Case No. 14-4151

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

FRIENDS OF ANIMALS,
Defendant-Intervenor-Appellant,

v.

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

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

BRIEF *AMICI CURIAE* OF DEFENDERS OF WILDLIFE, ANIMAL WELFARE INSTITUTE, CENTER FOR BIOLOGICAL DIVERSITY, HUMANE SOCIETY OF THE UNITED STATES, SIERRA CLUB, AND WILDEARTH GUARDIANS IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* certify as follows:

Defenders of Wildlife, Animal Welfare Institute, Center for Biological Diversity, Humane Society of the United States, Sierra Club, and WildEarth Guardians are non-profit corporations registered with the Internal Revenue Service.

The above organizations assert that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respectfully submitted this 20th day of April 2015.

By: /s/ Jason C. Rylander
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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

This brief is submitted with all parties' consent in accordance with Federal Rule of Appellate Procedure 29 and the rules of this Court.

Defenders of Wildlife is dedicated to protecting all native wild animals and plants in their natural communities, and preserving the habitat on which they depend. As intervenor or *amicus curiae*, Defenders has successfully defended federal wildlife protections from constitutional challenges in the Fourth, Fifth, Ninth, Eleventh, and District of Columbia circuits.

The Animal Welfare Institute is dedicated to alleviating the suffering caused to animals by people and to protecting species threatened with extinction. AWI works to safeguard endangered or threatened wild animals and their habitats and to implement humane solutions to human-wildlife conflict.

The Center for Biological Diversity works through science, law, and policy to secure a future for all species on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States.

The Humane Society of the United States' work on behalf of animals includes the protection of vulnerable wildlife species. HSUS coordinates the Prairie Dog Coalition—an alliance of non-profit organizations, concerned citizens, and scientists dedicated to the protection of imperiled prairie dogs and restoration of their ecosystems. HSUS and the Coalition participate in government decision-

making processes, land-use planning efforts, and prairie dog conservation and relocation projects to promote protection of prairie dogs.

The Sierra Club creates opportunities for people of all ages, levels, and locations to have meaningful outdoor experiences and works to safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and litigation.

WildEarth Guardians protects and restores the wildlife, wild places, wild rivers, and health of the American West. Guardians has used litigation, education, and collaborative management tools to protect prairie dogs for almost 20 years.

Representing millions of members across the country, *Amici* support the longstanding ability of Congress to protect imperiled wildlife under the Constitution through the Endangered Species Act and other federal laws.[1]

[1] No party or party's counsel authored this brief in whole or in part. No person, party or counsel—other than the *Amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

The Utah prairie dog (*Cynomys parvidens*) is precisely the kind of species Congress designed the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., to conserve. Driven to the brink of extinction by what has been called "a calculated genocide,"[2] this highly social keystone herbivore found only in south-central and southwest Utah declined from a historic population of 95,000 to fewer than 2,100 animals in the 1970s.[3] Under the protection of the ESA, however, it has begun to recover; its range-wide population is now roughly 40,000, raising hopes that the ESA's temporary protections may one day be unnecessary. 77 Fed. Reg. 46,158, 46,169 (Aug. 2, 2012).

In approving the ESA, a nearly unanimous Congress recognized that America's wildlife heritage was at risk from commercial and recreational exploitation and that such losses posed incalculable burdens on future generations. With a mandate to conserve *all* species wherever they are found, the law reflects the prudent, rational, and scientific view that species like the Utah prairie dog are worth saving both inherently and as components of larger ecosystems, even if we do not fully understand their ecological or economic importance.

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[2] Theodore G. Manno, *The Utah Prairie Dog: Life Among the Red Rocks* 151 (2014); *id*. at 129-30, 133-36.
[3] *Id.* at 2.

Despite forty years of successful federal wildlife protection under the ESA for species great and small, the court below held for the first time that the U.S. Constitution does not permit Congress to protect wildlife on private land when the species exists in only one state and is not a commodity presently bought or sold in marketplaces. This conclusion erroneously discounts the fundamental relationship of wildlife protection to interstate commerce, misreads and ignores relevant Supreme Court precedent, and has been rejected in six cases by five federal courts of appeal.[4]

As this brief will show, Congress has the constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, to protect rare species like the Utah prairie dog. Neither *United States v. Lopez*, 514 U.S. 549 (1995), nor *United States v. Morrison*, 529 U.S. 598 (2000), prohibit Congress from protecting the nation's rich biodiversity heritage, regardless of range or present commercial value, through the ESA. Since *Lopez* and *Morrison*, every circuit court to consider the issue found

