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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS, Petitioner and Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE; et al., Respondents and Defendants, and FRIENDS OF ANIMALS, Respondent-Intervenor.	Case No. 2:13-cv-00278-DB **PETITIONER AND PLAINTIFF'S COMBINED RESPONSE AND REPLY TO FEDERAL DEFENDANTS' AND RESPONDENT-INTERVENOR'S OPPOSITIONS TO PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND CROSS-MOTIONS FOR SUMMARY JUDGMENT** Honorable Dee Benson

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Pursuant to this Court's August 14, 2013, scheduling order, ECF No. 46, People for the Ethical Treatment of Property Owners (PETPO) files this combined Response and Reply to the Responses and Cross-motions for Summary Judgment filed by United States Fish and Wildlife, *et al.* (Federal Defendants), ECF No. 56, and Friends of Animals, ECF No. 58.

INTRODUCTION

All parties have moved for summary judgment in this challenge[1] to the federal government's constitutional authority to impose a rule prohibiting *any* activity, unless specifically exempt or authorized by federal permit, that harms a Utah prairie dog, a species that is found only in Utah, is not traded in the interstate market, and any harm to which is only tenuously connected to an insubstantial amount of interstate commerce. This broad regulation of activity cannot be sustained under the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Additionally, the prohibition cannot be upheld under the Necessary and Proper Clause. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*); *Gonzales v. Raich*, 545 U.S. 1 (2005).

[1] The constitutional arguments supporting PETPO's Administrative Procedure Act and Tenth Amendment claims are identical. *See* Fed. Def's Opp'n at 14-15.

Defendants argue otherwise on four bases: first, each of the Circuit Courts of Appeals to consider the constitutionality of the Endangered Species Act's (ESA) take prohibition have upheld it,[2] Fed. Def.'s Opp'n at 2; second, that there is some interstate economic activity related to the prairie dog, *id.* at 27-31; third, that all species can be regulated under the Commerce Clause because they have some amorphous value, Friends of Animals' Opp'n at 4-11; and, finally, that regulations adopted under the ESA can be upheld as necessary to the Act's comprehensive scheme, Fed. Def.'s Opp'n at 25-28, 37-41.

Defendants' arguments are unavailing. First, the appellate decisions on which they rely conflict with each other and Supreme Court precedent and many are silent about the constitutional arguments that PETPO has raised. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1174-77 (9th Cir. 2011); *GDF Realty Invs. v. Norton*, 326 F.3d 622, 627-41 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1066-80 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483, 492-506 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049-57 (D.C. Cir. 1997).

[2] Federal defendants note that Plaintiff's counsel has participated in each of these cases. Although they do not indicate why this point has any relevance, the uniformity amongst the circuit courts is not dispositive. Plaintiff's counsel was also recently counsel of record in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), where the Supreme Court's decision to allow judicial review of administrative compliance orders overturned every circuit court to have considered the question. *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010) (discussing the consensus amongst the circuit courts on that issue).

Second, defendants' reliance on attenuated connections between the Utah prairie dog and commerce cannot sustain the rule. The challenged rule does not regulate the Utah prairie dog but human activities that harm Utah prairie dogs.[3] *See* 50 C.F.R. § 17.40(g).

Third, Friends of Animals' argument that all species have "value" which Congress can protect under the Commerce or Necessary and Proper Clause admits of no limit. Biodiversity and the potential resource argument, if applied in other contexts, would justify federal regulation of anything. *See* PETPO's Mem. at 29-31, ECF No. 55-1; *see also United States v. Patton*, 451 F.3d 615, 628 (10th Cir. 2006) (rejecting a similarly attenuated substantial effects argument).

Finally, neither the ESA nor the Special 4(d) Rule are a comprehensive scheme to regulate the market for a commodity. *See Raich*, 545 U.S. at 22-26. Defendants' comprehensive regulatory scheme argument doesn't suggest otherwise, but instead misconstrues *Raich* to require only that the federal government regulate broadly, regardless of its purpose or need to do so. *See* Fed. Def's Opp'n at 37-41. This reasoning would require both *Lopez* and *Morrison* to be reversed as the Gun Free School Zones Act[4] in *Lopez* was only a small part of an omnibus crime bill, as was the Violence Against Women Act[5] in *Morrison*.

