NO. 14-4165 (CONSOLIDATED WITH NO. 14-4151)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,
Plaintiff-Appellee,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,
Federal Defendants-Appellants,

and

FRIENDS OF ANIMALS,
Intervenors-Defendants-Appellants.

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

REPLY BRIEF FOR THE U.S. FISH AND WILDLIFE SERVICE ET AL.

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The question presented is whether the Section 4(d) Rule falls within Congress's power to regulate intrastate activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). This presents the Court with a modest task. It "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22 (*citing Lopez*, 514 U.S. at 557). For the multiple reasons set forth in the U.S. Fish and Wildlife Service's (Service's) Opening Brief, the Section 4(d) Rule easily passes muster under this deferential standard. In contending otherwise, People for the Ethical Treatment of Property Owners (PETPO) and a number of amici ask the Court to analyze the Rule in a vacuum, divorced from the comprehensive regulatory scheme of which it is an essential part, and further to turn a blind eye to much of the activity that the Rule itself regulates. PETPO also argues that upholding the Rule would eviscerate all limits on federal power. For the multiple reasons set forth below, PETPO's arguments are without merit, and fail entirely to refute the conclusion that the requisite rational basis exists.

ARGUMENT

The Section 4(d) Rule Regulates Activities that Are Part of an Economic Class of Activities that Have a Substantial Effect on Interstate Commerce

The Section 4(d) Rule is constitutional because it regulates activities that are part of an economic class of activities that have a substantial effect on interstate commerce. *Raich*, 545 U.S. at 17 (*citing Perez v. United States*, 402 U.S. 146, 151 (1971)); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942). As set forth in the Service's Opening Brief, four factors are considered in assessing whether Congress had "a rational basis to find that the regulated activity, taken in the aggregate, would substantially affect interstate commerce." *United States v. Patton*, 451 F.3d 615, 623 (10th Cir. 2006) (*citing Raich*, 545 U.S. at 22). Opening Brief at 29 (setting forth factors).

PETPO concedes that the Section 4(d) Rule regulates "some" economic activity, and further concedes that the most serious form of "take" regulated by the Endangered Species Act (ESA)—killing listed species—is likely to be the result of economic activity. PETPO's Answering Brief (PETPO Brief) at 14, 17. Nonetheless, PETPO contends that the heavy presumption of constitutionality afforded to statutes that are directed at commercial or economic activity does not apply because the 4(d) Rule "prohibits *any* activity—regardless of its nature—that effects [sic] any Utah prairie dog," except as specifically authorized. PETPO Brief at 13. PETPO also asks the Court to ignore the ESA's comprehensive regulation of take as well as much of the activity that the Rule itself regulates in analyzing whether the regulated activity

substantially affects interstate commerce. PETPO's arguments find no support in the case law and should be rejected. In the alternative, the Section 4(d) Rule passes constitutional muster even when viewed through PETPO's severely limited lens.

A. The Heavy Presumption of Constitutionality Afforded to Statutes Directed at Commercial or Economic Activity Applies.

Where the activity at which the statute is directed is commercial or economic, there is a "heavy—perhaps in reality irrebuttable—presumption that it affects more states than one, and falls within congressional power." *Patton*, 451 F.3d at 623. PETPO asserts that the Section 4(d) Rule must be evaluated "on its face" to determine whether this presumption applies and that, so evaluated, the presumption does not apply because, even though the Rule regulates "some" economic activity, it is not expressly limited to such activity. PETPO Brief at 12-13. PETPO urges the Court to define the "regulated activity" as Utah prairie dog "take" and to analyze it in a vacuum, divorced from both the ESA's comprehensive regulation of take and the activities restricted by the 4(d) Rule itself. PETPO Brief at 16 & n.12 (arguing that the Court should not consider the commercial activities restricted by the Rule). Yet, PETPO focuses on the activities restricted when it identifies the following examples of "noneconomic activities" regulated by the Rule: a child who throws a rock at a Utah prairie dog; a driver who hits a Utah prairie dog on the road; a homeowner who moves a Utah prairie dog that has been struck by a car in front of her home; and a person who catches a Utah prairie dog to transport it to a conservation area. PETPO

Brief at 14-15. A number of amici that support PETPO similarly argue that the ESA and the Section 4(d) Rule regulate non-economic activity because their restrictions on take are not limited to commercial transactions, phrased in terms of commercial transactions, or both.[1] This argument fails for multiple reasons.

