Nos. 14-4151 and 14-4165

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

v.

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

and

FRIENDS OF ANIMALS,
Intervenor-Defendant-Appellant.

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On Appeal from the United States District Court for the District of Utah
Case No. 2:13-cv-00278-DB, Honorable Dee Benson, District Judge Name

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# BRIEF *AMICUS CURIAE* OF UNITED STATES SENATORS MIKE LEE, JAMES INHOFE, MIKE ENZI, DAVID VITTER, TED CRUZ, AND ORRIN HATCH AND CONGRESSMEN JASON CHAFFETZ, CHRIS STEWART, MIA LOVE, AND ROB BISHOP IN SUPPORT OF APPELLEE PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS AND IN SUPPORT OF AFFIRMANCE

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## IDENTITY AND INTEREST OF AMICI CURIAE

United States Senators Mike Lee, James Inhofe, Mike Enzi, David Vitter, Ted Cruz, and Orrin Hatch and Congressmen Jason Chaffetz, Chris Stewart, Mia Love, and Rob Bishop respectfully submit this brief of Amici Curiae to assist the Court in resolving serious questions regarding the constitutionality of provisions of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, as applied to intrastate species.[1] Senator Lee, Senator Hatch, Congressman Chaffetz, Congressman Stewart, Congresswoman Love, and Congressman Bishop represent the State of Utah, where the federal government's regulation of the Utah prairie dog under the Endangered Species Act has placed significant burdens on both private property owners and the state. Senator Lee is also the sponsor of the Native Species Protection Act (S. 1142), which seeks to clarify that non-commercial species found entirely within the borders of a single state are not in interstate commerce or subject to regulation under the Endangered Species Act or any

[1] Counsel for all parties to these consolidated appeals have consented to the filing of this amicus brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the Amici Curiae or their counsel—contributed money that was intended to fund preparing or submitting the brief. Counsel for Amici, however, was a counsel of record for the Appellee People for the Ethical Treatment of Property Owners in the district court.

provision of law enacted as an exercise of the power of Congress to regulate interstate commerce. Senator Inhofe, who represents the State of Oklahoma, is the Chairman of the Senate Environment and Public Works Committee, and Congressman Bishop is the Chairman of the House Natural Resources Committee, both of which have jurisdiction over the Endangered Species Act. Senator Enzi represents the State of Wyoming, Senator Vitter represents the State of Louisiana, and Senator Cruz represents the State of Texas. All of these states are home to various species regulated under the Endangered Species Act.

Members of Congress are bound by oath to support and defend the Constitution. Thus, as members of the United States Congress, Amici have a direct interest in ensuring that the laws passed by Congress, including the Endangered Species Act, are constitutional.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States Constitution creates a federal government of limited powers. *E.g.*, *New York v. United States*, 505 U.S. 144, 155 (1992). That government may exercise only those few powers expressly granted to it. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citing The Federalist No. 45 (J. Madison)). Unfortunately, over the course of the Nation's history, the Supreme Court has construed the Constitution's grant of powers—in

particular the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3—beyond the Framers' intent. *See United States v. Lopez*, 514 U.S. 549, 584-99 (1995) (Thomas, J., concurring). Nevertheless, in interpreting the Commerce Clause, the Supreme Court has been careful not to "obliterate the distinction between what is national and what is local." *Id.* at 566-67 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935)). The Court therefore has cautioned that federal regulation under the Commerce Clause cannot be sustained if the rationale supporting that regulation has no limiting principle, *United States v. Morrison*, 529 U.S. 598, 615-16 (2000), or if it relies upon a line of reasoning that would "pile inference upon inference" to connect the regulated activity to interstate commerce, *Lopez*, 514 U.S. at 567.

Employing these principles, the Supreme Court has held that the federal government, under the Commerce Clause (and in conjunction with the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 17), may regulate (i) things in interstate commerce, (ii) the channels of such commerce, (iii) economic activities that, in the aggregate, have a substantial effect on interstate commerce, as well as (iv) certain non-economic activities, the regulation of which is essential to vindicating a larger

regulation of interstate economic activity. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *id*. at 34-35 (Scalia, J., concurring in the judgment).

