ROBERT G. DREHER,
Acting Assistant Attorney General
SETH M. BARSKY, Chief
KRISTEN L. GUSTAFSON, Assistant Chief
MARY HOLLINGSWORTH, Trial Attorney
AZ Bar No. 027080
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
(202) 305-0324(tel)
(202) 305-0275 (fax)

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF UTAH, CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICES, et al., Defendants.	CASE NO. 2:13-cv-00278-DB-BCW **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Defendants United States Fish and Wildlife Service; Daniel M. Ashe, in his official capacity as Director of the U.S. Fish and Wildlife Service; Noreen Walsh, in her official capacity as Regional Director of U.S. Fish and Wildlife Service's Mountain-Prairie Region; the United States Department of the Interior; and S.M.R. Jewell, in her official capacity as Secretary of the Interior, hereby cross-move for summary judgment on all claims in PETPO's Complaint, filed on April 18, 2013, ECF No. 2, and oppose

Plaintiff's Motion for Summary Judgment ("Br."), ECF No. 55.

TABLE OF CONTENTS

INTRODUCTION

On August 2, 2012, the U.S. Fish and Wildlife Service ("FWS") issued a rule pursuant to Section 4(d) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(d), extending many of the ESA Section 9 protections to the Utah prairie dog ("prairie dog"), a species listed as "threatened" under the Act. 50 C.F.R. § 17.40(g); 77 Fed. Reg. 46158 (the "rule"). Trying to address continued conflicts between landowners and prairie dogs, FWS included in the rule procedures for allowing "take" of prairie dogs: on properties located within 0.5 miles of conservation lands; where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites; on agricultural lands; and for otherwise legal activities associated with standard agricultural practices. 50 C.F.R. § 17.40(g); 77 Fed. Reg. at 46158. Despite FWS' attempts to find a balanced approach to conserving the prairie dog and its habitat, PETPO members have sued nevertheless, seeking to eliminate all restrictions on their ability to remove or extirpate Utah prairie dogs on non-federal land,[1] which serves as habitat for over 70% of all prairie dogs. AR2329.

PETPO does not challenge the substance of the rule, i.e., FWS' determinations regarding the methods and procedures necessary to conserve the prairie dog; rather, it claims that Congress, and thus FWS, lacked the constitutional authority to extend ESA Section 9 protections through Section 4(d) to the prairie dog because the species happens to occur within only one state and, in PETPO's view, lacks any commercial or economic value. PETPO argues that Congress should not be permitted to protect intrastate species like the prairie dog,[2] which account for about 68% of all listed species or around 1,075 species,[3] without first making particularized findings

---

[1] Plaintiff's Complaint asserts that Congress has no constitutional authority to regulate take of the prairie dog on non-federal land. ECF No. 2 at ¶¶ 3, 111-12, 125-26, & prayer for relief.

[2] Intrastate species are those that occur within only one state.

[3] *See* FWS, Environmental Conservation Online System, Generate Species List (Nov. 7, 2013, 1:53 PM), http://ecos.fws.gov/tess_public/pub/adHocSpeciesForm.jsp (last visited Jan. 17, 2014).

concerning each and every listed intrastate species' effects on commerce. Br. at 28. Although PETPO's brief devotes little attention to relevant case law, its arguments have been rejected by every court that has reviewed a similar Commerce Clause challenge to the ESA, including five Circuit Courts. All five Circuit Courts have upheld the statute and its challenged regulations and rules as constitutional, a fact conceded by PETPO in a footnote. Moreover, other Circuits, including the Tenth Circuit, have affirmed the constitutionality of the ESA under the Commerce Clause either with little discussion or under different factual scenarios.

PETPO's claims are not unique, [4] lack merit, and should be rejected by this Court. The rule is constitutional whether analyzed under the Commerce Clause or the Necessary and Proper Clause. The ESA itself is entitled to a presumption of validity, and the facts as set forth in this brief, as well as in the many other judicial decisions to address this issue, establish a rational basis for Congress' decision to protect all listed species wherever they occur. Every Court to have reached the issue has concluded that the ESA is a comprehensive scheme that has a substantial relation to interstate commerce. The legislative history of the ESA establishes that one of Congress' main concerns in conserving endangered and threatened species was protecting such species as valuable resources. One of the most important avenues for protecting ESA-listed species is extending Section 9 prohibitions through rules such as the challenged rule, which regulate activities that are part of an economic class of activities that have a substantial effect on interstate commerce. Moreover, such protections are key to conserving listed species, including the prairie dog, and ensuring their continued existence as valuable resources to mankind. Because preventing Congress from using ESA Sections 4(d) and 9 to protect intrastate species, which account for a majority of all listed species, would undercut the ESA, the rule may also be

[4] For over a decade, Pacific Legal Foundation ("PLF"), the organization representing PETPO, has tried to advance these arguments by participating in some fashion in the above-mentioned constitutional challenges targeting intrastate species across the country. Because the courts have consistently rejected these arguments, PETPO and PLF ask this Court to ignore this well-established precedent.

upheld as an essential part of the ESA.

Moreover, PETPO's Complaint should be dismissed for lack of subject matter jurisdiction because PETPO has failed to show that its members' alleged injuries will be redressed by an order determining that the challenged 4(d) rule exceeds the Federal Government's authority to regulate. Specifically, PETPO asks the Court to invalidate the rule under the mistaken assumption that a favorable decision would allow its members to remove or kill prairie dogs on their property without regulatory impediment. However, even if the Court were to determine that Congress, through the FWS, exceeded its constitutional authority here, PETPO members would still be regulated by more restrictive state regulations, which only permit the take of prairie dogs "in cases where Utah prairie dogs are causing damage to agricultural lands" or "as provided in a valid Incidental Take permit issued by" FWS. Utah Admin. Code R657-19-6(1)(b)(i), (ii). Accordingly, PETPO lacks standing to assert its members' claims.[5]

BACKGROUND

I. ESA: Statutory and Regulatory Background

The Endangered Species Act, 16 U.S.C. §§ 1531 et seq., is landmark legislation enacted by Congress in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Concerned "over the risk that might lie in the loss of *any* endangered species," *Tenn. Valley Auth. v. Hill* ("*TVA*"), 437 U.S. 153, 177 (1978), Congress enacted the ESA "to ensure the continued existence of species to 'perform vital biological services to maintain a balance of nature within their environments' and provide 'for biological diversity for scientific purposes.'" *Safari Club Int'l v. Jewell*, -- F. Supp. 2d --, No. 11-1564, 2013 WL 4041541, at *3 (D.D.C.

[5] PETPO does not assert that it has standing in its own right based on harm to the organization. Complaint at ¶¶ 1-2. Rather, its assertion of standing is based solely on alleged harm to its members.

Aug. 9, 2013) (quoting S. Rep. No. 93-307, at 2, 1973 U.S.C.C.A.N. 2989, 2990). "Underpinning the promulgation of the ESA was the belief that 'it is in the best interest of mankind to minimize the losses of genetic variations' because endangered species 'are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.'" *Safari Club*, 2013 WL 4041541, at *3 (quoting *TVA*, 437 U.S. at 178); *see also GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 639 (5th Cir. 2003) (noting that one of the drafters' main concerns was the "'incalculable' value of the genetic heritage that might be lost absent regulation" (citing H.R. Rep. No. 93-412, at 4)).

Congress found that "various species of fish, wildlife, and plants in the United States have been rendered extinct as *a consequence of economic growth and development* untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1) (emphasis added). Congress also found that other species have been so depleted that they are in danger of or threatened with extinction and that these species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id.* § 1531(a)(2)-(3); *see also TVA*, 437 U.S. at 177. In enacting the ESA, Congress created a statutory framework "to effectuate [its] goal of protecting vital and endangered species of animals" by "construct[ing] a comprehensive means to balance economic growth and development with adequate conservation measures." *Safari Club*, 2013 WL 4041541, at *3 (quoting H.R. Rep. No. 97-567, pt. 1, at 10, 1982 U.S.C.C.A.N. 2807, 2809 (1982)).

To this end, the ESA's comprehensive scheme provides numerous avenues for the protection of threatened and endangered species. Section 4 of the ESA directs the Secretary[6] to determine which species should be listed as "endangered" or threatened" based on how imperiled the species is according to five "listing factors." 15 U.S.C. § 1533(a)(1)(A)-(E). A species is considered "endangered" if it is "in danger of extinction throughout all or a significant portion of

[6] The Utah prairie dog falls under the jurisdiction of the Secretary of the Interior and FWS. *Id.* § 1532(15).

its range," while a "threatened species" is one "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(6), (20). Once a species is listed as endangered, it enjoys a variety of legal protections, many of which take the form of prohibitions set out in Section 9. *Id.* § 1538(a). These prohibitions include such activities as: importation and exportation of any listed species; "take"; possession, sale, delivery, transportation, and shipment of such species in violation of subparagraphs (B) and (C); delivery, receipt, transportation, or shipment in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, of any such species; and the sale or offer for sale in interstate or foreign commerce of any such species. *Id.* § 1538(a)(1)(A)-(F) (endangered species). As used in the ESA, "take" is a term of art meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any individual of a listed species, or any "attempt to engage in any such conduct." *Id.* § 1532(19). "Harm" within the definition of "take" is defined by regulation to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. Section 9 also prohibits the violation of any promulgated regulation pertaining to a listed threatened species. 16 U.S.C. § 1538(a)(1)(G).

Whenever any species is listed as threatened, Section 4(d) authorizes the Secretary to "issue such regulations as he deems necessary and advisable to provide for the conservation of such species."[7] *Id.* § 1533(d). Under this provision, the Secretary has the discretion to extend any of the Section 9 take prohibitions to threatened species. By regulation, FWS has generally extended Section 9 take prohibitions to wildlife species listed as threatened except where it issues a "special rule"[8] containing "all the applicable prohibitions and exceptions." 50 C.F.R. § 17.31

[7] PETPO does not challenge Section 4(d), which is the provision of the ESA that authorizes FWS to issue such rules as the one challenged here.