[4] *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) *cert. denied sub nom. Orchards v. Salazar*, 132 S. Ct. 498 (2011) (upholding ESA protection for the Delta smelt); *Alabama-Tombigbee Rivers Coal. v. Kempthorne* ("*ATRC*"), 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008) (Alabama sturgeon); *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004) (arroyo toad); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005) (six species of cave invertebrates); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001) (red wolves); *Nat'l Ass'n of Home Builders v. Babbitt* ("*NAHB*"), 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (Delhi Sands flower-loving fly).

that protection of species does not exceed the powers of Congress. These courts have affirmed that the ESA's constitutionality does not depend on whether the *individual species* at issue has a substantial effect on commerce, but whether Congress rationally concluded that extinction of species—irrespective of present commodity value—substantially affects interstate commerce.

Even if protection of the Utah prairie dog did not substantially affect interstate commerce, Congress can still reasonably regulate non-economic intrastate activities under the Commerce Clause, in conjunction with the Necessary and Proper Clause, U.S. Const. art. I, § 8, as part of a comprehensive scheme to address activities that in the aggregate substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1 (2005); *Lopez*, 514 U.S. at 558 ("'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.'" (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)). Under this principle, Congress may properly protect the Utah prairie dog because the ESA is a comprehensive statute that addresses the national economic impact of the extinction of *all* species, and does so in part by preserving the *noncommercial* species on which *commercial* species and the ecosystems that support life inextricably depend.

The district court's radical reinterpretation of the Commerce Clause would put judges in the position of making complex scientific and economic determinations about the value of individual species. This dangerously narrow view has no constitutional basis. In *Raich*, the Supreme Court made clear that the Commerce Clause remains, as it has been since *Gibbons v. Ogden*, 22 U.S. 1 (1824), and *Wickard v. Filburn*, 317 U.S. 111 (1942), a broad grant of power to Congress to address issues of national significance that affect and are affected by commerce.[5] Accordingly, this Court should reverse the district court's decision and uphold the ESA's constitutionality as applied to take of the Utah prairie dog.

ARGUMENT

I. The Commerce Clause Broadly Permits Regulation of Activities That Affect Interstate Commerce

Under the Commerce Clause, Congress may regulate "the channels of interstate commerce," "the instrumentalities of interstate commerce, and persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Raich*, 545 U.S. at 16-17. As the Supreme Court recently

[5] The Court majority chided the *Raich* respondents' "myopic focus" and "heavy reliance" on *Lopez* and *Morrison*, noting that they read these precedents "far too broadly." 545 U.S. at 23, 23 n.34. Similarly, Justice Scalia wrote that "those decisions [*Lopez* and *Morrison*] do not declare noneconomic intrastate activity to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation." *Id.* at 2218 (concurring).

reaffirmed, "[t]he power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578-79 (2012) ("*NFIB*") (citing *Wickard* and *Perez v. United States*, 402 U.S. 146 (1971)).[6] "Our case law firmly establishes 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*, 545 U.S. at 17.

In assessing Congress's authority under the Commerce Clause, "the task before [the Court] is a modest one." *Raich*, 545 U.S. at 22. The court "ask[s] only (1) whether Congress had a 'rational basis' for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a 'reasonable connection between the regulatory means selected and the asserted ends.'" *Hodel v. Indiana*, 452 U.S. 314, 323-324 (1981). "[The Court] need not determine whether respondents' activities, taken in the aggregate, substantially

[6] "Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others." *NFIB*, 132 S.Ct. at 2585-86; *see also id*. at 2616 (Ginsburg, J., concurring and dissenting in part) ("This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce.") (citing *Raich*, 545 U.S. at 17).

affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22. "In answering these questions, the Court presumes the statute under review is constitutional and may strike it down only on a 'plain showing' that Congress acted irrationally." *Morrison*, 529 U.S. at 607**.**

In evaluating whether Congress had a rational basis for regulating non-economic activities that may have a substantial effect on interstate commerce in the aggregate, the Tenth Circuit considers:

> whether (1) the activity at which the statute is directed is commercial or economic in nature; (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.

United States v. Patton, 451 F.3d 615, 623 (10th Cir. 2006) (citing *United States v. Grimmett*, 439 F.3d 1263, 1272 (10th Cir. 2006) (facial challenge) and *United States v. Jeronimo-Bautista*, 425 F.3d 1266, 1269 (10th Cir. 2005) (as-applied challenge)). As the *Patton* court explained,

> the first factor determines whether the regulated activity falls within the definition of "commerce." If so, in light of the substantial integration of the American economy in the past two centuries, there is a heavy—perhaps in reality irrebuttable—presumption that it affects more states than one, and falls within congressional power.