Here, Appellants United States Fish and Wildlife Service and Friends of Animals argue in favor of federal regulation of the "take" of Utah prairie dog under the Endangered Species Act. *See* 50 C.F.R. § 17.40(g). They contend that such regulation is justified in part because the "take" of protected species (including the Utah prairie dog) is an economic activity that, in the aggregate, substantially affects interstate commerce. Further, they assert that the Endangered Species Act is a comprehensive economic regulatory scheme that would be undercut if the regulation of Utah prairie dog takes were forbidden. *See* Service Br. at 31-47; Friends Br. at 22-35.

The Service and the Friends are in error. The regulated activity—the "take" of Utah prairie dog—is categorically noneconomic: nothing in that activity turns on the economic character of the act as regulated. And far from being a market regulatory scheme, the Endangered Species Act is a conservation statute which is (at best) merely tangentially directed toward economic interests. Hence, the regulation of the take of Utah prairie dog cannot be sustained as part of a non-existent larger regulation of economic activity.

## A COMMERCE CLAUSE BACKGROUND

### I. The Supreme Court's Modern Commerce Clause Framework

#### A. The Tripartite Framework

The Supreme Court has set forth a tripartite framework for testing the scope of the federal government's Commerce Clause power. According to that framework, the federal government can regulate the use of the channels of interstate commerce, the instrumentalities or things in such commerce, and activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. In *Lopez*, the Court overturned the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), concluding that the regulation of gun possession near a school—an activity that the Court considered "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," 514 U.S. at 561—cannot be justified within the tripartite framework, *see id*. at 567. The Court did suggest, however, that the case's outcome might have been different had the Act been "an essential part of a larger regulation of economic activity," such that "the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id*. at 561.

A few years later, the Court in *Morrison*, reiterating the *Lopez* tripartite framework, *see* 529 U.S. at 609, held that the Commerce Clause cannot justify the regulation of gender-motivated violence, and thus overturned the Violence Against Women Act, 42 U.S.C. § 13981. The federal government had argued that such regulation could be supported under the *Lopez* "substantially affects" category. *See* 514 U.S. at 609. The Court, however, rejected that argument, explaining that the "substantially affects" category has hitherto been limited to activities that are "some sort of economic endeavor." *Id*. at 612. The Court emphasized that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id*. at 613. The Court nevertheless left open the possibility that regulation of non-economic activity might, in some circumstance, be constitutional. *See id*. (declining to adopt a categorical rule to the contrary).

**B. The "Larger Regulation of Economic Activity" Corollary**

The Court addressed that possibility in *Raich*, in which the respondents challenged the regulation, under the Controlled Substances Act, 21 U.S.C. §§ 801-904, of marijuana grown at home for personal, non-commercial use. Conceding that the Act generally was a lawful exercise of the Commerce Clause power, the respondents argued nevertheless that the Act could not be constitutionally applied to the intrastate manufacture and

possession of marijuana. *See* 545 U.S. at 15. The Court began its analysis affirming the *Lopez* categories. *See id*. at 16-17. The Court then looked to its seminal Commerce Clause decision, *Wickard v. Filburn*, 317 U.S. 111 (1942), for guidance. *See Raich*, 545 U.S. at 17-18. In *Wickard*, the Court rejected a Commerce Clause challenge to the Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281-1393, upholding the Act's regulation of wheat grown at home for personal consumption. *See Wickard*, 317 U.S. at 128-29. The Court in *Raich* read *Wickard* for the proposition that Congress can regulate a non-commercial activity touching upon a "fungible commodity for which there is an established . . . interstate market," if "that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. Once having deduced that principle, the Court easily determined that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions," thus justifying the regulation of that non-commercial activity. *See id*. at 19.