[8] Regulations regarding the take of a threatened species are referred to as "special 4(d) rules" in reference to the ESA provision authorizing such regulations.

(blanket 4(d) rule). When developing a special 4(d) rule, like the challenged rule, FWS considers the "methods and procedures which are necessary to bring [the] threatened species to the point at which the measures provided … are no longer necessary." 16 U.S.C. § 1532(3). In other words, FWS considers the threats contributing to the listing of the species and how measures such as extending Section 9 take prohibitions will achieve the statutory goal of conserving the species.

II. Factual Background

The Utah prairie dog (*Cynomys parvidens*) is the smallest of the five species of prairie dogs, all of which are native to North America. 77 Fed. Reg. at 46160. The prairie dog is a burrowing rodent in the Sciuridae family, which includes squirrels and chipmunks. *Id.* As the name suggests, this species of prairie dog occurs only in southwestern Utah. 56 Fed. Reg. 27438, 27438 (June 14, 1991) ("1991 rule"); 49 Fed. Reg. 22330, 22330 (May 29, 1984) ("1984 rule"). Prairie dogs hibernate approximately four to six months each year, with juvenile prairie dogs remaining above ground one to two months longer than adults. 77 Fed. Reg. at 46160.

Over 70% of all prairie dogs occur on private or other non-federal lands. AR2329. Prairie dogs prefer areas with deep, productive soils, which are the same areas preferred by agricultural producers. 77 Fed. Reg. at 46161; AR2311, 2339. Prairie dogs are particularly drawn to agricultural lands because "[a]gricultural tilling practices create unusually deep, soft soils optimum for burrowing; irrigation increases vegetation productivity," and one of the prairie dog's preferred foods, alfalfa, is a major crop in this region. 77 Fed. Reg. at 46161; AR2334. Recent prairie dog surveys show the spring count for prairie dogs to be approximately 5,600 animals.[9] AR13323.

---

[9] PETPO cites only population estimates derived from summer estimates, Br. at 5, which are deceptively high because it is the period during which young prairie dogs first become active above ground, *see* 49 Fed. Reg. at 22330; 56 Fed. Reg at 27439. Prairie dogs have a high rate of reproduction, and thus the prairie dog population spikes in summer and early fall. 56 Fed. Reg. at 27439. However, young prairie dogs, which stay active months longer than the adult population, suffer a high mortality rate in the fall and winter. *Id.*; *see also* 77 Fed. Reg. at 46160 (less than 50% of prairie dogs survive to breeding age, i.e., the age of one year).

Starting around the 1920s, eradication programs, including poisoning campaigns to eliminate prairie dogs in agricultural operations, as well as habitat destruction and disease, caused the prairie dog population to eventually drop to a low of 2,160 adult animals in the spring of 1976. 77 Fed. Reg. at 46161; 56 Fed. Reg. at 27438; AR8498. The prairie dog was listed as an endangered species on June 4, 1973, pursuant to the Endangered Species Conservation Act of 1969, a precursor to the ESA. 38 Fed. Reg. 14678. On May 29, 1984, the FWS downlisted the prairie dog to threatened and issued a special 4(d) rule rather than extending all Section 9 take prohibitions through the blanket 4(d) rule in the hope that a special 4(d) rule would help alleviate the conflict between prairie dog conservation and agricultural interests in the area.[10] 49 Fed. Reg 22330. Alfalfa, one of the prairie dog's preferred foods, is a major crop in the region. FWS received estimates that, as a result of prairie dog activity on agricultural lands, local ranchers were losing around $1.5 million annually in crop losses and equipment damage. *Id.* at 22330.[11] FWS, in consultation with the Utah Division of Wildlife Resources ("UDWR"), issued a rule authorizing the legal take of 5,000 prairie dogs annually on certain delineated lands in Iron County consistent with Utah State law to avoid ranchers taking matters into their own hands and killing prairie dogs using methods that would have far more catastrophic effects on the prairie dog population. *Id.* at 22331, 22333.

In 1991, FWS reevaluated the status of the prairie dog and found that the species was still threatened over much of its range by habitat loss. 56 Fed. Reg. at 27438. In addition, FWS found that the damaged caused by local concentrations of prairie dogs provoked farmers in some areas to kill them illegally to protect crops and cropland. *Id.* Based on data from 1989 counts, FWS estimated the spring adult population to be over 9,200 animals at that time. *Id.* at 27439. During

---

[10] Without this special 4(d) rule, the blanket 4(d) rule would apply and all take of prairie dogs would be prohibited in the absence of a Section 10 permit issued by FWS. *See* 50 C.F.R. § 17.31.

[11] The Utah Farm Bureau Federation submitted comments in favor of the 1984 rule on behalf of the more than 18,000 families whose agricultural properties overlapped with prairie dog habitat. *Id.* at 22331.

the summer months there were population explosions as young prairie dogs emerged from burrows and became active. Some agricultural fields became so densely populated by prairie dogs that they were ruined for agricultural use. With this in mind, FWS determined that "allowing controlled take of nuisance [prairie dogs] between June 1 and December 31 would address farmers' needs to control nuisance animals without interfering with conservation efforts." *Id.* at 27439. FWS determined that controlled takes in areas in which prairie dogs were reaching carrying capacity during the summer would also benefit the species at the population level by reducing the probability of disease transmission. *Id.* FWS increased the maximum annual take from 5,000 to 6,000 animals and expanded the geographic scope of the rule to private lands throughout the species range. State law continued to restrict take to agricultural lands.

In 2012, FWS revisited the take authorized by the 1984 and 1991 rules and the methods used to implement the earlier versions of the rule. 77 Fed. Reg. at 46158. After two rounds of notice and comment, the FWS issued the rule challenged here. *Id.* One of the primary objectives of the amendment to the rule was to update the rule so that it would be consistent with the practices of UDWR, the entity administering the control programs. AR1754; *contra* Br. at 9. For instance, due to State regulations and policy that are more restrictive than both the 1991 and 2012 rules, take of the prairie dog has never been permitted on property other than agricultural lands, *see* Utah Admin. Code R657-19-6, 19-7; *contra* Br. at 9, 11, 12.[12].

FWS also wanted to find more effective methods for balancing the conservation of the species with the interests of private landowners other than agricultural producers whose land has become prairie dog habitat during the last few decades. Thus, the 2012 4(d) rule focused on measures to authorize prairie dog take in situations not already covered by other ESA

[12] Nearly all of the declarants have had prairie dogs on their property for years, if not decades. As a practical matter, if the 1991 rule had functioned in the way that Plaintiff suggests, presumably PETPO's members would already have managed the prairie dogs on their property.

mechanisms. *See* 77 Fed. Reg. at 46167 ("The mechanism to authorize take on private lands that are not included in this rule is the ESA Section 10(a)(1)(B) process and implementation of [habitat conservation plans]."). For instance, FWS did not authorize take for property development in the 4(d) rule because the agency had already permitted Iron County to authorize such take pursuant to an ESA Section 10 incidental take permit[13] issued 15 years ago. In 1998, FWS issued a countywide incidental take permit[14] based on a habitat conservation plan ("HCP")[15] developed by Iron County and the UDWR to comprehensively address conflicts between development of private lands and conservation of the prairie dog. AR8481. Thus, Iron County residents who want to develop their land do not need to apply for a new incidental take permit, but rather are able to do so pursuant to the 1998 HCP by applying for a building permit and getting the County Commission's approval.[16] AR8531-32. Those interested in residential and commercial development in Iron County may also seek authorization from the County Commission to take prairie dogs pursuant to the permit issued by FWS to the Iron County Commission on November 6, 2013, for the County's Final Low-effect Habitat Conservation Plan for the Utah prairie dog. *See* U.S. Fish & Wildlife Service, Iron County Habitat Conservation Plan and Permit TE-20942B for Iron County (December 27, 2013, 10:26 AM), http://www.fws.gov/mountain-prairie/species/mammals/utprairiedog (last visited Jan. 17, 2014). With regard to the airport, which was the subject of a programmatic ESA Section 7 consultation

---

[13] Under ESA Section 10, FWS may exempt some take from Section 9's prohibitions by issuing an incidental take permit to allow otherwise lawful activities that are likely to result in take of an ESA-listed species if FWS believes such an exemption would enhance the propagation or survival of the affected species. 16 U.S.C. § 1539(a). A Section 10 permit provides protection to an actor complying with the terms of the permit from ESA Section 9 take liability. *Id.* § 1538(a).

[14] PETPO does not challenge the Iron County Section 10 permit here.

[15] An HCP allows for economic development in conjunction with species conservation.

[16] Because the allegations of harm asserted by Kevin Childs, Mark Bradshaw, and Bruce Hughes stem from a different ESA mechanism—the Iron County HCP and countywide incidental take permit—those PETPO members fail to show an injury traceable to the rule and thus cannot establish standing in their own right.

in 2010, FWS had already provided for incidental take of prairie dogs in the incidental take statement ("ITS") issued with the biological opinion that was prepared following that consultation.[17] AR11689-90. FWS supplemented the 2010 biological opinion by adding a provision that allows direct, lethal take of prairie dogs at airports in accordance with the terms set out in the rule. *See* 77 Fed Reg. at 46176.