The challenged rule exceeds the scope of the Commerce Clause because it does not satisfy the test articulated in *Lopez* and *Morrison*. It is also beyond the Necessary and Proper Clause

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[3] In essence, the Special 4(d) Rule, like the Violence Against Women Act, regulates violent acts, only those committed against Utah prairie dogs instead of women.

[4] The Gun Free School Zones Act was not a standalone bill but a single title of the omnibus Crime Control Act of 1990. *See* Pub. L. No. 101-647, 104 Stat. 4789 (1990). If defendants are correct, the Gun Free School Zones Act should have been upheld as a necessary part of Congress' comprehensive regulation of crime. *But see Lopez*, 514 U.S. at 559.

[5] Similarly, the Violence Against Women Act was a single title within the omnibus Violent Crime Control and Law Enforcement Act of 1994. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

because it is inconsistent with the standards articulated in *Raich* and *NFIB*. Therefore, this Court should grant PETPO's Motion for Summary Judgment, deny both of defendants' motions, and enjoin the application of the unconstitutional Special 4(d) Rule.

I

PETPO HAS STANDING TO CHALLENGE THE APPLICATION OF THE SPECIAL 4(d) RULE TO PRIVATE PROPERTY

The Special 4(d) Rule injures PETPO's members, including residents and property owners in southwestern Utah, as well as the municipal government for Cedar City, Utah.[6] The Special 4(d) Rule forbids these members from using or developing their private property, from providing municipal services, and from protecting the remains of their loved ones who reside at Cedar City cemetery.[7] Because PETPO alleges that its members are unlawfully forbidden from acting by the federal prohibition against Utah prairie dog takes and the requested relief would redress this unlawful restraint on their action, PETPO satisfies each of the elements of standing. *See S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013) (identifying the elements of standing) (*SUWA*).

Defendants challenge PETPO's standing on two grounds: first, that these injuries are not redressable because Utah also regulates the take of Utah prairie dogs, Fed. Def's Opp'n at 17-20; and, second, that the general prohibition against the take of protected species, 50 C.F.R. § 17.31, will apply if the Special 4(d) Rule is invalid, *see* Friends of Animals' Opp'n at 2-4. The first must be

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[6] Morton Decl. ¶ 6, ECF No. 55-7; Webster Decl. ¶¶ 2-3, ECF No. 55-8; Lamoreaux Decl. ¶¶ 3-4, ECF No. 55-6; Hughes Decl. ¶¶ 3-4, ECF No. 55-5; Childs Decl. ¶¶ 3-4, ECF No. 55-4; Burgess Decl. ¶¶ 3-4, ECF No. 55-3; Bradshaw Decl. ¶¶ 2-3, ECF No. 55-2.

[7] Morton Decl. ¶ 5, ECF No. 55-7; Webster Decl. ¶¶ 4-11, ECF No. 55-8; Lamoreaux Decl. ¶¶ 6-11, ECF No. 55-6; Hughes Decl. ¶¶ 6-11, ECF No. 55-5; Childs Decl. ¶¶ 6-16, ECF No. 55-4; Burgess Decl. ¶¶ 5-21, ECF No. 55-3; Bradshaw Decl. ¶¶ 4-10, ECF No. 55-2.

rejected because a plaintiff can seek redress even if the challenged regulation is one of multiple obstacles to her desired action. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-64 (1977) (holding that a plaintiff cannot be denied standing because additional obstacles would remain after relief was granted); *see also Larson v. Valente*, 456 U.S. 228, 243 (1982) (holding that a favorable decision need not relieve a plaintiff's every injury to satisfy the redressibility requirement). The requested relief would bring PETPO's members one important step closer to being able to use their property as they wish or to more efficiently provide government services to the residents of Cedar City.

The cases cited by Federal Defendants are easily distinguishable because in those cases the Court couldn't order the defendant to act,[8] essential parties for the requested relief were absent,[9] or the plaintiff would have no possible legal right to access documents, even if given the relief requested.[10] Here, Federal Defendants argue only that other obstacles would remain if enforcement of the Special 4(d) Rule were enjoined. But this is no basis to deny standing. *See Village of Arlington Heights*, 429 U.S. at 260-64.