First and foremost, the relevant question is not whether the ESA and the Section 4(d) Rule are tailored perfectly to encompass economic activity and economic activity alone, but instead whether "the activity at which the statute is *directed* is commercial or economic." *Patton*, 451 F.3d at 623 (emphasis added). Congress is not required to "legislate with scientific exactitude." *Raich*, 545 U.S. at 17. "When Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class." *Id.* (*citing Perez*, 402 at 154-55) (citation omitted). Related to this, where "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." *Lopez*, 514 U.S. at 558 (quoted in Raich, 545 U.S. at 17).

The applicable standard poses a significant problem for PETPO because it is evident that the activity at which the ESA and the Section 4(d) Rule are *directed* is commercial or economic, in stark contrast to the violent criminal activity at which the

[1] *See* Brief Amicus Curiae of U.S. Senators Mike Lee et al. at 4, 11-14; Brief Amicus Curiae of National Association of Homebuilders (NAHB Brief) at 9-11; Brief Amicus Curiae of U.S. Chamber of Commerce (Chamber of Commerce Brief) at 9.

statutes at issue in *Lopez*, *Morrison*, and *Patton* were directed. This is the second, related problem with PETPO's argument—*no* case supports the proposition that the mere fact that a statute reaches some noncommercial activity means that the statute is not directed at commercial or economic activity. Further, *no* case supports the proposition that this determination should be based on the provision challenged considered in a vacuum, divorced from the broader statute of which it is a part. The statutes considered in the cases on which PETPO relies are simply of a completely different nature and scope than the ESA.

In *Lopez*, the Supreme Court held that the Gun-Free School Zones Act of 1990 (GFSZA), which made it a federal crime to possess a gun in a school zone, "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551. Importantly, the Court did not turn a blind eye to the GFSZA as a whole in analyzing the constitutionality of the specific provision challenged, 18 U.S.C. § 922(q)(1)(A), but instead determined that the GFSZA did not constitute a larger regulation of economic activity, such that the provision could not "be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[2] *Id.* at 561.

[2] Nor did the Court ignore the activities the statute actually restricted in the case before it, as PETPO advocates here. Instead, the Court observed that the

In *United States v. Morrison*, 529 U.S. 598 (2000), the Court similarly looked to the object of the Violence Against Women Act, of which the challenged provision creating a federal remedy was a part, when it opined that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 605, 613. While the Court did mention that "Congress elected to cast [the provision's] remedy over a wider" body of crime than that affecting interstate commerce, it did so in the course of explaining that the statute lacked a jurisdictional hook—the second factor—and *not* in determining whether the statute was directed at commercial or economic activity. *Id.* at 598-99.

In *Patton*, this Court found that a statute criminalizing the possession of body armor by a felon, which was not part of a comprehensive regulatory scheme, was not directed at commercial or economic activity. 451 F.3d at 625. Applying *Lopez*, the Court stated that "[w]e can think of no reason that mere possession of body armor by a felon would be deemed commercial when the mere possession of a firearm near a school was not." *Id.* Then, recognizing that the Supreme Court interpreted the contours of the inquiry in *Raich* "by reference to 'economics' rather than 'commerce' and included the 'consumption of commodities' as well as their production and distribution within that definition," the Court went on to consider whether the possession could be described as "consumption." *Id.* (citation omitted). The Court

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"Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce . . ." *Id.* at 567.

explained that consumption is "the act of destroying a thing by using it; the use of a thing in a way that thereby exhausts it," and found that "possessing or wearing body armor neither destroys nor exhausts it." *Id.* (citation omitted).

The activity at which the ESA and the Section 4(d) Rule are directed is readily distinguishable from the activity at which the criminal statutes in the foregoing cases were directed. As explained in the Service's Opening Brief at 31-39, the ESA is a comprehensive resource-conservation statute that at once protects listed species from take and restricts commercial activities from taking listed species. Thus, even assuming PETPO has properly characterized the provisions challenged in *Lopez* and *Morrison* as components of "'scheme[s]' to regulate crime," PETPO Br. at 34, the statutory scheme that PETPO challenges here—the ESA—"is at the opposite end of the regulatory spectrum."[3] *Raich*, 545 U.S. at 24. The courts of appeals that have opined on the regulated activity in the ESA context have not all focused on the same side of the resource-conservation coin, but they all concluded that the nature of the regulated activity *is* commercial or economic. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634, 640 (5th Cir. 2003) (species and biodiversity protection); *Gibbs v.*

[3] It is not at all clear that PETPO's characterization is accurate. As Justice Scalia explained in his concurrence in *Raich*, "neither [*Lopez* nor *Morrison*] involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation; *Lopez* expressly disclaimed that it was such a case, and *Morrison* did not even consider the possibility that it was." *Raich*, 545 U.S. at 39 (Scalia, J., concurring).