The rule continues to provide for the issuance of permits for intentional take on agricultural lands and, in addition, adds an exemption for incidental take caused by otherwise legal activities associated with standard agricultural practices.[18] 50 C.F.R. § 17.40(g)(3),(5); 77 Fed. Reg. at 46158; AR 1748-49; *contra* Br. at 11. The rule does not require the construction of prairie dog-proof fences as a condition of a permit to lethally control prairie dogs on agricultural property. 50 C.F.R. § 17.40(g)(3); *contra* Br. at 13. The rule also added an exemption for properties located within 0.5 miles of conservation lands and for areas where prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites. 50 C.F.R. § 17.40(g)(2); 77 Fed. Reg. at 46158. There is no limit to the amount of translocation or incidental or direct lethal take that may be authorized under the safety hazards and human cultural and burial sites exemption. AR1753. Additionally, all legal methods of direct lethal take may be used for areas where prairie dogs present a serious safety hazard or disturb the sanctity of significant human cultural or burial sites when lethal take is authorized after a prairie dog-proof barrier is constructed. AR1754, *contra* Br. at 9.

The rule also set the total annual take as 10% of the rangewide population instead of a flat 6000 animals. 50 C.F.R. § 17.40(g)(3)(iii)(A). This new limit is above the average actual take

---

[17] PETPO does not challenge that biological opinion or ITS in this lawsuit.

[18] PETPO mentions this exemption from the take prohibitions, Br. at 11, among others, but then wrongly asserts that the "special 4(d) rule makes it unlawful for any person to engage in any activity which harms any Utah prairie dogs[,]" Br. at 23. This overbroad statement is contradicted by the plain language of the rule, as well as PETPO's own description of the rule earlier in its brief.

under the previous rules. 77 Fed. Reg. at 46175. FWS took into consideration the fact that, in the 25 years since the first 4(d) rule was issued, the actual take of prairie dogs had never reached the permitted take. AR1752. Finally, FWS retained the authority to prohibit or restrict take, if necessary, "*for the conservation of the species*." *Compare* AR1756 (emphasis added); *and* 1991 rule, 56 Fed. Reg. at 27440; 27443; *and* 1984 rule, 49 Fed. Reg. at 22333 (same), *with* Br. at 9.

III. Administrative Procedure Act

Under the Administrative Procedure Act ("APA"), the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be…not in accordance with law [or] contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)-(B).

IV. Tenth Amendment

Under the Tenth Amendment to the U.S. Constitution, the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X. But when the Constitution grants Congress authority to act, the Tenth Amendment expressly disclaims any reservation of that power to the States. *See United States v. Hatch*, 722 F.3d 1193, 1203 (10th Cir. 2013), *pet. for cert. filed*, No. 13-6765 (Oct. 1, 2013) (citing *New York v. United States*, 505 U.S. 144, 156 (1992)).

RESPONSE TO STATEMENT OF ELEMENTS AND UNDISPUTED MATERAL FACTS

Defendants do not dispute that PETPO must show that FWS' application of ESA Section 4(d) to the prairie dog exceeded Congress' authority under the Commerce and Necessary and Proper Clauses. PETPO does not set out individual elements of its claim to which Defendants must respond. Defendants are cross-moving for summary judgment on Plaintiff's two claims and, therefore, will provide more detail on the elements of those claims below.

Defendants hereby respond to PETPO's statement of "uncontroverted facts" pertaining to the Commerce Clause:

1. Disputed as explained in the Argument section.
2. Undisputed

3. Undisputed, but, to the extent that PETPO is asserting that this is a required element, Defendants disagree. *See United States v. Jeronimo-Bautista*, 425 F.3d 1266, 1273 n.4 (10th Cir. 2005).

4. Undisputed, but, to the extent that PETPO is asserting that this is a required element, Defendants disagree. *See Raich*, 545 U.S. at 21; *United States v. Grimmett*, 439 F.3d 1263, 1272 (10th Cir. 2006) (Tenth Circuit noting that the Supreme Court has "never required Congress to make particularized findings in order to legislate" (citation omitted)).

5. Undisputed, but, to the extent that PETPO is asserting that this is a required element, Defendants disagree. *See Raich*, 545 U.S. at 21; *Grimmett*, 439 F.3d at 1272.

Defendants hereby respond to PETPO's statement of "uncontroverted facts" pertaining to the Necessary and Proper Clause:

1. Undisputed.

2. Undisputed.

3. Disputed, in part. *See* Argument, II(1)(ii)-(iii).

4. Disputed, see below.

5. Disputed in part. *See, e.g., TVA*, 437 U.S. at 178.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Defendants respectfully request that the Court grant their Cross-Motion for Summary Judgment on the grounds that Plaintiff lacks standing or, in the alternative, that Congress has the authority pursuant to ESA Section 4(d) to extend Section 9 prohibitions to the Utah prairie dog to conserve the species so that the prairie dog may reach the point at which such measures are no longer necessary.

I. Standing

An organization has Article III standing to sue on behalf of its members if "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the

participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (citation omitted).

To establish that its members would have standing to sue in their own right, PETPO must demonstrate three elements: injury in fact, traceability, and redressability. *S. Utah Wilderness Alliance ("SUWA") v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1233 (10th Cir. 2010). A deficiency of any one of the three prongs suffices to defeat standing. *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2012).

"In order to satisfy the 'redressability' requirement for constitutional standing, a plaintiff must show that there is at least a 'substantial likelihood' that the relief requested will redress the injury claimed…." *See Baca v. King*, 92 F.3d 1031, 1036 (10th Cir. 1996) (citation omitted); *see also Opala v. Watt*, 454 F.3d 1154, 1159 (10th Cir. 2006).

PETPO cannot establish that the alleged injuries of its members are likely to be redressed by a favorable decision. The uncontroverted facts supporting this conclusion are:

1. UDWR lists the prairie dog as a Utah sensitive species due to its federal status as a threatened species. AR9089; 12311.

2. The State of Utah issued regulations on take of the Utah prairie dog that were in place at the time PETPO filed its Complaint and that are more restrictive than the provisions set forth in the rule challenged by PETPO. Utah Admin. Code R657-19-6; *see also* AR4634 (explaining that UDWR set additional limits to use of 4(d) rule through permitting system that has been in place since the 1984 rule).

3. Under the Utah Prairie Dog Provisions, R657-19-6, a person may not take a prairie dog without first obtaining a certificate of registration from the UDWR. A certificate of registration will not be issued unless the "taking will not further endanger the existence of the species," and one of the following criteria is met:

(i) in cases where Utah Prairie dogs are causing damage to agricultural lands as provided in the rules of [FWS]; or

(ii) as provided in a valid Incidental Take Permit issued by [FWS] under an approved Habitat Conservation Plan; or

(iii) as provided under a valid Incidental Take Permit issued by [FWS] allowing take of Utah prairie dogs on specified private lands as part of an approved conservation agreement enacted between [FWS] and the owner of those private lands.

R657-19-6(1)(b)(i)-(iii).

4. Under R656-19-7, "[t]aking of a Utah prairie dog on any land or by any method, other than as provided in the valid certificate of registration, including any public land, is a violation of state and federal law."

5. The ESA authorizes States to enact laws or issue regulations "respecting the taking of an endangered species or threatened species [that are] more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined." 16 U.S.C. § 1535(f).

II. Congress has the constitutional authority to extend ESA Section 9 prohibitions to the prairie dog pursuant to ESA Section 4(d)

Defendants respectfully move for summary judgment pursuant to Federal Rule of Civil Procedure 56 on the claim that Congress has the authority under the Commerce Clause or, in the alternative, under the Necessary and Proper Clause, as a matter of law to extend Section 9 prohibitions to the prairie dog pursuant to ESA Section 4(d). There are no triable issues of material fact in this case.

Plaintiff asserts two claims: (1) an APA claim that the rule is not in accordance with law, 5 U.S.C. § 706(2)(A), or is contrary to any constitutional right, power, privilege, or immunity, *id.* § 706(2)(B); and, in the alternative, (2) a claim that the rule violates the Tenth Amendment to the U.S. Constitution. Br. at 14. Because these claims are premised on the exact same facts and the same alleged violation of the Commerce and Necessary and Proper Clauses, Defendants do not distinguish between these two claims in their argument that Congress, and therefore, FWS, has

the authority under ESA Section 4(d) to extend Section 9 prohibitions to the threatened prairie dog.

To establish that Defendants are entitled to judgment in their favor, they must show that Congress, through FWS, has not exceeded its authority under the Constitution by extending ESA Section 9 prohibitions to the prairie dog pursuant to ESA Section 4(d).

The Supreme Court has recognized three categories of regulation in which Congress is authorized to engage under its commerce power. *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate purely local activities that substantially affect interstate commerce. *Id.* at 16-17 (citations omitted).

Defendants must show that FWS' application of ESA Section 4(d) to the prairie dog is within Congress' power to regulate purely local activities that substantially affect interstate commerce. When determining whether Congress has the authority under the Commerce Clause to regulate, courts have considered whether: (1) the activity at which the statute is directed is commercial or economic in nature, however broadly one might define those terms; (2) the statute contains an express jurisdictional element involving interstate activity that might limit its reach; (3) Congress has made specific findings regarding the effects of the prohibited activity on interstate commerce; and (4) the link between the prohibited conduct and a substantial effect on interstate commerce is attenuated. *Grimmett*, 439 F.3d at 1272.

In the alternative, Defendants must show that Congress has the authority to extend ESA Section 9 prohibitions to intrastate species, like the prairie dog, as a regulation of intrastate activity that is essential to the ESA, a comprehensive regulatory scheme that has a substantial relation to interstate commerce. *See Raich*, 545 U.S. at 18.

The uncontroverted facts supporting this conclusion are:

1. The ESA is a comprehensive "regulatory statute [that] bears a substantial relation to

commerce." *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1272-73 (11th Cir. 2007) (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)); *see also San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *GDF*, 326 F.3d at 639; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003).

2. Congress enacted the ESA, in part, to conserve endangered and threatened species, and their habitat, as valuable resources for numerous industries. *See TVA*, 437 U.S. at 178; *San Luis*, 638 F.3d at 1176; *Alabama-Tombigbee*, 477 F.3d at 1274.