Furthermore, the state regulation applies as a consequence of, and relies upon, the federal prohibition. A species is regulated as a "state sensitive species" if it is regulated, is being proposed for regulation, or was recently regulated under the ESA. Utah Admin. Code R657-48-2(o). Also,

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[8] *See Wyo. Sawmills v. U.S. Forest Serv.*, 383 F.3d 1241, 1246-49 (10th Cir. 2004) (concluding that a corporation could not establish an injury from the loss of an opportunity to bid on the right to log federal lands where the agency was under no obligation to offer the opportunity).

[9] *See Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 892 (10th Cir. 2011) (finding that alleged injuries due to an unconstitutional statute couldn't be redressed where relief was sought against a defendant with no power to enforce the challenged statute).

[10] *See Okla. Hosp. Ass'n v. Okla. Publ'g Co.*, 748 F.2d 1421, 1425 (10th Cir. 1984) (holding that the plaintiff was not denied access to documents at issue in an earlier suit as a result of a protective order but due to its status as a nonparty).

the application of the state regulation depends on the federal prohibitions. For example, it limits the granting of take permits to cases where take is authorized under the Special 4(d) Rule or pursuant to a federal permit issued by FWS under Section 10 of the ESA. Utah Admin. Code R657-19-6, 19-7. Finally, as Friends of Animals points out, these state rules were enacted to allow the state to participate in the federal scheme. *See* Friends of Animals' Opp'n at 3 n.3. All of this indicates that a challenge to the Special 4(d) Rule is a predicate to state reform.

The second argument—that the general take prohibition would apply if the Special 4(d) Rule is invalid—fails for two reasons. First, PETPO challenges the application of the Special 4(d) Rule to activities that occur on non-federal land. Compl. ¶¶ 98-126. If this narrow challenge succeeds, the rule would continue in force on federal lands and the general prohibition against the take of threatened species would not apply to the Utah prairie dog. *See* 50 C.F.R. § 17.31. Additionally, a declaration and injunction against federal regulation of Utah prairie dog take under either the Special 4(d) Rule, which applies now, or the general 4(d) rule, which notably does not, is encompassed by the relief requested in the complaint. *See* Compl. at 20.

II

THE SPECIAL 4(d) RULE CANNOT BE SUSTAINED UNDER THE COMMERCE CLAUSE

When Congress is not regulating the channels or instrumentalities of interstate commerce, or things moving in interstate commerce, its Commerce Clause power is limited to regulating economic activities that, in the aggregate, have a non-attenuated and substantial effect on interstate commerce. *See Morrison*, 529 U.S. at 610. The Special 4(d) Rule does not satisfy this standard.

Federal Defendants claim that the Tenth Circuit has already decided the Commerce Clause issue. *See* Fed. Def's Opp'n at 22-23. But the Tenth Amendment claim at issue in *Wyoming v. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006), was *only* that letters sent from

FWS—offering to cede regulation of the gray wolf to the state if it took certain acts—unconstitutionally commandeered the state's government. *See Wyoming v. Dep't of Interior*, 360 F. Supp. 2d 1214, 1238-39 (D. Wyo. 2005) ("The Plaintiffs assert that FWS is attempting to commandeer the legislative processes of Wyoming . . . .").

The district court also expressed a view on the unrelated question of whether the take prohibition could be upheld under the Commerce Clause. *See id.* at 1241-42. But a Commerce Clause challenge was not presented to the Tenth Circuit and its decision to uphold the judgment below "for substantially the same reasons given in [the district court's] opinion" shouldn't be construed as ruling on one. *See Wyoming*, 442 F.3d at 1264; *see also* Wyoming's Opening Brief in *Wyoming v. Dep't of Interior*, No. 05-8026, 2005 WL 2367705, at *43-48 (10th Cir. June 20, 2005) (raising a commandeering claim under the Tenth Amendment, but not a Commerce Clause challenge, in the briefing before the Tenth Circuit). The reasons to which the Tenth Circuit opinion referred were the district court's reasons for rejecting the commandeering claim—if the state rejected the agency's *quid pro quo*, the federal government would continue to regulate, not force the state to do so. *See Wyoming*, 360 F. Supp. 2d at 1241. Contrary to Federal Defendants' assertion, the question of whether Congress can regulate the take of species generally, or any particular species, has not been presented to the Tenth Circuit and it has never ruled on that question. *See Wyoming*, 442 F.3d at 1264.[11]