451 F.3d at 623. If the regulated activity cannot be characterized as "commercial or economic in nature," the Court looks to "the statutory text, the articulated

congressional understanding, and independent evidence of whether the activity has a substantial effect in the aggregate." *Id.* at 624. Under the precedent of this Circuit, five other circuits, and the Supreme Court, protection of endangered species must pass this test.

A. Endangered Species Protection Is Commercial and Economic

As every court to examine the issue has found, the ESA is "a general regulatory statute bearing a substantial relation to commerce." *ATRC*, 477 F.3d at 1273; *accord GDF Realty*, 326 F.3d at 640 ("ESA's take provision is economic in nature and supported by Congressional findings to that effect."); *Gibbs*, 214 F.3d at 496 (Congress could rationally find that "conservation of endangered species and economic growth are mutually reinforcing."). In the ESA, Congress drew a clear link between economic activity and the extinction of species, noting 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), and that "these species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id.* § 1531(a)(2).

Several ESA provisions directly speak to regulation of economic activity and interstate commerce: The definition of "commercial activity" includes "all activities of industry and trade" and "the buying and selling of commodities and

activities conducted for the purpose of facilitating such buying and selling," 16 U.S.C. § 1532(2); overutilization for commercial purposes must be considered in determining whether a species is endangered, 16 U.S.C. § 1533(a)(1)(B); the Interior and Commerce Secretaries are authorized to regulate trade in non-listed species that closely resemble listed species, 16 U.S.C. § 1533(e); the ESA has supremacy over conflicting state law regarding interstate commerce in endangered and threatened species, 16 U.S.C. § 1535(f); and transport or sale of endangered species in interstate commerce is prohibited, 16 U.S.C. § 1538(a).

The legislative history likewise blames "the pressures of trade" for threatening the nation's fish, wildlife, and plants. H.R. Rep. No. 93-412, at 2 (1973), *reprinted in* Comm. on Environment and Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 149 (1982). Congress recognized the importance of controlling commercial activities that impact endangered species:

> Man can threaten the existence of species of plants and animals in any number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. … Restrictions upon the otherwise unfettered trade in these plants and animals are a significant weapon in the arsenal of those who are interested in the protection of these species.

Id. at 5.

Taken together, the ESA's legislative history, findings, and substantive provisions demonstrate that Congress plainly intended to regulate economic

activities that negatively impact endangered species. Indeed, species and habitat loss—including the attempted eradication of the Utah prairie dog—occur principally as a consequence of economic activity. As the Fifth Circuit noted, "[a]side from the economic effects of species loss, it is obvious that the majority of takes would result from economic activity." *GDF Realty*, 326 F.3d at 639. Likewise, the Fourth Circuit concluded, "of course, natural resource conservation is economic and commercial." *Gibbs*, 214 F.3d at 506. [7]

The ESA does not just protect the economic value of species themselves. It regulates economic activities that impact species, prevents externalities stemming from economic activities, and preserves resources for future economic use. "Environmental laws inevitably regulate and affect commerce because the nation's natural resources supply, after all, what are literally the basic ingredients of commercial life." Richard J. Lazarus, *The Making of Environmental Law* 205 (2005).

[7] Judge Wilkinson's words are apt: "It is within the power of Congress to regulate the coexistence of commercial activity and endangered wildlife in our nation and to manage the interdependence of endangered animals and plants in large ecosystems. It is irrelevant whether judges agree or disagree with congressional judgments in this contentious area…. Congress could find that conservation of endangered species and economic growth are mutually reinforcing. It 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.

i. The Economic Value of Wildlife Protection Is Incalculable

The known and potential economic value of wildlife is enormous. A recent report found that the nation's 33.1 million anglers, 13.7 million hunters, and 71.8 million wildlife watchers spent $145 billion on fishing, hunting, and wildlife watching in 2011 alone. U.S. FWS, Quick Facts from the 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (2011), *available at* http://www.census.gov/prod/2012pubs/fhw11-qkfact.pdf. The commercial value of biodiversity resources is also significant. Wild fish species support a multi-billion dollar industry that contributes to the livelihood of millions of people worldwide. In 2011 alone, the U.S. seafood industry supported approximately 1.2 million jobs and generated $129 billion in sales impacts. NOAA Fisheries, Fisheries Economies of the U.S. (2011), *at* https://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2011/FEUS%2011%20National%20Overview.pdf. The pharmaceutical industry has long depended on biodiversity for drug discovery and manufacture. Studies suggest that 25 to 50 percent of an estimated $825 billion in global pharmaceutical sales is based on genetic materials from plants and wildlife. The Economics of Ecosystems and Biodiversity (TEEB) for Business 5:13 (2012), *at* http://www.teebweb.org/media/2012/01/TEEB-For-Business.pdf.