3. The rule is an application of ESA Section 4(d), 16 U.S.C. § 1533(d), to the prairie dog. *See* 50 C.F.R. § 17.40(b)-(q) (applying ESA Section 4(d) to numerous listed species, including the grizzly bear, primates, mountain lions, the Louisiana black bear, and the polar bear).

4. The extensive legislative history on the ESA contains numerous statements on the effect of both the loss as well as conservation of endangered and threatened species on interstate commerce. *See TVA*, 437 U.S. at 178-79; *GDF*, 326 F.3d at 640.

5. The prairie dog has commercial or economic value. *See, e.g.*, AR233; 2336; 8309 (value of prairie dog as a keystone species). Citations to sources showing commercial value of prairie dogs in tourism industry are found in the Argument section of the brief.

6. The rule regulates activity that is commercial in nature. *See, e.g.*, 50 C.F.R. § 17.40(g).

7. Protecting species by regulating take pursuant to Sections 9 and 4(d), thereby ensuring the continued existence of endangered and threatened species as valuable resources, is directly related to interstate commerce. *See GDF*, 326 F.3d at 640 (holding that "the link between species loss and a substantial commercial effect is not attenuated").

8. The aggregation of the effects of applying Section 9 prohibitions to endangered species and extending such prohibitions to threatened species, like the prairie dog, through Section 4(d) is an essential part of the ESA. *See Gibbs*, 214 F.3d at 492.

9. The ESA would be undercut if FWS were unable to extend Section 9 prohibitions to endangered and threatened intrastate species wherever they occur, including prohibitions on

activities that could result in the take of such species. *See GDF*, 326 F.3d at 640.

ARGUMENT

PETPO lacks standing because, even if the Court were to hold that Congress does not have the authority to extend ESA Section 9 prohibitions to prairie dogs under Section 4(d), PETPO's members would still be subject to Utah's more restrictive regulations on the take of prairie dogs. Invalidating the 4(d) rule does not reduce PETPO members' alleged harm at all and, thus, Plaintiff's claims are not redressable. Should the Court reach the merits, the Court should enter summary judgment in Defendants' favor because the challenged rule is a valid exercise of Congress' authority to legislate under the Commerce Clause or, in the alternative, the Necessary and Proper Clause, and does not violate the APA or Tenth Amendment.[19]

I. PETPO fails to meet all required elements of Article III standing

PETPO cannot show that its members would otherwise have standing to sue in their own right. All of PETPO's declarants are subject to the more restrictive state rules on the take of prairie dogs issued by UDWR, which were in place at the time PETPO filed its Complaint and act as an independent and separate barrier to redressing their alleged harm. Because PETPO cannot show that its members would be in any different position than they are now, even if the Court were to rule in its favor, PETPO's lawsuit must be dismissed for lack of standing.

As a court of limited jurisdiction, this Court must first determine whether PETPO has properly invoked jurisdiction before reaching the merits of this case. *See Consumer Data*, 678 F.3d at 902; *SUWA*, 620 F.3d at 1233; *see also Raines v. Byrd*, 521 U.S. 811, 820 (1997) (recognizing that, to "keep[] the Judiciary's power within its proper constitutional sphere, [courts] must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency"). The burden of establishing a

[19] Plaintiff's APA and Tenth Amendment claims are identical and, therefore, Defendants do not distinguish the two claims for purposes of the Argument section of this brief.

federal court's subject matter jurisdiction falls on the party asserting jurisdiction. *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1201 (10th Cir. 2012); *Raley v. Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1275 (10th Cir. 2011). It is presumed that federal courts lack jurisdiction "unless 'the contrary appears affirmatively from the record.'" *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citation omitted); *see also Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004). "Standing must be analyzed from the facts as they existed at the time the complaint was filed." *Tandy*, 380 F.3d at 1284.

To demonstrate standing to sue under Article III, PETPO must show that: its members (1) have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *SUWA v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013). PETPO cannot establish the third element of standing. PETPO states that its members' harm is their inability to remove or kill any and all prairie dogs on their property without restriction.[20] *See, e.g.*, ECF No. 55-2 (complaining that the rule prevents him from "entirely" removing prairie dogs); 55-5 at 1 (complaining that, even if the rule did allow for unlimited take, declarant "would have to suffer a similarly costly and time-consuming permit process"); 55-6 (complaining that they cannot remove prairie dogs on agricultural lands without a permit). PETPO also alleges that some members are harmed because, according to PETPO, the rule prevents them from "pursuing other commercial development," without an incidental take permit from the FWS. Br. at 12. PETPO presents one declaration from a farmer who alleges that, even though the rule exempts legal activities associated with standard agricultural practices and allows for some lethal take, it "does not allow

[20] Defendants disagree with PETPO's characterization of the terms and procedures set forth in the 4(d) rule as well as PETPO's members' options for developing their land. Defendants refer to PETPO's characterization of harm solely for purposes of demonstrating that the members upon whom PETPO relies lack standing.

them to take steps to protect their property—including their valuable equipment—from the effects of the Utah prairie dog…These effects include damage to the Lamoreauxs' swathers, balers, and bale wagons, lost equipment time while this equipment is damaged, and the costly repairs associated with fixing that damage." *Id.* at 12-13; *see* ECF No. 55-6.

PETPO implies that the rule is the only regulation preventing its members from removing or killing prairie dogs without restriction. However, in addition to the 4(d) rule, there are more restrictive state rules governing the take of prairie dogs, *see* R657-19-6, 19-7; *see also* AR4634. Under R657-19-6, a person may not take a prairie dog "without first obtaining a certificate of registration from the division." R657-19-6(1)(a). A certificate of registration for taking prairie dogs "*may* be issued" if the "taking will not further endanger the existence of the species" and prairie dogs are causing damage to agricultural lands as provided in FWS' rules, or the applicant has a valid ESA Section 10 incidental take permit issued by FWS. Other than those limited exemptions, R657-19-7(2) prohibits the take of prairie dogs "on any land or by any method" as a violation of state law. Moreover, the "taking of any Utah prairie dog outside the areas provided in this section is prohibited, except by division employees while acting in the performance of their assigned duties." R657-19-7(4). Utah's more restrictive rules on the take of prairie dogs are consistent with the ESA, which authorizes States to enact laws or issue regulations "respecting the taking of an endangered species or threatened species [that are] more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined," 16 U.S.C. § 1535(f), and are not challenged by Plaintiff.

Even if Plaintiff received the relief it seeks in this case, it cannot show that its members' alleged harm would be reduced. *See Baca*, 92 F.3d 1031, 1036 ("[A] plaintiff must show that there is at least a 'substantial likelihood' that the relief requested will redress the injury claimed….). First, none of PETPO's declarants' harm is relieved by the State's more limited take exemptions. Based on PETPO's declarations, only Dean Lamoreaux could fall within one of

the categories set out in R657-19-6. However, he would have to show that prairie dogs are "causing damage to agricultural lands as provided in the rules of the FWS," R657-19-6(1)(b)(i), and he has already conceded in his declaration that his alleged damage—the damage to his equipment and having to apply for a permit to be exempted from the take prohibitions—is not addressed by the 4(d) rule. *See* ECF No. 55-6. In other words, he would not qualify for a certificate based on having agricultural lands that are being damaged in a way that is recognized by FWS' rules and would be required to apply for a Section 10 permit, which he would not have to do under the 4(d) rule. Second, to the extent that a favorable decision would affect the State's exemptions, the State otherwise prohibits all other take of prairie dogs. *See* R657-19-7(2).

Moreover, PETPO has not challenged the state rules and cannot establish redressability where UDWR may still apply the more restrictive rules to PETPO members. *See Wyo. Sawmills v. U.S. Forest Serv.*, 383 F.3d 1241, 1246 (10th Cir. 2004) (plaintiff could not establish redressability where, even with a favorable order, agency would be under no obligation to redress plaintiff's alleged harm); *see also Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 892 (10th Cir. 2011); *Okla. Hosp. Ass'n v. Okla. Publ'g Co.*, 748 F.2d 1421, 1425 (10th Cir. 1984). As PETPO concedes, Br. at 7, from 1991 to 2012, UDWR applied its more restrictive rules, issuing certificates only if an applicant could show certain kinds of agricultural damage, despite the fact that FWS' 1991 rule appeared to allow take on all private property. Because PETPO cannot establish that it is likely, rather than speculative, that its alleged harm will be redressed by a favorable outcome, the Court must dismiss this suit. *See Opala*, 454 F.3d at 1159.

II. Congress has the authority to extend ESA Section 9 prohibitions to intrastate species listed as endangered or threatened under the ESA

It is well-established that Congress has the constitutional authority to protect endangered and threatened species wherever they occur. PETPO's brief is noticeably devoid of almost any discussion of the relevant case law, which is not surprising given that its arguments have been

rejected by every court that has considered them. Five Circuits[21] have evaluated and dismissed post-*Lopez* Commerce Clause challenges to the application of ESA Sections 4 and 9 to intrastate species. *See San Luis*, 638 F.3d 1163 (delta smelt), *cert. denied*, 132 S. Ct. 498 (2011); *Alabama-Tombigbee*, 477 F.3d 1250 (Alabama sturgeon), *cert. denied*, 552 U.S. 1097 (2008); *GDF*, 326 F.3d 622 (six species of subterranean invertebrates), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo*, 323 F.3d 1062 (arroyo toad), *cert. denied*, 540 U.S. 1218 (2004); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* ("*NAHB*") *v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands Flower-Loving fly), *cert. denied*, 524 U.S. 937 (1998). *San Luis* and *Alabama-Tombigbee* evaluated these challenges in light of *Raich*, in which the Supreme Court upheld Congress' authority under the Commerce Clause to regulate noncommercial intrastate activity as an essential part of a comprehensive statutory scheme that bears a substantial relation to commerce.