[11] Federal Defendants make the same error with respect to the First Circuit's decision rejecting a commandeering claim in *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). As the court expressly noted, the state defendants "d[id] not challenge Congress' authority to enact the Endangered Species Act." *Id.* at 168. Yet Federal Defendants assert that the First Circuit's decision "affirmed the constitutionality of the ESA under the Commerce Clause." Fed. Def's Opp'n at 21 n.21.

A. The Special 4(d) Rule Is Not a Regulation of Economic Activity

The Special 4(d) Rule forbids *any* activity that harms a Utah prairie dog, unless specifically exempted or permitted.[12] PETPO's Mem. at 23-27. No defendant denies this. Rather, they argue that the Special 4(d) rule should be upheld because its prohibition sweeps in some economic activities, some of the activities that PETPO members wish to take are economic, or by obscuring the nature of the activity being regulated entirely.[13]

This first argument should be rejected as inconsistent with *Lopez*. Under the Commerce Clause the regulation must be of economic activity. *See Lopez*, 514 U.S. at 567. That some of the activity regulated by a provision could be economic is insufficient. *Lopez* demonstrates this distinction. Although the Court characterized possession of a gun near a school as "in no sense an economic activity," *see id*., it isn't true that this activity can *never* be economic. For instance, a private security or body guard could travel near a school carrying a gun as part of her job. The same

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[12] Federal Defendants repeatedly assert disagreements with PETPO's characterization of the Special 4(d) Rule. *See* Fed. Def'n Opp'n at 8, 10, 11, 18 n.20, 33 n.33. Most of these are illusory because the Federal Defendants descriptions of the rule do not conflict with PETPOs. *Compare* Fed. Def's Opp'n 10 *with* PETPO's Mem. at 9-11 (agricultural lands exemption); *compare* Fed. Def's Opp'n at 10 *with* PETPO's Mem. at 10-11 (safety hazard and significant human cultural or burial sites exemption); *compare* Fed. Def's Opp'n at 11 *with* PETPO's Mem. at 9 (Service's authority to further restrict take if necessary "for the conservation of the species"). Another is based on the assertion that activities forbidden by the Special 4(d) Rule should not be attributed to it if state regulations and practice also forbid them. *See* Fed. Def's Opp'n at 8. Even if any of the disagreements exist, none are relevant to PETPO's constitutional claim.

[13] Although purporting to agree that "it is important for the Court to accurately define the nature of the regulated activity at issue [in this case,]" Friends of Animals *never* suggests any alternative characterization of the activities that the Special 4(d) Rule regulates. Friends of Animals' Opp'n at 4-6.

is true of the Special 4(d) Rule; the prohibition against causing harm to a Utah prairie dog is not a regulation of economic activity.[14]

The second argument—that the constitutional challenge can be rejected because the particular plaintiff is restrained from engaging in an economic activity—must be rejected as factually inaccurate and inconsistent with *Lopez*. *See GDF Realty*, 326 F.3d at 634; *but see Rancho Viejo*, 323 F.3d at 1072-73. It is factually inaccurate because PETPO's members are not only prohibited from engaging in economic activities—though they are forbidden from doing those things. *See, e.g.*, Decl. of Bruce Hughes, ECF No. 55-5, ¶ 10. For example, the municipal government of Cedar City is forbidden from providing services to the city's residents without suffering delay and expense as a result of the Special 4(d) Rule. *See* Decl. of Joe Burgess, ECF No. 55-3; *see also* Decl. of Brenda Webster, ECF No. 55-8 (describing how the Special 4(d) Rule affects those with loved ones at the Cedar City Cemetery). These activities cannot be characterized as "economic" without stretching that term so broadly as to nullify the limits recognized in *Lopez* and *Morrison*.