Babbitt, 214 F.3d 483, 492 (4th Cir. 2000) (commercial activities restricted); *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003) (same).

Quite simply, regardless of whether the regulation of take is viewed through a protective lens, a restrictive lens, or both, the nature of the regulated activity is commercial or economic. Taking listed species is consumptive because it depletes the valuable resources that Congress sought to protect in the ESA, including the listed species themselves, the ecosystems on which they depend, and biodiversity. Accordingly, even if take is considered apart from the context in which it occurs as PETPO advocates, taking listed species *is* economic activity. Further, though, this consumption occurs primarily in the course of commercial activities. As the Fifth Circuit recognized in *GDF Realty*, "[a]side from the economic effects of species loss, it is obvious that the majority of takes would result from economic activity." 326 F.3d at 639. A number of amici that support PETPO further illustrate this point through the effects of ESA regulation they identify, which are limited neither to Utah nor to the Section 4(d) Rule. *See* NAHB Brief at 1 (national trade association members throughout the United States are subject to ESA regulation "[t]hrough the regular course of operating their businesses"); Chamber of Commerce Brief at 21 (arguing that the Court "should not lose sight of the significant economic ramifications [that ESA enforcement] has on the business community," yet should not consider these effects when conducting the substantial-effects analysis).

"The most fundamental guide to statutory construction is common sense." *Salt Lake City v. Western Area Power Admin.*, 926 F.2d 974, 984 (10th Cir. 1991). The third problem with PETPO's argument is that it would require the Court to abandon its common sense in evaluating the activity at which the ESA and the Section 4(d) Rule are directed. Even under the severely limited facial analysis that PETPO advocates, which involves looking only at the text of the Section 4(d) Rule and ignoring both the ESA's comprehensive regulation of take and PETPO's activities restricted by the Rule, PETPO Brief at 12 n.9, it is apparent that the Rule is directed at conserving valuable resources, and that the take it restricts occurs primarily in the course of commercial activities. As such, the Rule is directed at commercial or economic activity. As the Fourth Circuit succinctly stated in *Gibbs*, "[o]f course natural resource conservation is economic and commercial." 214 F.3d at 506.

The Court need not conduct such a limited analysis, however, and may also take into account that the "severe burdens" of which PETPO complains are almost exclusively burdens on its commercial activities.[4] PETPO Brief at 3. PETPO makes

[4] Accordingly, the Court need not "hazard a guess" as to how often take would occur in the course of commercial activity. PETPO Brief at 15. PETPO complains almost exclusively of harm to its various commercial enterprises, yet asks the Court to ignore these impacts when analyzing the constitutional question. The Court should reject PETPO's attempt to "have its cake and eat it too". *Rancho Viejo*, 323 F.3d at 1077 (rejecting the plaintiff's similar attempt to prevent the D.C. Circuit from considering the activities restricted by characterizing its claim as a facial challenge). Moreover, PETPO's "overbreadth" argument is particularly misplaced in light of its characterization of its claim as a facial challenge because, to prevail on such a challenge, the plaintiff must demonstrate that there are no set of circumstances under

no argument, nor could it, that the hypothetical violent child who throws a rock at a Utah prairie dog, driver who strikes one on the road, woman who moves one that has been struck in front of her home, or person who transports one to a conservation area, are the actors at which the Rule is directed or those that are primarily restricted by it. Of course, no such actors are before the Court. Rather, PETPO's members complain primarily of restrictions on their efforts to develop property for sale, start businesses, and operate recreational facilities, an airport, and a cemetery. PETPO Brief at 3. PETPO's argument that the Section 4(d) Rule is analogous to the statute at issue in *Morrison* because "[e]ach forbids violent activities, only against different objects," PETPO Brief at 13, is specious. The criminal statutes at issue in *Lopez*, *Morrison*, and *Patton* did not have as their primary object the conservation of valuable natural resources, nor did they restrict commercial actors and activities from destroying those resources. Whereas in *Morrison*, "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus," 529 U.S. at 611, here both the actors and their conduct have a commercial character, and both the purposes and design of the ESA

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which the challenged statute would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (cited in *Rancho Viejo*, 323 F.3d at 1077). The same standard applies to facial challenges to regulations. *Reno v. Flores*, 507 U.S. 292, 301 (1993); *Scherer v. United States Forest Service*, 653 F.3d 1241 (10th Cir. 2011). Here, PETPO's own set of circumstances is one in which the Section 4(d) Rule is valid.

and the Section 4(d) Rule have an evident commercial nexus. The first-factor heavy presumption of constitutionality accordingly applies.