Moreover, the Supreme Court has addressed the scope and application of the ESA many times and has not questioned the constitutionality of the statute. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 708 (1995) (upholding regulation defining "harm" within the Section 9 take context to include "significant habitat modification or degradation where it actually kills or injures wildlife"); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *TVA*, 437 U.S. at 153. In fact, in *Raich* the Supreme Court identified the take provision of the Bald and Golden Eagle Protection Act ("Eagle Protection Act"), discussed in more detail in section (II)(A) below, as an example of a valid means of regulating interstate commerce through the prohibition of intrastate activities. 545 U.S. at 26 n.36 (citing 16 U.S.C. § 668(a)); *cf. Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979).

---

[21] Addressing a Tenth Amendment challenge to the application of the ESA, the First Circuit affirmed the constitutionality of the ESA under the Commerce Clause without discussion. *Strahan v. Coxe*, 127 F.3d 155, 167 (1st Cir. 1997).

Although the Tenth Circuit has never explicitly addressed the issue at hand, PETPO fails to mention that the Court affirmed the District of Wyoming's assessment of a related claim in *Wyoming v. U.S. Department of Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005), *aff'd*, 442 F.3d 1262 (10th Cir. 2006). In that case, the State, among others, alleged various causes of action related to FWS' management and control of depredating gray wolves, the agency's rejection of the State's proposed wolf management plan, and FWS' decision not to delist the gray wolf. *Id.* at 1224. Plaintiffs raised a Tenth Amendment claim alleging that FWS did not have the authority to require the State to manage wolves on non-federal property in a manner that comports with the ESA. *Id.* at 1238. Relevant to this case, the district court rejected the implication that Congress does not have the authority to regulate ESA-listed species on non-federal property, noting that "[i]t is well settled that the ESA is a Constitutional exercise of Congressional authority under the Commerce Clause." *Id.* at 1240 (citing *Rancho* Viejo, 323 F.3d at 1062). The court further noted:

> [A] properly styled Tenth Amendment argument alleging that the Federal Defendants, and therefore Congress, is powerless to regulate gray wolves via the ESA on private or State lands because such regulation violates the Commerce Clause is meritless. Time and again the courts of the United States have upheld the regulatory powers of Congress under the Commerce Clause; woe be the court that deviates from this broad and well defined concept of Article I powers. *See Gibbs*, 214 F.3d at 492. . . . This assertion holds true even post *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed.2d 626 (1995). Simply put, no court of the United States has invalidated any ESA regulation for exceeding the powers delegated to Congress by the Commerce Clause.

Id. at 1241-42.

On appeal, the Tenth Circuit affirmed the lower court's opinion, stating that it was doing so

> for substantially the same reasons given in its opinion. Because we hold, however, that the Plaintiffs have failed to identify a final agency action which is necessary to satisfy the statutory standing requirements under the APA, unlike the District Court, we express no opinion on the merits of the Plaintiffs' ESA and NEPA claims.

Wyoming v. U.S. Dep't of Interior, 442 F.3d 1262, 1264 (10th Cir. 2006) (citations omitted). The Tenth Circuit described the lower court's holding on the constitutional claims, stating that the "Defendants' actions 'are consistent with the powers delegated to them by Congress through the

ESA via the Commerce Clause, and these actions do not invade any province of Wyoming's state sovereignty reserved by the Tenth Amendment.'" *Id*. Thus, in affirming the lower court's holding on the constitutional claims, the Tenth Circuit appeared to agree, at least under the circumstances presented, that the regulation of state and private property for the benefit of an ESA-listed species is a valid exercise of Congressional authority under the Commerce Clause.

As an initial matter, PETPO does not contend that the passage of the ESA was beyond Congress' constitutional power and, in any event, as noted above, the Tenth Circuit has already affirmed that the ESA is a Constitutional exercise of Congressional authority under the Commerce Clause. *See Wyoming*, 442 F.3d at 1264. Nor does PETPO contend that ESA Section 4(d), or any other provision of the ESA, is an unconstitutional exercise of congressional authority. Plaintiff's Complaint is limited to the argument that "the federal government has no constitutional authority to regulate the take of Utah prairie dog on *non-federal land*," and a request that the Court "invalidate regulations preventing PETPO's members from protecting their property and other interests." Complaint ¶ 3 (emphasis added); *see also id.* ¶¶ 110-12, 124-26, prayer for relief. To the extent that Plaintiff's motion for summary judgment can be read to assert claims broader than those set forth in its Complaint or request relief beyond that requested in its Complaint, such amendments to a complaint through summary judgment briefing are impermissible and should be rejected by the Court. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (en banc) ("[W]here, as here, the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court."); *Wasco Prods. v. Southwall Techs.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings." (citation omitted)).

A. Congress has authority under the Commerce Clause to extend ESA Section 9 prohibitions to intrastate threatened species

Congress has the authority under the Commerce Clause to extend ESA Section 9 prohibitions

to the prairie dog as a regulation of activities that substantially affect interstate commerce. Elaborating on this category of regulation, the Supreme Court recently affirmed Congress' "power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich* at 17. Such acts of Congress are presumed constitutional and may be invalidated "only upon a plain showing that Congress has exceeded its constitutional bounds," *United States v. Morrison*, 529 U.S. 598, 607 (2000).

Trying to fit a square peg into a round hole, Plaintiff urges the Court to treat the rule like the single-subject statutes at issue in *Lopez* and *Morrison* rather than as an application of the ESA, a comprehensive regulatory statute akin to the one generally at issue in *Raich*. Specifically, Plaintiff asks the Court to excise this particular application of ESA Section 4(d), which it argues regulates a noneconomic activity of a noncommercial, intrastate species. Br. at 23. In *Raich*, the Supreme Court rejected this approach, which had been utilized by the Ninth Circuit to enjoin a particular application of the Controlled Substances Act ("CSA"), stating:

> The Court of Appeals was able to conclude [that the challenged application of the statute was unconstitutional] only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law."

545 U.S. at 26 (citation omitted); *see also id.* at 38 (Scalia, J., concurring) (noting that neither *Lopez* nor *Morrison* involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation). Courts that have addressed similar Commerce Clause challenges to the ESA also have rejected this argument. *See San Luis*, 638 F.3d at 1175 ("Pursuant to *Raich*, when a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute (rather than an isolated application) in determining whether the statute relates to 'commerce or any sort of economic enterprise." (citing *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 561)); *Alabama-Tombigbee*, 477 F.3d at 1272-73; *see also GDF*, 326 F.3d at 629 (a regulated activity may affect interstate commerce either alone or when aggregated with other activities that are also regulated by the law at issue). This

distinction between a single-subject statute and the challenged rule—an application of a comprehensive regulatory statute—is pivotal because, as the Supreme Court reaffirmed in *Raich*, "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)). Plaintiff's unsupported assertion that this application of ESA Section 4(d) should be reviewed in a vacuum should be rejected.

1. The rule regulates activities that are "part of an economic 'class of activities' that have a substantial effect on interstate commerce"[22]

The task before this Court is a "modest one"; the Court need not determine whether regulating take through the extension of ESA Section 9 prohibitions to the prairie dog alone or "taken in the aggregate, substantially affect[s] interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22 (quoting *Lopez*, 514 U.S. at 557); *see United States v. Patton*, 451 F.3d 615, 623 (10th Cir. 2006).

i. The ESA is a comprehensive scheme that has a substantial relation to commerce

Although Plaintiff disagrees with the five Circuit Courts that have determined that the ESA is a comprehensive regulatory scheme having a "substantial relation to commerce," Plaintiff does not meaningfully challenge the conclusions of those courts. PETPO points only to the oft-cited objective of the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." Br. at 33. On par with the statute at issue in *Raich*, the ESA was enacted as a comprehensive scheme to combat international and interstate threats to endangered and threatened species and to ensure the continued existence of these species as "potential resources," *TVA*, 437 U.S. at 178 (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess., at 4-5 (1973)); *see Raich*, 545 U.S. at 11-12 (Congress enacted CSA to consolidate piecemeal drug laws and enhance federal drug enforcement powers consistent with the federal government's overhaul of drug policy). The fact that Congress also had non-

[22] *Raich*, 545 U.S. at 17.

economic motives for enacting the ESA does not undercut an otherwise valid exercise of the Commerce Clause. *See Raich*, 545 U.S. at 12-13 (noting that one of the main objectives of the CSA was to "conquer drug abuse"); *see also Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964) ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

Finding it "apparent that the 'comprehensive scheme' of species protection contained in the [ESA] has a substantial effect on interstate commerce," the Eleventh Circuit highlighted ESA Section 9's prohibition on all interstate and foreign commerce in endangered species.[23] *Alabama-Tombigbee*, 477 F.3d at 1274; *see also San Luis*, 638 F.3d at 1176. That Court noted that, "[a]lthough the true size of an illegal market is difficult to gauge, the United Nations Environment Programme estimates the illegal component of the worldwide trade in wildlife generates $5 billion to $8 billion in proceeds annually." 477 F.3d at 1273 (citation omitted). Expressing many of the same concerns shared by Congress when it was drafting the ESA, President Obama reaffirmed the value and purpose of conserving protected species when he issued an executive order in July 2013 on combating wildlife trafficking to "address the significant effects of wildlife trafficking on the national interests of the United States." Exec. Order No. 13648, 78 Fed. Reg. 40621, 40621 (July 1, 2013). In that executive order, he stated:

> The poaching of protected species and the illegal trade in wildlife and their derivative parts and products (together known as 'wildlife trafficking') represent an international crisis that continues to escalate…The survival of protected wildlife species . . . has beneficial economic, social, and environmental impacts that are important to all nations. Wildlife trafficking reduces those benefits while generating billions of dollars in illicit revenues each year, contributing to the illegal economy, fueling instability, and undermining security. Also, the prevention of trafficking of live animals helps us control the spread of emerging infectious diseases.