Some of the circuits have rejected Commerce Clause challenges because the particular plaintiff was prevented from engaging in economic activity. *See* Fed. Def's Opp'n at 32-34; *see also Rancho Viejo*, 323 F.3d at 1072-73; *Gibbs*, 214 F.3d at 492-96. But this argument is inconsistent with *Lopez*. As PETPO's Memorandum explains, the defendant in *Lopez* was paid to deliver a

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[14] Federal Defendants repeatedly accuse PETPO of contradicting itself by referencing, though not relying exclusively on, economic activities to establish standing while arguing that the Special 4(d) Rule cannot be upheld as a regulation of economic activity. Fed. Def's Opp'n at 31, 33. This accusation misunderstands the relevant standards. Some of PETPOs members have experienced economic injuries, giving them standing. For standing, an economic injury that is fairly traceable to a regulation is sufficient. *SUWA*, 707 F.3d at 1153. But the Commerce Clause inquiry uses a different test than standing. It asks whether the challenged provision is a regulation of economic activity. *See Lopez*, 514 U.S. at 560. For that, you look to the activity regulated by the challenged regulation—gun possession in *Lopez* and any non-exempt acts that harm a Utah prairie dog here.

handgun at a school, *i.e.*, was engaged in an economic activity. *See* PETPO's Mem. at 24. Yet, the Supreme Court recognized that the Gun Free School Zones Act was not a regulation of economic activity and declared it unconstitutional. *See Lopez*, 514 U.S. at 560.

Defendants also assert that evaluating whether the Special 4(d) Rule is a regulation of economic activity would be contrary to the Supreme Court's instruction not to "excise, as trivial" individual activities from a class. *See Perez v. United States*, 402 U.S. 146, 152 (1971). This argument fails because the quoted language forbids the exclusion of activities because *in isolation* they don't substantial effect on interstate commerce. *See Raich*, 545 U.S. at 23. Defendant's argument presupposes that the Special 4(d) Rule is a regulation of economic activity. *See id.* (explaining that individual activities cannot be "excise[d], as trivial" *after* the Court has found that the class of activities being regulated is within the reach of federal power).

B. The Absence of a Jurisdictional Element and Legislative Findings Undermine the Special 4(d) Rule's Constitutionality

Neither a jurisdictional element nor legislative findings are required to sustain a regulation under the Commerce Clause. Fed. Def. Opp'n at 34-36. But, to the extent these factors remain part of the constitutional test, *see Lopez*, 514 U.S. at 560-66, their absence weighs *against* the constitutionality of the Special 4(d) Rule.

C. Any Connection Between Utah Prairie Dog Takes and Interstate Commerce Is Attenuated

Even if the Special 4(d) Rule were a regulation of economic activity, it would exceed Congress' Commerce Clause power because Utah prairie dog takes do not substantially affect interstate commerce. Defendants claim that they do because *the species* is related to commerce in a variety of ways: (1) it has value to its ecosystem and contributes to biodiversity, Fed. Def's Opp'n at 29; (2) government websites tout the Utah prairie dog as a reason for tourists to visit federal lands,

id.; (3) whatever unspecified amount of Utah prairie dog tourism occurs also generates an unspecified amount of revenue for tourism-related industries, Friends of Animals' Opp'n at 12; (4) the prohibited activities occur on property that itself has commercial value, Fed. Def's Opp'n at 29.; (5) Dr. John Hoogland and his colleagues study Utah prairie dogs, Friends of Animals' Opp'n at 12-15. But, as PETPO has explained, these effects are either insignificant or too attenuated to sustain the Special 4(d) Rule under the Commerce Clause. PETPO's Mem. at 29-31. Defendants also contest whether this Court's consideration should focus on the Utah prairie dog. Instead, defendants argue that the Special 4(d) Rule can be upheld because endangered species generally have a substantial effect on interstate commerce. *See* Friends of Animals' Opp'n at 4-11. This argument, too, must be rejected as too attenuated to withstand scrutiny under *Lopez* and *Morrison*. *See* PETPO's Mem. at 29-31.