B. *The Link Between the Regulated Activity and Interstate Commerce Is Direct and Substantial.*

Even if the Court were to conclude that the ESA and the Section 4(d) Rule are not directed at commercial or economic activity, an examination of their effects reveals the requisite link between the regulated activity and interstate commerce. *Patton*, 451 F.3d at 625 (negative first-factor determination "does not end the inquiry, but it does channel [the] analysis" to evidence of the statute's effects). The question is "not whether, [the Court], as judges, . . . believe[s] the challenged statute has a substantial effect on interstate commerce, but whether Congress could reasonably have thought so." *Id.*

1. *The Proper Scope of the Inquiry Is the ESA's Effects as a Whole.*

As set forth in the Service's Opening Brief, the ESA and the Section 4(d) Rule have numerous, direct, and substantial effects on interstate commerce, both protective and restrictive. Contrary to PETPO's argument, the proper scope of this analysis is the ESA's effects, and not merely the Section 4(d) Rule's effects. This is because Congress has the authority "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (*citing Perez*, 402 U.S. at 151); *Wickard*, 317 U.S. at 128-29. The question is accordingly whether the class of activities regulated by the ESA is within

the reach of federal power. *Perez*, 402 U.S. at 154. A determination that the specific subset of activities carved out by PETPO falls within the definition of "commerce" is not a prerequisite to conducting the proper constitutional analysis. As the Supreme Court explained in *Wickard*, "even if appellee's activity be local and *though it may not be regarded as commerce*, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce." 317 U.S. at 125 (emphasis added) (*quoted in Raich*, 545 U.S. at 17).

The applicable standard again poses a significant problem for PETPO because, "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." *Perez*, 402 U.S. at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)); *see also Raich*, 545 U.S. at 22. PETPO argues that it does not impermissibly ask the Court to "excise individual applications of a concededly valid statutory scheme" because, similar to the defendants in *Lopez* and *Morrison*, it brings a facial challenge, rather than an as-applied challenge like the one brought in *Raich*. PETPO Brief at 28 (*quoting Raich*, 545 U.S. at 23). This argument fails because it again elevates form over substance and finds no support in the case law.

As discussed *supra* at 5-6, the Supreme Court's decisions in *Lopez* and *Morrison* hinge on the nature and reach of the statute at issue, and not on the scope of the plaintiff's specific challenge. In *Raich*, the Court evaluated the class of activities regulated by the Controlled Substances Act (CSA), and not merely those within the

scope of the plaintiffs' challenge. 545 U.S. at 24 (stating that Congress's classification of marijuana as a Schedule I substance, "unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'") (citation omitted). Indeed, the Court faulted the court of appeals for "isolating a separate and distinct' class of activities" where Congress had made a different choice. *Id.* at 26.

The Section 4(d) Rule is indisputably an application of the ESA, and in particular of ESA Section 4(d), which authorizes the Service to regulate the take of threatened species. 16 U.S.C. § 1533(d). The ESA, Section 4(d), and the Section 4(d) Rule challenged here all reflect Congress's choice to protect listed species and the ecosystems on which they depend on both federal and non-federal land, regardless of whether the species cross state lines or are bought and sold. Because the majority of listed species occur only within one state, and because species are interdependent (another fact that readily distinguishes the ESA from the criminal statutes at issue in *Lopez* and *Morrison*), this protection is an essential part of the scheme. Accordingly, the scheme is the proper focus of the inquiry. While this principle was most recently applied in *Raich*, it has a long history. *See Perez*, 402 U.S. at 151-53 (recounting the history of the 'class of activities' principle through ten Supreme Court decisions); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1276 (11th Cir. 2007). As the Supreme Court explained in *Hodel v. Indiana*:

> A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

452 U.S. 314, 329 n.17 (1981). As each of the five circuits to consider the question has found, the ESA is a "general regulatory statute" bearing "a substantial relation to commerce." *Gibbs*, 214 F.3d at 497; *en Realty*, 326 F.3d at 640; *Rancho Viejo*, 323 F.3d at 1073; *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176 (9th Cir. 2011); *Alabama-Tombigbee*, 477 F.3d 1270 at 1273; *Nat'l Ass'n of Homebuilders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997). Accordingly, each of the five circuits also correctly refused to limit its effects analysis to the effects of the specific ESA application challenged. *San Luis*, 638 F.3d at 1175-77 ("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.'") (citation omitted); *Alabama-Tombigbee*, 477 F.3d at 1273-74 (discussing "'[t]he commercial impact of the [ESA]"); *GDF Realty*, 326 F.3d at 638-40; (aggregating takes of the species at issue with takes of all listed species); *Gibbs*, 214 F.3d at 497 (finding that takes of red wolves in the aggregate had a significant impact on interstate commerce, and further that the challenged regulation was independently sustainable on the ground that it was an

essential part of a larger regulation of economic activity that could be undercut if the intrastate activity were not regulated); *NAHB*, 130 F.3d at 1046 ("In evaluating whether ESA Section 9(a)(1) is a regulation . . . of activity that substantially affects interstate commerce, we may look not only to the effect of the extinction of the individual endangered species at issue in this case, but also to the aggregate effect of the extinction of all similarly situated endangered species."). In *Gibbs*, the Fourth Circuit rejected an argument nearly identical to PETPO's argument here that it should "excise [from the ESA] as unconstitutional a disfavored [regulation]" governing take of a single species. 214 F.3d at 498. As it explained, "given that Congress has the ability to enact a broad scheme for the conservation of endangered species, it is not for the courts to invalidate individual regulations." *Id.*

2. *In the Alternative, the Link Between the Activity Regulated by the Section 4(d) Rule Alone and Interstate Commerce Is Direct and Substantial.*

For the reasons set forth in the Service's Opening Brief at 34-38 and supported by the record, the link between the activity regulated by the Section 4(d) Rule itself and interstate commerce is direct and substantial. PETPO argues that the Rule's protective effects are indirect and attenuated, and does not address its restrictive effects at all, resting on the argument that they are outside the purview of the effects the Court should consider. PETPO Brief at 16 n.12 (arguing the Court should not consider the context in which Utah prairie dog take occurs), 18-27 (protective effects). Again, PETPO relies almost exclusively on *Lopez* and *Morrison*, and again this reliance

is misplaced. The criminal statutes at issue in *Lopez* and *Morrison* sought neither to conserve valuable natural resources nor to restrict commercial activities from depleting those resources. In both cases, the Supreme Court rejected the argument that the crime regulated had the requisite impact on interstate commerce because the costs of crime are substantial, and are borne by the national population through various means, including higher insurance rates, less effective schools, and ultimately a less productive national citizenry. *Lopez*, 514 U.S. at 563-64; *Morrison*, 529 U.S. at 615-16.

Here by contrast, while Congress was evidently concerned about the costs of species and biodiversity loss on the nation when it enacted the ESA, the specific activity regulated by the Section 4(d) Rule also has numerous, direct, and substantial effects on interstate commerce. In short, the Rule conserves the Utah prairie dog, which is: a keystone species of the western grassland ecosystem; of interest to wildlife viewing tourists and photographers who travel interstate; and a subject of scientific research, an interstate market. Opening Brief at 10-12, 35; Aplt. App. 65, 101-34, 173-180; *Gibbs*, 214 F.3d at 494. It also preserves the ecosystem on which the species depends. Further, the Rule directly restricts a number of commercial activities, which is evident both from the face of the Rule and from the restrictions of which PETPO complains. Op. PETPO Brief at 36; 50 C.F.R. § 17.40(g)(2), (4), and (5); 77 Fed. Reg. 46,158, 46,168 (Aug. 2, 2012).

C. *The Section 4(d) Rule Does Not Intrude Into a Traditional Area of State Authority.*

PETPO and some amici also incorrectly contend that the Section 4(d) Rule impermissibly encroaches on Utah's traditional authority over its resident wildlife. PETPO Brief at 20-21; Brief of the State of Utah et al. as *Amici Curiae* (States' Brief) at 12. "Although States have important interests in regulating wildlife and natural resources within their borders, *this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers*." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (emphasis added).