These numbers do not capture the full contribution of biodiversity and intact ecosystems to interstate commerce. In enacting the ESA, Congress determined that endangered species are of "incalculable" value, including "the *unknown* uses that endangered species might have and the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA v. Hill*, 437 U.S. 153, 178-79 (1978); *see also Preseault v. ICC*, 494 U.S. 1, 17-18 (1990) (protection of potential future value in interstate commerce is within Congress's Commerce Clause authority). Because scientists and economists cannot fully quantify the value of ecosystem services in monetary terms, their substantial impact on commerce, though real, is not readily grasped. *NAHB*, 130 F.3d at 1052 n.11. Nonetheless, "[a]ll of the industries we have mentioned—pharmaceuticals, agriculture, fishing, hunting, and wildlife tourism—fundamentally depend on a diverse stock of wildlife, and the Endangered Species Act is designed to safeguard that stock." *ATRC*, 477 F.3d at 1274.[8]

In enacting the ESA, Congress properly recognized that the commercial impact of extinctions could not be addressed in piecemeal fashion because of the unquantifiable relationships among various species. Prohibiting the take of all

[8] As the Eleventh Circuit found, "Inside fragile living things, in little flowers or even in ugly fish, may hidden treasures hide." *ATRC*, 477 F.3d 1274-75.

species close to extinction is a rational prophylactic to protect against the many commercial consequences of ecological collapse.

ii. The ESA Regulates Economic Activities That Impact Species

The ESA's provisions against taking species address economic activities by prohibiting the import, export, sale, offer for sale, shipping, delivery, and transport of listed species. 16 U.S.C. § 1538(a); *see ATRC*, 477 F.3d at 1273 (purchases in the U.S. of listed wildlife in violation of ESA Section 9 were estimated to total $200 million annually for domestically caught animals and $1 billion for animals caught abroad); *GDF Realty*, 326 F.3d at 640 (noting the take provision's economic nature). Yet Congress intended the take provision to address activities other than commercial trade in the animals themselves. H.R. Rep. No. 93-412, at 150 ("'Take' is defined broadly . . . [to] allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young."); *see Babbitt v. Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 696-708 (1995) (upholding the Service's definition of "harm" to include habitat modification).

Moreover, regardless of whether the particular species taken is presently in trade, the ESA's take prohibition regulates economic activity because it

encompasses the underlying economic and commercial activity causing the take. "[D]istinguishing the actual act of taking from the purpose of the take … seems like an invitation to engage in legal legerdemain permitting judges to declare unconstitutional regulations they personally oppose." Michael C. Blumm & George A. Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 Envtl. L. 309, 349 (2004). In upholding the ESA's take provision, the D.C. and Fourth Circuits relied in part on the commercial nature of the development activities affected. The D.C. Circuit concluded that because the "regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens" the prohibition on the take of the toad affected interstate commerce, even if the toads themselves did not. *Rancho Viejo*, 323 F.3d at 1072. The court also relied on the "plainly commercial character. . . [of] the 'design' of the statute" as "the ESA seeks in part to regulate 'economic growth and development untempered by 'adequate concern and conservation'" to prevent extinctions. *Id*. at 1072-73. Likewise, although both decisions were based primarily on biodiversity value, in *NAHB*, Judge Henderson's concurrence noted that "Congress contemplated protecting endangered species through regulation of land and its development" and stressed the economic nature of the development of roads for the hospital at issue. 130 F.3d at 1058-59. In *Gibbs*, Judge Wilkinson noted that the ESA regulates the economic activities of

ranching and farming by restricting take of listed predators on private lands to prevent loss of livestock. 214 F.3d at 495.

Courts have taken a similar approach in rejecting Commerce Clause challenges to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, which, like the ESA, regulates harm from a broad range of economic activities. Courts have found that statutory imposition of liability for pollution *on private land* by its owner was within the Commerce Clause because CERCLA indirectly regulated the economic activity that incidentally generated the waste. *See, e.g.*, *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) (statute addressed actions with "an economic character" because on-site disposal of waste conferred market advantage to the business); *United States v. Domenic Lombardi Realty, Inc.*, 204 F. Supp. 2d 318, 329 (D.R.I. 2002) (upholding liability for remediation costs for disposal of toxics on private junkyard). Just as CERCLA imposes liability on activities that may contaminate private land, the ESA, in regulating taking, necessarily regulates commercial activities that may cause take on private land.