This first argument—that the Utah prairie dog affects its ecosystem and biodiversity, which affect interstate commerce—is too attenuated. Because both the Utah prairie dog and its habitat lie within Utah, defendants argument for a substantial effect on these grounds is several steps removed from the take of Utah prairie dogs, the activity being regulated. *See* 50 C.F.R. § 17.40(g). This argument is premised on an attenuated causal chain: (1) the take of Utah prairie dogs on private property threatens the species viability (2) which threatens its ability to perform its functions within its ecosystem (3) which threatens the health of that ecosystem (4) which threatens the interstate commerce—agriculture, etc.—that relies on that ecosytem. Such attenuated causal chains were expressly rejected in *Lopez* and *Morrison*. *See* 529 U.S. at 615-16.

The second argument—the Utah prairie dog affects interstate commerce because it draws tourists to federal lands—is irrelevant because PETPO admits that, under the Property Clause, the federal government may regulate activities affecting those on federal lands. U.S. Const. art. IV, § 3,

cl. 2. Defendants also don't explain why the federal government's own promotion of Utah prairie dogs on these lands can extend its authority to all activities affecting the Utah prairie dogs, regardless of where they are found. *See* Fed. Def's Opp'n at 29-30. Finally, this unmeasured tourism related to the Utah prairie dog could be due to the federal defendants' decision to list the species under the Endangered Species Act.

The third argument—concerning the Utah prairie dogs' effect on tourism-related industries—similarly must be rejected because there is no indication that this effect is anything but insignificant and it is too attenuated. It is as removed from the activity being regulated here as any of the activities relating to the species' ecosystem discussed above. *See Morrison*, 529 U.S. at 615-16 (denying that attenuated causal chains can sustain a regulation under the Commerce Clause).

The fourth argument—the prohibited activities occur on private property, which has commercial value—must be rejected as plainly inconsistent with the Supreme Court's command that Congress' Commerce Clause authority be subject to limits. *See Morrison*, 529 U.S. at 615. If Congress has the authority to regulate any activities on land with commercial value, *i.e.*, all land, there are no limits to its power.

The fifth argument—scientists study the Utah prairie dog—must be rejected as insignificant[15] and too attenuated for a variety of reasons. First, most of Dr. Hoogland's allegations concern his research of prairie dogs generally, and are not specific to the Utah prairie dog. *See* Decl. of Dr. John L. Hoogland, ECF No. 57-1. Second, Dr. Hoogland's research cannot demonstrate that

[15] PETPO means no disrespect to Dr. Hoogland. This argument is not meant to suggest that his research is arcane or inconsequential, but only that its effect on the nation's $16.5 trillion economy is not sufficient to trigger Congress' Commerce Clause power. *See* World Bank, Purchasing Power Parity Gross National Income by Country 2012, http://www.data.worldbank.org/indicator/NY.GNP.MKTP.PP.CD (last visited Mar. 17, 2014) (reporting United States GNP in 2012).

Utah prairie dog takes substantially effect interstate commerce if the substantial effect requirement is to remain a meaningful limit on the federal government's powers. *See Morrison*, 529 U.S. at 614-15 (requiring a *substantial* effect on interstate commerce). Finally, and relatedly, Dr. Hoogland's allegations are too attenuated to sustain the Special 4(d) Rule. Dr. Hoogland alleges that his career has, in part, focused on the object—the Utah prairie dog—effected by the acts being regulated under the Special 4(d) Rule. Academics have similarly studied both guns and women. Yet the Supreme Court declared the federal government's regulation of gun possession and violence against women beyond Congress' Commerce Clause power. *See Morrison*, 529 U.S. at 601-02, 613-17; *Lopez*, 514, U.S. at 560-66. A rule that allowed Congress to regulate any activities affecting a subject of academic research would deny any limit on Congress' power.

Defendants also aver that the Special 4(d) Rule can be sustained on the effects of endangered and threatened species generally on interstate commerce. *See* Friends of Animals' Opp'n at 4-11. But this argument is inconsistent with *Lopez* and *Morrison* because it relies on effects too attenuated to meaningfully limit Congress' power. *See Morrison*, 529 U.S. at 614-15. First, this argument has no logical limit. Although Congress has limited the application of the Endangered Species Act to endangered and threatened species, nothing in defendants' argument would restrict its constitutional authority to these species. *See* Friends of Animals' Opp'n at 19. Since all species affect their ecosystem and biodiversity, defendants' argument would similarly support the authority to regulate any activity affecting any living thing. *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 413-14 (2005); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. 174, 198-99 (1998). If endangered and threatened species have a substantial effect on interstate commerce, it necessarily follows that wildlife (of which these species are a subset) generally does so.