---

[23] This prohibition also extends to threatened species by regulation, *see* 50 C.F.R. § 17.31(a), and is among the prohibitions that the FWS extended to the prairie dog, *see* 50 C.F.R. § 17.40(g)(1) ("all prohibitions of § 17.31(a) and (b) and exemptions of § 17.32 apply to the Utah prairie dog" except those exemptions to take set forth in § 17.40(g)(2)-(6)).

Id. § 1. Thus, to say that the ESA does not control an "established and lucrative interstate [or international] market" in listed species is plainly wrong. *Compare with* Br. at 33.

Plaintiff also ignores the fact that one of the ESA's primary purposes as expressed by Congress is to conserve listed species as resources for numerous industries, including pharmaceuticals, agriculture, and wildlife-related tourism. *See San Luis*, 638 F.3d at 1176; *Alabama-Tombigbee*, 477 F.3d at 1274. The value of these listed species goes well beyond their sale price. Quoting the House Report accompanying the ESA, the Eleventh Circuit explained that "as human development pushes species towards extinction, 'we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable.'" *Alabama-Tombigbee*, 477 F.3d at 1273 (quoting H.R. Rep. No. 93-412, at 4 (1973)). Courts have recognized the potential value of endangered and listed species to medicine. *See id.* at 1273 (noting that nine of the ten most commonly used prescription drugs in the United States are derived from natural plant products); *Gibbs*, 214 F.3d at 494 (noting that half of the most commonly prescribed medicines are derived from plant and animal species). They have also emphasized the importance of genetic diversity to improving agriculture and aquaculture. *Alabama-Tombigbee*, 477 F.3d at 1273).

The ESA also protects listed species as valuable resources that "stimulate commerce by encouraging fishing, hunting, and tourism." *Id.* at 1274; *see also San Luis*, 638 F.3d at 1176 ("Interstate travelers stimulate interstate commerce through recreational observation and scientific study of endangered or threatened species."); *Gibbs*, 214 F.3d at 493 (describing wildlife-related recreational activities' substantial effect on interstate commerce). The latest figures from U.S. Census Bureau on Fishing, Hunting, and Wildlife-Associated Recreation show that in 2011 alone over 22.5 million Americans traveled away from home to observe, photograph or feed wildlife.[24] Of those traveling away from home for wildlife-related recreation, about 30%

[24] U.S. Dep't of the Interior, et al., 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 4, available at

traveled outside their state of residence for such recreation. *Id.* at 44. The Report showed that wildlife-watching expenditures, which include trip-related expenses and equipment, total around $54.9 billion in 2011 alone.[25] The ESA also protects the "future and unanticipated interstate-commerce value of species." *San Luis*, 638 F.3d at 1176. Regeneration of a threatened or endangered species might allow future commercial utilization of the species, such as hunting and fishing. *GDF*, 326 F.3d at 639; *see also San Luis*, 638 F.3d at 1176. In sum, the ESA bears a substantial relation to commerce. As the Eleventh Circuit found with respect to the *Alabama-Tombigbee* plaintiff's arguments on this very point, PETPO could not, and does not, persuasively argue to the contrary. *See* 477 F.3d at 1273.

ii. The Utah prairie dog has biological and commercial value

The preservation of biodiversity, including the protection of the prairie dog specifically, is the regulation of economic activity. *See Gibbs*, 214 F.3d at 495, 497 (recognizing that loss of the endangered red wolf could have unintended consequences on other species resulting in losses to crops and other items of interstate commerce). Throughout its brief, PETPO asks this Court to assess the value and importance of the prairie dog in isolation, which as a biological matter, makes little sense. Limiting review to the effects of a regulation on individual component species, as compared to listed species as a class, is particularly inappropriate in view of the "critical nature of the interrelationships of plants and animals between themselves and with their environment." *GDF*, 326 F.3d at 640 (quoting H.R. Rep. No. 93-412, at 6). "Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage." *NAHB*, 130 F.3d at 1052 n.11 (quoting Edward O. Wilson, The Diversity of Life

---

http://wsfrprograms.fws.gov/subpages/NationalSurvey/NatSurveyIndex.htm (last visited Jan. 17, 2014).

[25] Expenditures for wildlife-related recreation in 2011 amounted to about $1.7 million in Utah alone. *Id.* at 96.

308 (1992)); *see also Gibbs*, 214 F.3d at 495 (citing studies showing how removal of one species could affect others). In this case, prairie dogs have significant biological value as a keystone species of the western grassland ecosystem.[26] *See* AR233; 8309. Prairie dog colonies "increase biological diversity and species richness." AR8309. They also

> decrease vegetation height and increase landscape heterogeneity. Burrowing and excavation mixes the soil and promotes uptake of nitrogen by plants. The burrow and mound systems change soil chemistry by increasing the porosity of the soil to allow deep penetration of precipitation, and increasing the incorporation of organic materials into the soil. Several wildlife species such as burrowing owls [], rabbits [], ground squirrels [], weasels [], and badgers [] also rely on the habitat conditions created by Utah prairie dog colonies, and frequently use their burrows.

AR233; AR2336. Other species, including golden eagles, large hawks and bobcats, are also known to prey on prairie dogs. AR6877.

The prairie dog also has commercial value to those who enjoy visiting Utah to observe wildlife. In the Utah Survey of Fishing, Hunting, and Wildlife-Associated Recreation, about 178,000 nonresidents reported observing, photographing, or feeding wildlife, and 112,000 reported engaging in those activities with regard to small land mammals, specifically including prairie dogs.[27] The commercial value of the prairie dog is also apparent from Utah park websites, which highlight the presence of this threatened species. For instance, Bryce Canyon National Park hosts an annual Utah Prairie Dog Day to provide visitors with opportunities to "view prairie dogs in their natural habitat."[28] The Utah prairie dog is one of four (out of 59) featured mammals

---

[26] A "keystone species" is one "whose loss can transform or undermine the ecological processes or fundamentally change the species composition of the wildlife community" or ecosystem. U.S. Fish & Wildlife Service, *Why Save Endangered Species?*, 6 (July 2005), http://www.fws.gov/nativeamerican/pdf/why-save-endangered-species.pdf.

[27] U.S. Department of Interior, et al., 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: Utah 11, 34, available at http://www.census.gov/prod/www/fishing.html (last visited Jan. 17, 2014).

[28] http://www.nps.gov/brca/planyourvisit/updogday.htm (last visited Jan. 6, 2014); *see also* Utah Prairie Dog Day – 2012, http://www.nps.gov/brca/parknews/upd2012.htm (last visited Jan. 17, 2014).

on the Bryce Canyon website.[29] The Capitol Reef National Park Region likewise features the prairie dog as part of possible wildlife viewing activities in southern Utah.[30] Interestingly enough, Cedar City's Tourism Bureau, which provides information on the many recreational activities in the area, informs visitors that at Dixie National Forest they have the opportunity to see the Utah prairie dog, among other "interesting" species.[31] Presumably tourism websites would not feature a species that was of no interest to visitors.

PETPO's argument that the prairie dog lacks commercial value because FWS did not identify "overutilization [of the species] for commercial, recreational, scientific, or educational purposes," 16 U.S.C. § 1533(a)(1)(B), lacks logic. Br. at 26. Identifying threats that support a listing determination under the ESA is a different inquiry from whether a listed species has commercial value. If a species is threatened due to overutilization, that finding would establish that the species has commercial value. But identifying overutilization as a threat requiring ESA listing is not a requirement to establishing that a species has economic or commercial value. In this case, the prairie dog's commercial value does not negatively affect the species.

Allowing indiscriminate take of prairie dogs would have an effect on commerce because it is likely to significantly decrease the species' population size, thereby reducing the commercial benefits of this species. *See Gibbs*, 214 F.3d at 492 (finding direct relationship between wolf takings and interstate commerce because of effect on tourism, scientific research, and commercial trade in wolf pelts). But, even if the Court concludes that the prairie dog has little commercial value, the rule should still be upheld as a valid exercise of Congress' constitutional power under the Commerce Clause. The Supreme Court has reiterated that "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Raich*, 545 U.S. at 17 (quoting *Lopez*,

---

[29] *See* http://www.nps.gov/brca/naturescience/mammals.htm (last visited Jan. 17, 2014).

[30] *See* http://www.capitolreef.org/wildlife.html (last visited Jan. 17, 2014).

[31] *See* http://scenicsouthernutah.com/dixie-national-forest (last visited Jan. 17, 2014).

514 U.S. at 558).

iii. The rule is directed at activity that is commercial or economic in nature

The Court is not required to find that the extension of Section 9 prohibitions to the prairie dog itself substantially affects interstate commerce to uphold Congress' authority in this case; though the ESA may "'ensnare[] some purely intrastate activity, . . . [the Court should not] excise individual components of that larger scheme.'" *San Luis*, 638 F.3d at 1177 (quoting *Raich*, 545 U.S. at 17). Nevertheless, unlike the statutes in *Lopez* and *Morrison*, which had "nothing to do with 'commerce' or any sort of economic enterprise," *Lopez*, 514 U.S. at 561, the 4(d) rule does regulate activity that is commercial or economic in nature.