Thus, because the ESA regulates a universe of unspecified commercial activities that may cause take, regardless of whether the species taken has economic value as a commodity, the provision regulates economic activity. Under Tenth Circuit precedent, the substantial impact on interstate commerce of

regulating such activities may be presumed. *Patton*, 451 F.3d at 623. However, as demonstrated below, even without this presumption, the Commerce Clause clearly authorizes the ESA's regulation of take of single-state species irrespective of present commodity value.

B. The Congressional Determination That Take of Single-State Species Substantially Affects Interstate Commerce in the Aggregate Regardless of Current Commodity Value Is Rational

In evaluating whether the prohibition on Utah prairie dog take is permissible under the Commerce Clause, this Court need only consider whether the statutory authorization of take restrictions for single-state noncommercial species bears a substantial relation to interstate commerce, not whether the take of Utah prairie dogs themselves substantially affects interstate commerce. The Ninth and Eleventh Circuits relied on *Raich* in upholding ESA regulation of single-state species with no present commercial value on the ground that Congress rationally deemed protecting such species essential to the ESA's regulation of national economic activity. Neither court relied on factual findings regarding the economic impact of the specific species in question. In this Circuit, decisions interpreting *Raich* also make clear that in Commerce Clause challenges the court must consider the rationality of Congress's decision to regulate a category of activity, as provided by the statute, *not* the individual circumstances involved in the case-specific application of that decision. *See, e.g.*, *Grimmett*, 439 F.3d at 1273 (as-applied

challenge to act criminalizing production of child pornography fails even where facts show no case-specific connection to commerce).

In *San Luis & Delta-Mendota Water Auth. v. Salazar*, agricultural challengers argued that an application of ESA Section 9 was unconstitutional because the Delta smelt is a "purely intrastate species" of "no commercial value." 638 F.3d at 1168. Rejecting this claim, the Ninth Circuit found that, under *Raich*, the relevant question was whether Section 9 "bears a substantial relation to commerce," not whether Delta smelt takings bore a substantial relation to commerce. *Id*. at 1177. Noting that ESA Section 9 addressed a number of national and interstate economic concerns and that the Eleventh, Fourth, Fifth, and D.C. Circuits had all concluded that the ESA bore a substantial relation to commerce, the Ninth Circuit agreed that the rule satisfied the substantial relation test. *Id*. at 1176-77. Consequently, the Ninth Circuit "refuse[d] to excise individual components of that larger scheme," even though those components might regulate "purely intrastate activity." *Id*. at 1177.

Similarly, in affirming ESA protection for the Alabama sturgeon, the Eleventh Circuit held that "Congress had a rational basis for believing that regulation of an intrastate activity was an essential part of a larger regulation of economic activity." *ATRC*, 477 F.3d 1250, 1276 (11th Cir. 2007) ("Even if we found a commercial nexus completely lacking here, we could not 'excise

individual applications of a concededly valid statutory scheme.'") (quoting *Raich*, 545 U.S. at 72). "[A] species' scientific or other commercial value is not dependent on whether its habitat straddles a state line." 477 F.3d at 1275. Further, because "the loss of any one species could trigger the decline of an entire ecosystem, destroying a trove of natural and commercial treasures, it was rational for Congress to choose to protect them all." *Id*.

Because the ESA authorizes prohibitions on the take of listed species without regard to whether the individual species itself is either (1) endemic to only one state or (2) a commodity for which there is an interstate market or (3) of any known economic value,[9] the proper question is whether Congress rationally could have concluded that a prohibition without those limitations was necessary to protect the national and interstate commercial interest in wildlife resources. Such an inquiry does not require analysis of technical scientific or economic data related to any individual species. Instead, it requires the Court to evaluate, as the Ninth and Eleventh Circuits have, whether the national and interstate commercial interests addressed in the ESA's statement of findings and purpose, 16 U.S.C. § 1531, are rationally addressed by protecting *all* listed species from extinction by a prohibition on take. As the Ninth Circuit explained:

> The ESA protects the future and unanticipated interstate-commerce value of species. Even where the species . . . has no current

[9] 16 U.S.C. §§ 1533(a)(1), (b)(1),(d); 1538 (a)(1)(B),(G).