Second, the argument impermissibly relies on attenuated effects. *See Morrison* 529 U.S. at 614-15. Reliance on the importance of all listed species to commerce is even further removed than the one expressly rejected in *Morrison*. *See* Friends of Animals' Opp'n at 4-11. In that case, the Supreme Court rejected, as too attenuated, Congress' findings that gender-motivated violence deters potential victims from engaging in a variety of economic activities which affect interstate commerce. *Morrison*, 529 U.S. at 615. Yet, if defendants' argument is correct, the Violence against Women Act should have been upheld so long as women—or perhaps even people—have a substantial effect on interstate commerce. This would be the natural consequence of defendants' argument that the activities regulated by the Special 4(d) Rule effect something which is, in turn, part of a larger class of things which substantially affect interstate commerce. *See* Friends of Animals' Opp'n at 4-11.

III

THE SPECIAL 4(d) RULE CANNOT BE SUSTAINED UNDER THE NECESSARY AND PROPER CLAUSE AS A COMPREHENSIVE REGULATORY SCHEME

The Special 4(d) Rule also exceeds the federal government's power under the Necessary and Proper Clause because it fails the standard articulated in *NFIB* and *Raich*. *See* PETPO's Mem. at 31-34. Neither the Special 4(d) Rule nor the ESA are comprehensive schemes to regulate the interstate market for a commodity. *See NFIB*, 132 S. Ct. at 2592-93; *Raich*, 545 U.S. at 22. In *Raich*, the Controlled Substances Act extensively regulated the interstate market for a variety of illicit drugs, including marijuana. *See* 545 U.S. at 22. Because the CSA comprehensively regulated this market for marijuana, Congress also had ancillary authority under the Necessary and Proper Clause to regulate those non-economic activities that, if it was denied this power, would frustrate its ability to regulate this market. *See id*.

Congress' purposes extended beyond regulating this market, and included "conquer[ing] drug abuse." *See id*. at 12-13. From this, Defendants argue that Congress can regulate any activities pursuant to a comprehensive regulatory scheme in order to achieve any purpose. *See* Fed. Def's Opp'n at 37-41. But this contention is false. First, it's inconsistent with *Lopez* and *Morrison*. As explained, each of those cases concerned part of a larger statute that broadly regulated crime. *See* notes 3-4 and accompanying text. If defendants' interpretation of *Raich* was correct, then surely both the Gun Free School Zones Act and Violence Against Women Act should have been upheld as part of Congress' comprehensive scheme to regulate crime. *But see Morrison*, 529 U.S. at 601-02, 613-17; *Lopez*, 514 U.S. at 560-66.

Second, if Congress can broadly regulate issues of public policy like crime, land use, and domestic relations simply because it accomplishes its non-commerce related goals in part by regulating economic activity, the Necessary and Proper Clause will have been converted into a general police power. Yet, the Supreme Court has expressly denied that the clause can be stretched to this point. *See Lopez*, 514 U.S. at 560. Federal Defendants' argument that the Special 4(d) Rule should be upheld because 68% of all listed species could potentially be beyond Congress' power to protect relies on just this type of reasoning. *See* Fed. Def's Opp'n at 40. Federal Defendants do not argue that the take of the Utah prairie dog must be regulated so that Congress can effectively regulate economic activity, but only that protection is necessary to avoid frustrating "the ESA's comprehensive scheme to protect listed species." *Id*.

