total economic value of maintaining healthy ecosystems in Clay, Duval, Putnam, and St. Johns counties exceeds $3 billion per year. Benefits include erosion control, maintenance of nutrient cycles, establishment of nurseries for fish and game species, and waste management.

- The Act provides national economic benefits by boosting wildlife-related tourism. Wildlife-related recreation generated more than $120 billion in revenues in 2006. Wildlife watching alone generated almost $45 billion and provided more than 860,000 private sector jobs. Visitors to National Parks, refuges, and other public lands spend $28 billion, leading to more than 400,000 private and public sector jobs.

- The Act protects critical habitat for imperiled wildlife that provides clean air and clean water, prevents erosion and protects vital natural resources. [ ] The National Wildlife Refuge System alone, which is home to many threatened and endangered species, produces at least $46 billion per year in ecosystem service benefits. At the national level, annual benefits from ecosystem services total $33 billion from soil maintenance, $30 billion from insect pollination, up to $72,000 per acre in flood control, and $3 to $8 billion from the commercial value of products from natural and managed forests, including timber, fuel wood, game, fruits, nuts, mushrooms, and honey.

Defenders of Wildlife, *The Economic Benefits of the ESA*, *available at* http://www.defenders.org/sites/default/files/publications/economic-benefits-of-the-endangered-species-act.pdf.

Conversely, studies looking at the negative impact of the ESA on various economic sectors repeatedly find very little, if any, evidence that protecting biodiversity is causing economic harm. With regard to agriculture, which is

often singled out by opponents of the ESA, researchers at the Massachusetts Institute of Technology ("MIT") concluded that: (1) there is "no *prima facie* evidence supporting a negative effect" on the agricultural component of gross state product; and (2) "it is clear that farm real estate values are not depressed by the last decade of expanded and wide-ranging endangered species protection." Stephen M. Meyer, The Economic Impact Of The Endangered Species Act On The Agricultural Sector (October 1995), *available at* http://web.mit.edu/polisci/mpepp/Reports/esaagr.PDF.

Obviously, the constitutionality of any specific application of the ESA does not turn on whether the ESA has a positive, negative, or neutral impact on any particular economy. However, the fact that the question of the ESA's impact on the economy is so highly debated and politically charged[3] is important because it goes to show precisely that the law was intended by Congress to limit the pursuit of certain economic activities in order to promote the protection of biodiversity. *See Gonzales v. Raich*, 545 U.S. 1, 19-20 n. 29, 35 (2005) (the commerce power permits Congress to restrict commerce). As the constitutional law professors that filed an *amicus* brief in support of the government and FoA explain it:

> Congress found that economic growth and development, products of economic activities, cause extinction. Economic growth harming species often occurs because customers in many states demand more interstate shipments of goods produced in states

[3] As two researchers put it, "ESA provisions frequently spark controversies pitting species protection against economic concerns." Matthew J. Kotchen and Stephen D. Reiling, Estimating and Questioning Economic Values for Endangered Species: An Application and Discussion, Endangered Species Update, V. 15, No. 5 at 77 (1988). Indeed, the first ESA case before the Supreme Court, *TVA v. Hill*, 437 U.S. 153 (1978), pitted the protection of a small fish against the completion of a multi-million dollar dam.

> where protected species reside. This demand for more goods to be shipped between states often leads to increased crop production, timber harvesting, and other activities that harm protected species, usually by degrading their habitat. The ESA's limits on harming protected species temper these and other economic activities, and hence interstate commerce, in order to avoid more extinction, regardless of the protected species' location or geographic range.
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> * * *
>
> [Thus, the] ESA passes muster because it addresses side effects of interstate commerce.

Brief of Constitutional Law Professors William C. Banks *et al.* as *Amici Curiae* in Support of Defendants-Appellants at 2-4 (citations omitted).

This Court should not let PETPO have it both ways. PETPO cannot be allowed to parade the alleged economic ills of its members associated with federal protections for Utah prairie dogs, while simultaneously asserting that the *killing* of Utah prairie dogs has absolutely no relationship to interstate commerce. The special 4(d) rule is not intended to merely make the killing or harassment of Utah prairie dogs illegal; it is intended to regulate economic activities that otherwise could lead to the further demise of a threatened species that has called Utah its home for longer than most humans can fathom.

CONCLUSION

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

Date: June 18, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 type using Microsoft Office 2013 in 14-point Cambria.

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I hereby certify that with the respect to the foregoing:

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

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Date: June 18, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2015, I electronically filed the foregoing Reply Brief with the clerk of the court using the CM/ECF system, which will send notification of such to the attorneys of record.

S/ Michael Harris
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