Plaintiff's argument that the rule does not apply to economic activity,[32] such as "intrastate coal mining, intrastate extortionate credit transactions, restaurants using substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat," Br. at 26, misstates the facts. The rule plainly regulates agricultural activities that may result in the take of prairie dogs, except where exempted as a standard agricultural practice, *see* 50 C.F.R. § 17.40(g)(5). PETPO seems to agree that the rule regulates agricultural activities, arguing in its Complaint that "[w]hile the 4(d) Rule refers to agricultural lands . . . as 'exempt' from the take prohibition, these lands are subject to significant restrictions on the take of the Utah prairie dog." Complaint ¶ 30; *see also* ¶¶ 36-37. Plaintiff states that, under the rule, take of prairie dogs "on agricultural lands can only be allowed if the property owner first obtains a permit from the [UDWR] or another federally authorized permitting entity." *Id.* ¶ 26; *see also* ¶¶ 31-34. Plaintiff once again highlights the regulation of agricultural lands in its brief. *See* Br. at 9-10; 12-13. However, then, for purposes of its argument, PETPO reverses course and argues that, "[p]aradoxically, economic activity—normal farming practices—are the

[32] If the 2012 4(d) rule does not regulate agricultural enterprises as Plaintiff attempts to argue at this point in its brief, Br. at 27, then Plaintiff could not rely on its declarant, Dean Lamoreaux, the owner of a 200-acre farm who alleges that his farm is regulated by the 4(d) rule, to establish standing because Mr. Lamoreaux would have no injury in fact.

only type of activity specifically exempted from the special 4(d) rule." Br. at 27.

Beyond Plaintiff's own statements that the rule regulates agricultural activities, the Court need only look at the history of the rule described in detail in the Background section to see that one of the primary purposes of the original rule was to find a balanced approach to protecting the prairie dog through the regulation of agricultural lands. *See* 49 Fed. Reg. at 22330 (previous regulation of take was affecting the agricultural community, costing farmers about $1.5 million annually). In fact, Iron County, where a majority of prairie dogs occur, was ranked the second highest producing county in Utah in 2005 for alfalfa, prairie dogs' preferred food. AR2334. In determining that the regulation of take is a valid exercise of constitutional authority, courts have considered the connection between the take and commercial activity.

Although PETPO attempts to distinguish *Rancho Viejo*, *Gibbs*, and *NAHB*—cases that took into consideration the particular economic activity being regulated—by extending its challenge to all applications of the rule, *see* Br. at 24, PETPO's standing declarations make clear that this case is about commercial activity. PETPO members assert that the rule prevents them from: (1) developing property into a car dealership or otherwise selling the property, ECF No. 55-2; (2) improving the golf course grounds for patrons, ECF No. 55-3; (3) selling lots in a residential subdivision, ECF No. 55-4; and (5) developing or selling property so that the member may "profit from [his] investment," ECF No. 55-5. Consideration of PETPO members' land use and activities is relevant here because PETPO does not bring a facial challenge to Section 4(d) or any other ESA provision; rather it limits its challenge to the application of ESA Section 4(d) to one species and more specifically as it applies on non-federal land. *See Rancho Viejo*, 323 F.3d at 1077 (explaining that the plaintiff developer's effort to limit the court's inquiry to an application of the ESA to a single listed species allegedly lacking in commercial value, which it wished to be treated as a facial challenge without reference to the commercial nature of the developer's own activities, was "simply the plaintiff's attempt to have its cake and eat it too").

Finally, PETPO members also complain that the rule regulates what activities may be

undertaken on their property and affects property values. *See, e.g.*, ECF No. 55-2 (alleging rule prevents removal of prairie dogs from property, which "makes the property impossible to sell"); 55-4; s*ee also* AR12266 (PETPO comment to proposed amendment to 4(d) rule, complaining that, as written, the rule would prevent members from removing prairie dogs, thereby preventing them from selling or using the property).[33] Except as exempted by the rule, s*ee* 50 C.F.R. § 17.40(g)(2)-(6), or a permit issued by FWS or UDWR, the prohibition on take includes significant habitat modification or degradation resulting in take, *see id.* § 17.3 (definition of harm). Although this provision only applies when an actual take occurs, the rule may regulate activity on property that is considered habitat for the prairie dog, which itself has commercial value, regardless of how the owner intends to use the property at issue.

Selectively citing *GDF*, Plaintiff argues that the Court should not consider the particular activities that happen to be regulated in this case, such as PETPO members' commercial development plans. Br. at 24; *but see Gibbs*, 214 F.3d at 492 (noting that the protection of commercial and economic assets, including valuable livestock and crops, is a primary reason for taking red wolves). PETPO is correct in stating that the Fifth Circuit did not rely on plaintiffs' particular development plans for the property where the takes would occur, but it did take into consideration the fact that "it is obvious that the majority of takes would result from economic activity." *See GDF*, 326 F.3d at 633-34, 639. The court noted that concern over the loss of species and habitat resulting from development was reflected in the ESA's findings, *see* 16 U.S.C. § 1531, and that loss of habitat due to development was one of the threats to that species at issue, as it is to the prairie dog. *GDF*, 326 F.3d at 639. PETPO also fails to mention that the court, finding that Section 9 "is economic in nature and supported by Congressional findings to

[33] Defendants disagree with PETPO's description of how the 4(d) rule and other relevant ESA mechanisms apply to its members. However, as relevant here, Plaintiff makes numerous assertions about the effect of the 4(d) rule on property values and commercial activity, such as farming and development, for purposes of establishing standing, but then abandons these assertions for purposes of making its mostly unsupported constitutional arguments.

that effect[,]" held that the extension of Section 9 prohibitions to six species of subterranean invertebrates, when aggregated with the take of other listed species, substantially affected interstate commerce. *Id.* at 640-41.

Even if the Court concludes that the impact of this particular application of ESA Section 4(d) on the market is "trivial by itself," that does not remove the extension of Section 9 prohibitions to the prairie dog from the scope of federal regulation. *See Raich*, 545 U.S. at 20 (noting that the trivial nature of Filburn's impact on the market in *Wickard* was not determinative of whether the regulation was constitutional). As the Fifth Circuit concluded in *GDF*, there can be no doubt that the extension of Section 9 prohibitions to prairie dogs, when aggregated with the regulation of other ESA-protected species, substantially affects interstate commerce. 326 F.3d at 640-41.

iv. Neither a jurisdictional element nor particularized legislative findings are required to establish Congress' authority to regulate pursuant to the Commerce Clause

Defendants do not dispute that neither the ESA nor the rule contain a jurisdictional element. This is of little importance, however, as the Tenth Circuit has stated that any "failure of the jurisdictional element effectively to limit the reach of the statute is not determinative." *Grimmett*, 439 F.3d at 1272 (citations omitted) (also noting that the court "need not linger on this issue" (quoting *Jeronimo-Bautista*, 425 F.3d at 1273 n.4)). PETPO also argues that the rule should be vacated because "[t]here are no legislative findings regarding the effects of takes of intrastate, noncommercial endangered or threatened species on interstate commerce" and "Congress has provided no clear explanation for why a take of the Utah prairie dog would substantially affect interstate commerce." Br. at 28. Setting aside the fact that it would be impractical to require Congress to make specific findings about every listed species before protecting such species, the Supreme Court has already declined to impose such a requirement. *See Raich*, 545 U.S. at 21 ("While congressional findings are certainly helpful . . . and [we will consider them] in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.").

When evaluating the constitutional authority to legislate under the Commerce Clause, the Tenth Circuit has taken into consideration the congressional history of the challenged statute even when "Congress [has not] engaged in specific fact finding regarding how [regulated intrastate activity] substantially affects the larger interstate . . . market." *Jeronimo-Bautista*, 425 F.3d at 1269-71; *see also Raich*, 545 U.S. at 20-21 (considering findings in the introductory section of the CSA even though they did not particularly address the activities at issue in the case). Courts that have reviewed challenges to specific applications of the ESA have likewise found the extensive congressional history on the statute relevant to their analysis. *See, e.g., GDF*, 326 F.3d at 640. In *TVA*, the Supreme Court highlighted the following passage found in the legislative history of the ESA, which demonstrates why Congress extended protections to all endangered and threatened species, not just those that occur in more than one state:

> From the most narrow possible point of view, *it is in the best interests of mankind to minimize the losses of genetic variations*. The reason is simple: **they are potential resources**. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

437 U.S. at 178 (emphasis added, but italics in original) (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess., at 4-5 (1973)); *see also GDF*, 326 F.3d at 632 (relying on same passage). A species' value in interstate commerce does not depend on whether the animals happen to cross state lines.

Plaintiff complains that FWS failed to include in the rule particularized findings that Utah prairie dog takes substantially affect interstate commerce. Br. at 29. The Supreme Court explicitly rejected this suggestion in *Raich*, stating that requiring Congress to include "detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme . . . is not only unprecedented, it is also impractical." 545 U.S. at 21 n.32. In this vein, none of the courts, including the five Circuit Courts that have addressed this issue, have required the agency to make such findings or establish its constitutional authority to act before acting to conserve a species. Moreover, FWS is not required under the ESA to make such findings. In fact, the plain language of the statute makes clear that, when drafting a 4(d) rule,

FWS' sole consideration should be what the agency "deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). The ESA defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."[34] *Id.* § 1532(3). Thus, FWS did not include the findings proposed by Plaintiff because, under the statute, the value of the prairie dog or the economic effect of the take of a prairie dog is irrelevant to the conservation of the species.

v. Section 9 prohibitions have a firm footing in the Commerce Clause

As to the final *Lopez* factor, the relationship between interstate commerce and the provisions set forth in the ESA to protect endangered and threatened species wherever they occur and ensure their continued existence as valuable resources is not attenuated. ESA Sections 4(d) and 9 are "an integral part of the overall federal scheme to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country." *Gibbs*, 214 F.3d at 492; *see also GDF*, 326 F.3d at 640 (holding that "the link between species loss and a substantial commercial effect is not attenuated"). Plaintiff suggests that it is unnecessary to regulate the take of all listed species. *See* Br. at 33-34. As previously noted, approximately 68% of all listed species occur only within one state. More than two-thirds of all listed species use habitat found on private land.[35] In the case of the prairie dog, over 70% of these animals occur on private land. AR2329. Thus, to remove protections from intrastate species or species whose habitat is found on non-federal lands would put at risk the conservation

---

[34] The statute further explains that "[s]uch methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." *Id.*

[35] *See* FWS, Working Together: Tools for Helping Imperiled Wildlife on Private Lands 2 (Dec. 2005), http://www.fws.gov/endangered/esa-library/pdf/ImperiledWildlifeFinalDec2005.pdf (last visited Jan. 17, 2014).

of a majority of listed species, which would have significant impact on interstate commerce.