Third, defendants' argument is inconsistent with the Supreme Court's analysis in *Raich*. If defendants were correct, the Supreme Court should have considered only whether regulating the purely intrastate cultivation and possession of marijuana was a rational means to further Congress' goal to conquer drug abuse. It didn't. *See Raich*, 545 U.S. at 26. Instead, the Court looked to

whether the regulation of this activity was necessary for Congress' comprehensive regulation of the market for marijuana to function as a regulation of that market. *See id.* As the Court explained, Congress could regulate this activity otherwise beyond its Commerce Clause power in order to ensure that "a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market" would be effective. *See id.* In applying the test this way, the Supreme Court showed that its references to "a larger regulation of economic activity, in which the regulatory scheme could be undercut" and discussion of the CSA as a "quintessentially economic" regulatory scheme cannot be dismissed as easily as defendants suggest. *See id*. at 24; *See NFIB*, 132 S. Ct. at 2592-93; *contra* Fed. Def.'s Opp'n at 37-41.

Therefore, the proper standard under the Necessary and Proper Clause is that Congress can regulate activities otherwise beyond its Commerce Clause power if necessary to a comprehensive scheme to regulate an existing market for a commodity. *See NFIB*, 132 S. Ct. at 2592-93; *Raich*, 545 U.S. at 22. Neither the Special 4(d) Rule nor the ESA satisfy this standard because neither comprehensively regulates a market for a commodity. *See Raich*, 545 U.S. at 22. The ESA is not a comprehensive scheme to "regulate[] the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market," *Raich*, 545 U.S. at 26, but a statute designed to conserve species and their ecosystems. *See* 16 U.S.C. § 1531(b). Defendants argue otherwise, noting that, because of its breadth, a number of markets for those species that have been commodified are encompassed by the prohibition against take. *See* Fed. Def's Opp'n at 25-26. But this argument is insufficient because it would only justify the federal government's regulation of those species which have been commodified. *See* PETPO's Mem. at 34. The Utah prairie dog is not one of those species. *See id*.

The Special 4(d) Rule also regulates noneconomic activities that are not necessary for the Service to regulate any market. *See* PETPO's Mem. at 34. Federal Defendants do not argue otherwise. *See* Fed. Def's Opp'n at 37-41. Instead, they attempt to read this requirement out entirely, relying on the Supreme Court's cases holding that the Necessary and Proper Clause does not generally require that Congress' chosen means be "absolutely necessary" to achieve its ends. *See id*. at 41; *see also United States v. Comstock*, 560 U.S. 126, 134 (2010). But this argument is inconsistent with *Raich*'s recognition that denying Congress authority to regulate must frustrate its comprehensive scheme to regulate economic activity. *NFIB*, 132 S. Ct. at 2592-93; *Raich*, 545 U.S. at 22.

Furthermore, *none* of the circuit courts have ever held that a take prohibition satisfies this standard. Rather, they've ignored important aspects of it—most notably whether the regulation of noneconomic activity is necessary for the comprehensive scheme to operate. *See, e.g.*, *San Luis & Delta-Mendota*, 638 F.3d at 1177. Like defendants, they have also misinterpreted the test as only requiring that Congress broadly regulate some subject matter, rather than asking whether Congress is adopting a comprehensive economic regulatory scheme. *See id.*; Fed. Def's Opp'n at 25-28, 37-41. Similarly, the Supreme Court's acceptance of the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668c, as regulating "the intrastate possession . . . of an article of commerce" does not imply that the Special 4(d) Rule is constitutional. *See* 545 U.S. at 26 & n.36. Unlike the bald eagle, the Utah prairie dog is not a significant article of commerce. *See Andrus v. Allard*, 444 U.S. 51, 54-56 (1979) (denying a challenge to the Bald and Golden Eagle Protection Act brought by sellers of goods made from eagles).

CONCLUSION

By regulating activities that harm Utah prairie dogs, irrespective of whether those activities are economic, the Federal Defendants have exercised their authority in a manner that exceeds Congress authority under the Commerce and Necessary and Proper Clauses. Therefore, PETPO asks this Court to grant its Motion for Summary Judgment and deny the motions filed by the Federal Defendants and Friends of Animals.

DATED: March 20, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2014, I electronically filed the foregoing: PETITIONER AND PLAINTIFF'S COMBINED RESPONSE AND REPLY TO FEDERAL DEFENDANTS' AND RESPONDENT-INTERVENOR'S OPPOSITIONS TO PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND CROSS-MOTIONS FOR SUMMARY JUDGMENT with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to counsel at the following e-mail addresses:

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