> commercial value, Congress may regulate under its Commerce Clause authority to prevent the destruction of biodiversity and thereby protect the current [and] future interstate commerce that relies on it. [The Eleventh Circuit] similarly reasoned that 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.

638 F.3d at 1176 (internal citations and quotation marks omitted). Confining the prohibition against take to species with current commercial value would result in the permanent loss of many species with undiscovered value, to the detriment of the national economy. *Id*.

The Ninth Circuit noted two additional reasons why species located only within one state could have impacts on interstate commerce. First, those species, whether individually or along with other species in that state, have "esthetic, ecological, educational, historical, recreational, and scientific value" and therefore draw "[i]nterstate travelers [who] stimulate interstate commerce through recreational observation and scientific study of endangered or threatened species." *San Luis*, 638 F.3d at 1176. Second, "[t]he genetic diversity provided by [those] species improves agriculture and aquaculture, which clearly affect interstate commerce." *Id*.

The Ninth and Eleventh Circuits' decisions also square with the Fifth Circuit's pre-*Raich* analysis in *GDF Realty*, which concerned six cave dwelling invertebrate species on private land. *GDF Realty*, 326 F.3d at 625, 638-640. After

concluding that take of the cave species did not have a substantial effect on interstate commerce in itself, the Fifth Circuit found that the prohibition on take, even for noncommercial single-state species, was essential to addressing the interstate commercial impacts of extinctions. *Id*. at 640. ("ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes."); *see also id*. at 644 (Dennis, J., concurring) (relying on the rationality of Congress's determination that prohibiting take of such species is necessary in light of the uncertainty and complexity in the dependence of commercial species on noncommercial species).

The appellate courts have all recognized, as Congress did, that the national economic value of maintaining biodiversity is enormous but cannot be fully quantified, nor can the true value of any individual species be assessed. *ATRC*, 477 F.3d at 1273 ("[T]he economic value of endangered species extends far beyond their sale price. The House Report accompanying the Endangered Species Act explains 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.'") (quoting H. R. Rep. No. 93-412, at 4 (1973)); *NAHB*, 130 F.3d at 1052 n.11 (quoting scientist Edward O. Wilson explaining why the traditional econometric approach fails to capture the full value economic of an

individual species). This judicially recognized aspect of biodiversity value underscores the need for the ESA's broad approach to protection rather than a species-by-species economic analysis, which is essentially what the decision below would demand.

The district court's approach places courts in the untenable position of making scientific and economic judgments about the impact of takes of individual species on interstate commerce. Worse, the court made these scientific and economic judgments without the benefit of a formal record because the ESA itself does not require the Service to evaluate the nexus between take of species and interstate commerce, nor even the economic value of the species, prior to effectuating a prohibition on its take. 16 U.S.C.§ § 1533(a)(1), (b)(1)A), (d); 1538(a)(1)(B), (G).

For example, an increasing number of scientists have concluded that the Utah prairie dog is a keystone species, *i.e*. a species with a "unique, significant, and disproportionately large impact on its ecosystem, meaning that ecological interactions in an area might collapse if the species were to disappear." Manno, *supra* n.1 at 20. Northern goshawks, red foxes, and red tailed hawks prey upon the species. *Id*. at 20-21.[10] The burrows and colony sites provide shelter and nesting

[10] Hawks and other avian species are themselves protected by federal law, the Migratory Bird Treaty Act, 16 U.S.C §§ 703-712, which is designed to protect interstate commerce and related interests in bird populations and implement

habitat for many other animals, including American badgers, long-tailed weasels, and hundreds of insect and arachnid species, which in turn draw bird species such as western bluebirds, western meadow-larks, and dark-eyed juncos. *Id*. at 21, 133. The colonies are "centers of ecological activity" where chipmunks, coyotes, deer, pronghorn, moths, and voles are found. *Id*. at 135 Fig. 7.6. Prairie dogs improve the quality of grasslands by aerating the soil, controlling noxious weeds or invasive plants, and mixing nutrients between soil layers. *Id*. at 21. In sum, extirpating colonies on private land has an immediate effect on the quality of that land much in the same manner that soil pollution reduces the quality of the private lands regulated under CERCLA. Further, because many of the species affected by the Utah prairie dog are highly mobile, the consequences of that extermination extend beyond the borders of private property.