The Federal Government exercised its commerce authority to enact the ESA after state and more limited federal efforts proved to be inadequate. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174-79 (1978) (recounting history). In the Act, Congress continued its approach of stepping in only as necessary. States retain full management authority over their resident wildlife so long as the wildlife is sufficiently protected that it does not become threatened or endangered. In determining whether a species meets the ESA's criteria for listing, the Service is required to take into account "those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect [the] species." 16 U.S.C. § 1533(b)(1)(A). Once species are listed, the state may continue to play an important role. Where specified criteria are met, the ESA authorizes the Service to enter into a cooperative agreement with any state for the purposes of conserving endangered and

threatened species; entering into such an agreement makes the state eligible for grants from the Service to carry out such conservation. 16 U.S.C. § 1535(c)(1). And, once a species recovers and is removed from the ESA's protection, full management authority is returned to the state.

Endangered species protection is properly addressed at the national level because:

> Species conservation may unfortunately impose additional costs on private concerns. States may decide to forego or limit conservation efforts in order to lower these costs, and other states may be forced to follow suit in order to compete. The Supreme Court has held that Congress may take cognizance of this dynamic and arrest the "race to the bottom" in order to prevent interstate competition whose overall effect would damage the quality of the national environment.

Gibbs, 214 F.3d at 501. The Supreme Court has consistently upheld Congress's authority to prevent interstate competition from causing various harms, including destruction of the natural environment. Most analogously, in *Hodel v. Virginia Surface Mining and Reclamation Association*, the Supreme Court upheld provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), where Congress had found that nationwide standards were necessary to prevent interstate competition among sellers of coal from causing states to forego improving and maintaining adequate coal mining standards within their borders. 452 U.S. 264, 281-82 (1981). PETPO argues that *Hodel v. Virginia* is distinguishable because SMCRA expressly regulated an economic activity (coal mining) and the 4(d) Rule does not, PETPO Brief at 14; but the salient point is that the ESA and the Section 4(d) Rule, like SMCRA, establish a

uniform floor of environmental protection below which states might otherwise go in the course of competing with other states to attract and retain business. "The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." *Hodel v. Virginia*, 452 U.S. at 282; *see also United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding a prohibition on the interstate shipment of goods produced in violation of the Fair Labor Standards Act to prevent interstate competition from fueling substandard labor conditions).

Here, Utah developed and implemented its own Utah Prairie Dog Management Plan for Non-Federal Lands (Utah Plan), in the wake of the district court's judgment. Brief of the States of Utah et al. as Amici Curiae (States' Brief) at 13-16. The states contend that the Utah Plan should control because Congress "may not intrude on wildlife preservation and management at the state level unless Congress has clearly indicated, pursuant to an enumerated constitutional power, the federal law should have such reach." States' Brief at 13. This argument misses the mark entirely because Congress and the Service *did* clearly indicate pursuant to an enumerated power that federal law should reach threatened species in the ESA and the Section 4(d) Rule. Congress does not lose its commerce power to protect valuable resources from interstate competition merely because a state enacts legislation that purports to be adequately protective. *See National League of Cities v. Usery*, 426 U.S. 833, 840 (1976); *Raich*, 545 U.S. at 41 (Scalia, J., concurring)). Even if the Utah Plan were adequate to conserve the Utah prairie dog, which it is not, this would not undercut Congress's

determination that the conservation of endangered and threatened species, as opposed to the regulation of wildlife generally, is necessary to prevent depletion of these scarce resources.

Further, the Utah Plan exemplifies the bidding-down dynamic discussed above. Its goal is "*[t]o remove restrictions from private property through a timely and structured process* while assisting in the conservation of populations on designated federal and protected non-federal lands."[5] Utah Plan at 1 (emphasis added). In a number of respects, it is less protective than the Section 4(d) Rule. For example, the Utah Plan exempts from all permitting requirements any private property not mapped as Utah prairie dog habitat according to the 2014 spring count survey, whereas the Section 4(d) Rule applies wherever Utah prairie dogs occur. Utah Plan at 12. The Utah Plan also establishes an annual *minimum* take limit of 6,000 Utah prairie dogs for development and agricultural/rangewide purposes; that limit can increase but not decrease based on spring population counts. Utah Plan at 13. By contrast, and based on the Service's evaluation of the available scientific literature and decades of experience implementing previous Utah prairie dog Section 4(d) rules, the 4(d) Rule establishes an annual take limit of 10% of the species' annual range-wide population on agricultural lands and lands within one-half mile of conservation lands. 50 C.F.R. § 17.40(g)(2)(3); 77 Fed. Reg. 46,158, 46,174-75. The Section 4(d) Rule thus ensures that take is reduced in low

[5] Utah has made the full plan, which took effect on May 8, 2015, available at http://wildlife.utah.gov/learn-more/prairie-dogs.html (last visited June 7, 2015).

population years; the Utah Plan does not.[6] Further, the Utah Plan does not require Utah prairie dog losses due to residential or commercial development to be minimized or offset, whereas the ESA requires impacts of take from non-federal activities to be minimized and mitigated through Habitat Conservation Plans. 16 U.S.C. § 1539(a)(1)(B).