The Eleventh Circuit addressed extensively the issue of whether it was rational for Congress to conclude that the regulation of intrastate species was an essential part of the larger regulatory scheme. *See Alabama-Tombigbee*, 477 F.3d at 1274-76. The court reasoned that "[b]ecause a species' scientific or other commercial value is not dependent on whether its habitat straddles a state line, Congress had good reason to include all species within the protection of the Act." *Id.* at 1275. Congress cannot be required to "anticipate which species might have undiscovered scientific and economic value." *Id.*; *see also San Luis*, 638 F.3d at 1176 (same). This conclusion is further supported by the consideration of the role of individual species in an ecosystem, in that the failure to protect one species could have unintended consequences for numerous other species, as well as the habitat in general. *See* section (II)(1)(ii). With that in mind, Congress could have rationally concluded that the failure to extend ESA Section 9 prohibitions to intrastate species would have a significant impact on interstate commerce related to all listed species.

Unlike the statutes at issue in *Morrison* and *Lopez*, under which "neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus," the application of ESA Section 4(d) to the prairie dog is part of an economic "class of activities" that has a substantial effect on interstate commerce. Accordingly, the Court should uphold the rule as a valid exercise of Congress' Commerce Clause power.

B. In the alternative, the Court should sustain the rule as a regulation of a class of activity that would undercut the ESA

Even if the Court concludes that ESA Section 4(d) as applied to the prairie dog regulates activity that is not itself commercial, Congress still has the authority to extend ESA Section 9 prohibitions to intrastate species, like the prairie dog, as a regulation of intrastate activity that is essential to the ESA, a comprehensive regulatory scheme that has a substantial relation to interstate commerce. *See Raich*, 545 U.S. at 18. Congress has the authority to enact "'all Laws which shall be necessary and proper for carrying into Execution' the powers enumerated in the

Constitution." *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2591 (2012) (quoting Art. I, § 8, cl. 18). Courts are "very deferential to Congress's determination that a regulation is 'necessary[,]' . . . [upholding] laws that are 'convenient, or useful or conducive to the authority's beneficial exercise.'" *Id.* at 2592-93 (citations omitted). In *Raich*, the Supreme Court reaffirmed that a regulation may be upheld when it is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 545 U.S. at 24-25[36]; *see also id.* at 35 ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.").

As every court that has reached this issue has concluded and for the reasons already discussed in detail in section (II)(A)(1)(i) above, the ESA is a comprehensive regulatory scheme that has a substantial relation to interstate commerce. Ignoring *Alabama-Tombigbee* and *San Luis*, the two post-*Raich* decisions reaffirming this conclusion, Plaintiff argues that *Raich*'s application should be limited to the "regulation of a local, noncommercial activity [only where it is a part of] 'a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative interstate market.'" Br. at 33. As an initial matter, PETPO fails to mention that in the very next sentence in *Raich*, the Supreme Court identified a similar take provision from the Eagle Protection Act, 16 U.S.C. § 668(a), as its first example of "[p]rohibiting the intrastate possession or manufacture of an article of commerce [is] a rational (and commonly utilized) means of regulating commerce in that product." 545 U.S. at 26 & n.36. Similar to the prohibitions set forth in ESA Section 9, the Eagle Protection Act prohibits, without a permit, a person from taking, possessing, selling, purchasing, bartering,

[36] As Plaintiff points out, Justice Scalia's concurring opinion in *Raich* and the Supreme Court's decision in *NFIB*, 132 S. Ct. at 2593, categorize these holdings as supported by the Necessary and Proper Clause, rather than solely under the Commerce Clause. It is irrelevant whether the Court characterizes the analysis as falling under the Commerce Clause or the Necessary and Proper Clause because the rule may be sustained as a valid exercise of Congress' constitutional authority under either provision.

offering to sell, transporting, and exporting or importing any bald eagle or golden eagle, alive or dead, or any part, nest, or egg thereof. 16 U.S.C. § 668(a). The prohibitions of this "conservation statute[] designed to prevent the destruction of certain species of birds[,]"*Andrus v. Allard*, 444 U.S. 51, 52-53 (1979), have been described as "sweepingly framed," *United States v. Dion*, 476 U.S. 734, 740 (1986), extending beyond commercial activities, *see United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996). Nevertheless, the Act has been upheld as a valid exercise of Congress' Commerce Clause power, in part, because the "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material." *Bramble*, 103 F.3d at 1481.

Moreover, the Eleventh Circuit explicitly rejected PETPO's argument in *Alabama-Tombigbee*. After describing the numerous applications of the principle that Congress may regulate some intrastate activity as an essential part of a larger permissible regulation, the court concluded that the Supreme Court's discussion in *Raich* of the effect of intrastate marijuana use on national drug prices was simply a part of its explanation of Congress' rational basis for regulating that intrastate activity. 477 F.3d at 1276-77. The Court explained further that,

> [u]nlike the statute involved in *Raich*, Congress did not rely on commodity pricing in justifying the Endangered Species Act. Instead, it made a determination that the most effective way to safeguard the commercial benefits of biodiversity was to protect all endangered [and threatened] species, regardless of their geographic range. That rational decision was within Congress' authority to make.

Id. at 1277. In any event, it is clear from the passage that PETPO quotes that the Court was merely illustrating the significant contrast between the CSA and the statutes at issue in *Lopez* and *Morrison*. *See* 545 U.S. at 23-26 ("The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum"). PETPO has not identified any language from *Raich* that suggests the analysis applies "only to statutes that regulate commodities for which there is an established and lucrative interstate market," as PETPO asserts.

Br. at 34. In fact, the Supreme Court denied certiorari on the Circuit Courts' decisions in *San Luis* and *Alabama-Tombigbee*, both of which relied on a more expansive interpretation of *Raich*'s holding. *See* 132 S. Ct. 498 (denying certiorari on *San Luis*); 552 U.S. 1097 (denying certiorari on *Alabama-Tombigbee*).

In determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, courts evaluate "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010) (citation omitted). The Supreme Court has reiterated that the Constitution leaves to Congress great discretion with regard to the means that may be employed in executing a given power, stating that Congress' legislative authority is "accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Id.* at 133-34; *see also United States v. Yelloweagle*, 643 F.3d 1275, 1284-85 (10th Cir. 2011) (same), *cert. denied*, 132 S. Ct. 1969 (2012).

Here, Congress' determination that all threatened and endangered species may be afforded the protections set forth in Section 9 regardless of where they occur is rational and entitled to a presumption of validity. *See Raich*, 545 U.S. at 28. Excluding from protection all intrastate species—68% of all listed species—or even all species with no current commercial or economic value, would substantially frustrate the ESA's comprehensive scheme to protect listed species. *See GDF*, 326 F.3d at 640 (regulating take of intrastate species is an essential part of the ESA's economic regulatory scheme); *Gibbs*, 214 F.3d at 497 (same). Congress recognized the importance of protecting the total ecosystem, the elements of which are potential resources for mankind. *TVA*, 437 U.S. at 177-79. "Because Congress could not anticipate which species might have undiscovered scientific and economic value, it made sense to protect all those species that are endangered [or threatened]." *Alabama-Tombigbee*, 477 F.3d at 1275.

As noted in the previous section, Plaintiff's suggestion that the extension of Section 9 prohibitions to all intrastate species, including the prairie dog, is not necessary for the

implementation of the ESA is easily dismissed. Although Defendants argue that the protection of all listed species is necessary, the Supreme Court has rejected the notion that the means selected by Congress must be "absolutely necessary." *Comstock*, 560 U.S. at 134 ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power." (citation omitted)). Because extending protections to all threatened and endangered species is essential to the ESA, the Court should reject Plaintiff's arguments that the rule should be excised from the ESA's larger scheme.

C. PETPO's Complaints Regarding the Substance of the Rule are Irrelevant

With the law decidedly in Defendants' favor, PETPO devotes much of its brief to complaining about prairie dogs[37] and the substance of the rule, which it does not challenge. Plaintiff has not challenged FWS' scientific assessment of the methods that are necessary and advisable to conserve the prairie dog and therefore much of its commentary on the application of the rule is irrelevant to the case at hand. PETPO's assessment of the rule also contains numerous misstatements and glosses over important contextual information, which is corrected in Defendants' Background section on the rule.

CONCLUSION

For all of the reasons provided above, Defendants ask the Court to uphold the rule, granting Defendants' Cross-Motion for Summary Judgment and denying in its entirety Plaintiff's motion for summary judgment.[38]

---

[37] PETPO describes expenses and maintenance costs resulting from the presence of prairie dogs on members' property and discusses the measures that its members have voluntarily undertaken to manage prairie dogs, such as building a fence around play areas. Br. at 13. Neither the voluntary measures nor the costs resulting from prairie dog damage are caused by the rule.

[38] Should the Court determine that Congress, through FWS, exceeded its constitutional authority, Defendants would request that the Court either remand the 4(d) rule without vacatur or provide the parties an opportunity to brief remedy separately from the merits. *See PPG Indus. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) ("Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.") (citations omitted).

DATED this 17th day of January, 2014.

Respectfully Submitted,

ROBERT G. DREHER,
Acting Assistant Attorney General
SETH M. BARSKY, Chief
KRISTEN L. GUSTAFSON,
Assistant Chief

/s/ Mary Hollingsworth
MARY HOLLINGSWORTH
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Phone: (202) 305-0324
Fax: (202) 305-0275
Email: mary.hollingsworth@usdoj.gov

Attorneys for Federal Defendants