But the district court rejected the Service's assertion that Utah prairie dogs affect interstate commerce by providing food for several other species of interstate commercial value by concluding that unless the Utah prairie dog was a "*major* food source for those animals . . . there [is] no evidence that the diminution of the Utah prairie dog . . . would significantly alter the supply or quality of animals for which a national market exists." Op. at 14-15 (emphasis added). Thus, without any

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international treaties. Along with the Bald and Golden Eagle Protection Act, 16 U.S.C §§ 668-668d, the ESA is part of a broad legislative effort to protect the national interest in conserving the nation's wildlife.

expert knowledge of the ecological relationships of the species discussed or the complex web of environmental factors that can influence the interdependence of species in an ecosystem, the district court simply concluded that extirpating the Utah prairie dog would not affect the populations of the commercially valuable species that prey upon it. Similarly, the district court concluded that the Service could not demonstrate the necessity of protecting the Utah prairie dog as part of preserving the ecosystems upon which other commercial species depend without proving that its extirpation would cause the *total extinction* of those other species. Op. at 15. The court offered neither a scientific, economic, nor legal basis for its conclusion that addressing interspecies consequences and ecosystem impacts apart from total extinction are beyond the legitimate powers of government. Op. at 15.[11]

Under *Raich*, the only question is whether the broad prohibition on take for endangered or threatened species, regardless of present location or commodity value, has a substantial relation to interstate commerce. Protecting single-state species regardless of present commercial value rationally addresses at least three sources of harm to the national economy: First, the loss of yet unidentified commercial value of the species; second, the incalculable present value of the

[11] The District Court also erroneously rejected evidence that the Utah prairie dog itself affects interstate commerce as a magnet for tourism and research. Op. at 14-15. Expenditures for scientific research, tourism, and the arts are discussed at length in Fund for Animals Brief, pp. 11, 25-33, and in the Government's Brief, pp. 11-12. *Amici* agree the species substantially affects interstate commerce and will not repeat the parties' detailed analysis here.

species in performing ecosystem services that sustain the productivity of lands and waters, and maintain the natural beauty that draws tourists; and third, the incalculable and often inadequately studied present value of the species in sustaining other interdependent species with current value as commodities. Because Congress rationally deemed that broad prohibitions on take were necessary to address these sources of harm to the national economy, the individual application of those prohibitions must be affirmed. *Raich*, 545 U.S. at 72.

II. The ESA's Protections for Utah Prairie Dogs Are Constitutional Under the Necessary and Proper Clause and Are Essential to Congress's Comprehensive Regulatory Program for Preserving Biodiversity

The ESA's protections for single-state species irrespective of present commercial value are also constitutional under the Necessary and Proper Clause because such protections are essential to the statutory scheme. Whereas Congress's authority to legislate under the Commerce Clause and other specifically enumerated powers is broad, "[t]he reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.'" *NFIB*, 132 S. Ct. 2566, 2579 (2012) (quoting Art. I, § 8, cl. 18). The Supreme Court

> ha[s] long read this provision to give Congress great latitude in exercising its powers: Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which

> are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. (internal quotation and citation omitted). The Supreme Court has "been very deferential to Congress's determination that a regulation is necessary" and has "upheld laws that are convenient, or useful or conducive to the authority's beneficial exercise." *Id*. at 2592 (internal quotation marks and citations omitted).

The Supreme Court recently characterized the Congressional authority affirmed in *Raich* as within the latitude provided by the Necessary and Proper Clause because it involved "only the constitutionality of individual applications of a concededly valid statutory scheme." *NFIB*, 132 S. Ct. at 2592-93. Likewise in *GDF Realty*, Judge Dennis's concurrence found that prohibiting the take of cave dwelling invertebrates on private land was "necessary and proper" as part of a "comprehensive scheme" to address the impact of extinction on interstate commerce and the national economy. 326 F.3d at 641-44. He explained:

> The prohibition of the Cave Species takes is integral to achieving Congress's rational purpose in enacting the ESA . . . the ESA regulates interstate commerce by attempting to prevent the extinction of both commercial and non-commercial species . . . Non-commercial species are in many instances vital to the survival of ecosystems upon which commercial species are dependent. The interrelationship of commercial and non-commercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species from extinction or harm.

Id. at 643-44. In other words, protecting only commercial species would not be sufficient if the noncommercial species upon which they depend were to become extinct, and establishing regulations to identify and protect only those specific dependencies would be impossible. *Id*. at 641-44.