"In circumstances where [Utah prairie dogs] create human health, safety and welfare hazards," the Utah Plan authorizes unlimited take so long as prior notice is provided to the Utah Division of Wildlife Resources. Utah Plan at 13. More protectively, the Section 4(d) Rule authorizes take in areas where Utah prairie dogs create human safety hazards or disturb the sanctity of significant human cultural or human burial sites, with the Service's approval, after all practicable measures to reduce the conflict have been implemented. 50 C.F.R. § 17.40(g)(4). The Utah Plan also provides for the piecemeal removal of take restrictions before all criteria for the species' recovery under the ESA are met; the Section 4(d) Rule does not. Specifically, if the three-year average spring count within a Recovery Unit reaches 2,000 adult animals, the Utah Plan would remove all restrictions on take on non-federal lands within that Recovery Unit. Utah Plan at 13. The five criteria for the Utah prairie dog's recovery under the ESA include numerical and demographic goals of at least

[6] As applied to the species' total population estimates from 1976 through 2010 (by way of example, as this data is in the record), the Section 4(d) Rule's 10% take limit would have ranged from 1,343 to 5,419 takes. Aplt. App. 54, 59.

2,000 adult animals in each Recovery Unit within protected habitat (a minimum of 5,000 acres that are spatially distributed to provide sufficient connectivity and gene flow within the unit) for five consecutive years. Aplt. App. 41.

Overall, it is clear that, in Utah's view, the level of protection afforded at the federal level under the ESA and the Section 4(d) Rule is too high. States' Brief at 5 (stating, despite the Utah prairie dog's threatened status under the ESA, that it is "far from endangered, and perhaps no longer even threatened"). This difference in opinion underscores that, in preventing Utah from lowering its standards beneath the federal floor, Congress and the Service acted well within their traditional federal role.

D. *Upholding the Section 4(d) Rule Would Not Eviscerate All Limits on Federal Power.*

PETPO is also wrong in its repeated contention that upholding the Section 4(d) Rule would eviscerate all limits on federal power. PETPO Brief at 6, 22-24, 27-28, 31, 37-44. The ESA and the Section 4(d) Rule permit the exercise of federal power only to conserve threatened and endangered species. This is a meaningful limit because, as discussed above, it allows the federal government to establish and maintain a national floor, a traditional federal function, but not to assume general, police power responsibility for all wildlife within a state's borders. *See Gibbs*, 214 F.3d at 503-04; *NAHB*, 130 F.3d at 1052 n.10 (identifying stopping points of rationales based on preserving biodiversity and preventing destructive interstate competition). The ESA's criteria for listing species as endangered or threatened are strict, and the

determinations must be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(a)(1); (b)(2). If PETPO believes that the Utah prairie dog no longer meets the ESA's definition of a threatened species, it may petition the Service to delist the species. Assuming the Utah prairie dog is eventually delisted, the Service's authority to manage it will cease and full management responsibility will be returned to Utah.

Under the third *Lopez* category at issue here, Congress has the power to regulate "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-89. This is a meaningful limit on federal power, but it is not susceptible to bright-line distinctions. Rather, as this Court has recognized, "[c]onsideration of effects necessarily involves matters of degree." *Patton*, 451 F.3d at 622. Further:

> If [the Court] entertain[s] too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless. If [the Court] entertain[s] too narrow an understanding, Congress is stripped of its enumerated power, reinforced by the Necessary and Proper Clause, to protect and control commerce among the several states. If [the Court] employ[s] too nebulous a standard, [it] exacerbate[s] the risk that judges will substitute their own subjective or political calculus for that of the elected representatives of the people, or will appear to be doing so.