Protection of intrastate species is essential to the ESA's goal of preserving the nation's biodiversity. Of the more than 1,500 species listed as endangered or threatened in the United States, roughly 68% occur only in one state. Gov't Br. at 25; *NAHB*, 130 F.3d at 1052 (finding 521 of the 1082 species then listed to be wholly intrastate species). Indeed, when Congress passed the ESA in 1973, it grandfathered onto the endangered species list from its predecessor statute 109 species of wildlife including 45 that inhabited only one state. Congress intended the ESA to protect all species, despite their limited range, because of their economic, ecological, and aesthetic values and because, absent national standards, protection of rare species at the state level could not be assured. *Rancho Viejo*, 323 F.3d at 1079 (federal regulation is necessary to "arrest the 'race to the bottom'" that would occur from interstate competition "'whose overall effect would damage the quality of the national environment.'" (quoting *Gibbs*, 214 F.3d at 501)); *NAHB*, 130 F.3d at 1056. As Congress recognized, "[p]rotection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized

policies and programs by various states might well be confusion compounded." H.R. Rep. No. 93-412, at 7.

In *Raich*, the Supreme Court held that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole" in the applicable federal scheme. 545 U.S. at 22. Concurring, Justice Scalia agreed that Congress "could reasonably conclude that its objective of prohibiting marijuana from the interstate market 'could be undercut' if those activities were excepted from its general scheme of regulation." *Id.* at 42 (Scalia, J.). Congress's decision to address the problem of interstate competition and inconsistent regulation in species protection through the adoption of a categorical rule thus "is entitled to a strong presumption of validity." *Id.* at 28.

Moreover, *Raich* cabined *Lopez* and *Morrison* to cases in which parties assert that "a particular statute or provision [falls] outside Congress' commerce power in its entirety," and distinguished cases where parties allege, as here, that "individual applications of a concededly valid statutory scheme" should be excised.[12] *Id.* at 23. This distinction is "pivotal for the Court has often reiterated that [w]here 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

[12] *Wickard*, 317 U.S. 111, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), were as-applied challenges.

the class." *Id.* (internal quotations omitted). Justice Scalia noted that *Lopez* and *Morrison* should not be understood to "declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government," because neither case "involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation." *Id*. at 38.

Given the number of species that reside in only one state, Congress could reasonably conclude that exclusion of such species from the ESA's coverage would "leave a gaping hole" in the statutory scheme, diminishing the nation's treasure trove of biodiversity and leading to potentially destructive interstate competition. *Raich*, 545 U.S. at 22. *See also Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981) ("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.").

Under a unified reading of *Raich*, *Lopez*, and *Morrison*, the district court's holding that protection of the Utah prairie dogs lacks a sufficient relationship to commerce is clear error and represents the kind of judicial policy-making that the Supreme Court's "permissive reading" of Congress's powers under the Commerce Clause and Necessary and Proper Clause was intended to avoid. *NFIB*, 132 S. Ct. at 2579 ("[W]e possess neither the expertise nor the prerogative to make policy judgments."). To prevail, Plaintiff-Appellees must demonstrate that Section 9's

take prohibition, the heart of the ESA's statutory scheme, lacks sufficient connection to interstate commerce to qualify as a comprehensive economic regulatory program. But no one seriously questions the general authority of Congress to protect threatened and endangered species. If the statute's regulation of that class of activities is rationally necessary and proper to achieving the Act's protections for national commercial interests, then the Court must refuse to "excise individual applications of a concededly valid statutory scheme." *Raich*, 545 U.S. at 72; *ATRC*, 477 F.3d at 1276 (internal quotations omitted).

Regulating take of noncommercial single-state species on private land is plainly "necessary and proper" to ensuring the efficacy of ESA provisions indisputably authorized by the Commerce Clause. Thus, even if the prohibition on take of Utah prairie dogs was not authorized *directly* by the Commerce Clause, it would nonetheless be authorized under the Necessary and Proper Clause to ensure the efficacy of the ESA protections conferred upon commercial species pursuant to the Commerce Clause.

CONCLUSION

Under *Raich*, the decisions of five circuits, and the precedent of this Court, the judgment of the district court should be reversed.

Respectfully submitted,

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April 20, 2015

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7), the attached Brief of *Amici Curiae* Defenders of Wildlife, et al., is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 6,998 words.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2015, I electronically filed the foregoing Brief of *Amici Curiae* Defenders of Wildlife, et al., with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.

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CERTIFICATION REGARDING ELECTRONIC FILING

I hereby certify that, with the exception of this page, the foregoing Brief of *Amici Curiae* Defenders of Wildlife, et al., is identical in all respects to the version filed electronically on April 20, 2015, via the Court's CM/ECF system.

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