Id. at 622-23. For the reasons discussed in the Service's Opening Brief and above, the activities regulated by the ESA and the Section 4(d) Rule have numerous, direct, and substantial effects on interstate commerce. In contending otherwise, it is PETPO that advocates an understanding of effects that would eviscerate a traditional distinction between state and federal power. If the federal government's authority to

prevent destructive interstate competition from depleting scarce natural resources depends on whether the specific resource, at the time of regulation, is a valuable commodity, occurs interstate, or both, then the federal government's traditional role in this arena would be subject to a new, significant, judicially-created limit that finds no support in precedent. *See Gibbs*, 214 F.3d at 504-06. This Court should reject PETPO's invitation to create such a limit, as "[i]t is as threatening to federalism for courts to erode the historic national role over scarce resource conservation as it is for Congress to usurp traditional state prerogatives in such areas as education and domestic relations." *Id.* at 505.

E. NFIB v. Sebelius *Casts No Doubt on the Constitutionality of the Section 4(d) Rule.*

Finally, PETPO and its amici also rely heavily on *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (*NFIB*), in which the Supreme Court upheld the Patient Protection and Affordable Care Act's (PPACA's) "individual mandate," which requires individuals to purchase health insurance policies meeting certain requirements, as a valid exercise of Congress's taxing power, and in which at least five Justices further opined that the mandate was not a valid exercise of the commerce or necessary-and-proper powers. 132 S. Ct. at 2585-601 (Roberts, C.J.), and *id.* at 2645-48 (Scalia, J., dissenting). This reliance is misplaced for multiple reasons. First and foremost, the Commerce Clause and Necessary and Proper Clause discussions are dicta. As this Court and others have recognized, "*NFIB* provides, 'no

controlling opinion on the issue of whether provisions of the Affordable Care Act violated the Commerce Clause.'" *United States v. White*, 782 F.3d 1118, 1124 n.3 (10th Cir. 2015) (quoting *United States v. Anderson*, 771 F.3d 1064, 1068 n.2 (8th Cir. 2014) and citing *United States v. Robbins*, 729 F.3d 131, 135 (2d Cir. 2013)).

Even if the opinions contained a relevant holding, which they do not, they would provide no support for PETPO's position. Both Chief Justice Roberts's separate opinion and the dissent find that the individual mandate could not be sustained under the Commerce Clause because the mandate does not regulate existing commercial activity, but instead compels such activity. *Id.* at 2586-91 (opinion of Roberts, C.J.); *id.* at 2647-49 (Scalia, J., dissenting). Both opinions further find that the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of PPACA's insurance reforms because, based on the prior conclusion that the mandate regulates no commercial activity, it is too broad to constitute a narrow exercise of power incidental to Congress's commerce authority. *Id.* at 2592 (opinion of Roberts, C.J.); *id.* at 2646-47 (Scalia, J., dissenting). Here by contrast, the ESA and the Section 4(d) Rule do not compel anyone to purchase something or to otherwise become active in commerce. Instead, as discussed in the Service's Opening Brief at 47 and *supra* at 7-10, and illustrated by the facts of this case, they conserve listed species principally through restrictions on commercial activities. Here for example, it is by their activities that PETPO's members have brought

themselves "within the sphere of federal regulation." *Id.* at 2592 (Roberts, C.J.) (opining on the permissible reach of the Necessary and Proper Clause).

To the extent non-commercial or non-economic activity is reached by the ESA and the Section 4(d) Rule, that activity is but a small portion of the whole, and its regulation is a rationally related means of exercising Congress's commerce power. In *NFIB*, the Chief Justice reiterated that "Congress can anticipate the *effects* on commerce of an economic activity." *Id.* at 2590 (emphasis in original) (citing cases). While it is PETPO's opinion that excising federal protection of the Utah prairie dog from the ESA would not frustrate the federal government's ability to regulate any market, PETPO Br. at 36, "[i]t is simply not beyond the power of Congress to conclude that a healthy environment actually boosts industry by allowing commercial development of our natural resources." *Gibbs*, 214 F.3d at 496. If Congress is unable to conserve potentially valuable endangered and threatened species, the ecosystems on which they depend, and biodiversity, in the numerous instances in which the protected species are not currently traded or do not currently occupy a multi-state range (via means that principally restrict commercial activities), the ESA's comprehensive regulatory scheme would be seriously undercut.

Contrary to PETPO's contention, *NFIB* does not alter the fact that the limited question before the Court is whether Congress had "a rational basis to find that the regulated activity, taken in the aggregate, would substantially affect interstate

commerce." *Patton*, 451 F.3d at 623 (citation omitted). Nor does it alter the fact that the answer is yes.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the applicable volume limitations because it is proportionally spaced and contains 6,977 words. I certify that the information on this form is true and correct to the best of my and knowledge and brief formed after a reasonable inquiry.

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