Not surprisingly, the Court concluded that the respondents' reliance on *Lopez* and *Morrison* was misplaced. To begin with, the Court observed that *Lopez* expressly left open the possibility of federal regulation of activities that, standing alone, would be unjustified, but, as part of a larger

regulation of economic activity, would be justified. *See Raich*, 545 U.S. at 24-25 (quoting *Lopez*, 514 U.S. at 561). In the Court's view, the regulation of non-commercial uses of marijuana under the Controlled Substances Act fit comfortably within this proviso. *See Raich*, 545 U.S. at 25. Second, the Court observed that in *Morrison* as well as in *Lopez*, the challenged statute "did not regulate economic activity." *Id*. In contrast, "the activities regulated by the [Controlled Substances Act] are quintessentially economic," because the Act is a statute that "regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id*. at 25-26. And given that the Act "directly regulates economic, commercial activity," it could not run afoul of *Morrison*. *See Raich*, 545 U.S. at 26.

Thus, the Court upheld the regulation of the consumption of homegrown marijuana because (i) the regulated activity touched upon a fungible commodity with an established interstate market, (ii) the regulation was part of a statute that directly regulates quintessentially economic activities, and (iii) Congress could rationally conclude that the challenged regulation was essential to vindicating the statute's overall scheme to eliminate the marijuana market. *See id*. at 32.

Concurring in the judgment, Justice Scalia wrote to clarify the relationship between the majority's holding and the Necessary and Proper Clause. Justice Scalia explained that, strictly speaking, only the first two categories of the *Lopez* framework (namely, the channels of commerce and the instrumentalities or things in commerce) can be justified solely by the Commerce Clause; the Necessary and Proper Clause is needed to give the federal government the power to regulate the third *Lopez* category—activities that substantially affect interstate commerce. *See Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment). He explained, however, that even as augmented by the Necessary and Proper Clause, the Commerce Clause still retains two important limitations on federal power. First, the "substantially affects" category cannot justify the isolated or one-off regulation of non-economic activity. *See id*. at 36. Second, that category can reach only non-economic activity that is "a necessary part of a more general regulation of interstate commerce." *Id*. at 37. In light of these principles, Justice Scalia agreed with the majority's upholding of the regulation of homegrown marijuana for personal consumption. Acknowledging that "simple possession is a noneconomic activity," he explained that regulating that activity is permissible only because it is necessary to make effective Congress's comprehensive regulation of the

market of "fungible commodities" such as marijuana. *See id*. at 40-41. *See also Nat'l Fed'n of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2592-93 (2012) (Roberts, C.J., concurring in the judgment) (reading *Raich* as considering the constitutionality of "'comprehensive legislation to regulate the interstate market' in marijuana," and concluding that regulation of intrastate possession and consumption is permissible because "marijuana is a fungible commodity"); *id*. at 2646 (Scalia, J., dissenting) (reading *Raich* as upholding the regulation of local cultivation and possession of marijuana as part of the effort to regulate the interstate market in that drug).

### C. Summary of Basic Principles

Two important principles follow from *Lopez*, *Morrison*, and *Raich*. First, Congress can regulate *intrastate economic activity* so long as that activity, in the aggregate, substantially affects interstate commerce. Second, Congress can regulate intrastate *noneconomic* activity if, but only if, such regulation is an essential part of a larger regulation of economic activity. As the following section demonstrates, regulation of the take of Utah prairie dog cannot be justified under either principle.

## ARGUMENT

### I. The Take of Utah Prairie Dog Is a Non-Economic Activity

The Endangered Species Act prohibits the "take" of species that have been determined to be "endangered." *See* 16 U.S.C. § 1538(a)(1)(B). The Act defines "take" broadly to mean "harass, harm, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id*. § 1532(19). The Act authorizes but does not require the Secretary of Interior (and thus her delegate the Service) to extend the same "take" protections to species, such as the Utah prairie dog, that have been listed as "threatened." *See id.* § 1533(d). The Service has exercised that authority. *See* 50 C.F.R. §§ 17.40(g)(1), 17.31(a), 17.21(a). Thus, under the Service's implementing regulations, "it is unlawful for any person . . . to take [the Utah prairie dog] within the United States." *See id*. § 17.21(c)(1).

Contrary to the Service's and the Friends' arguments, the regulated activity as defined by the Act and the implementing regulations is categorically non-economic. To begin with, the Act itself prohibits "take" without any connection to a commercial transaction. *See* 16 U.S.C. § 1538(a)(1)(B) (prohibiting the "take of any [endangered] species within the United States or the territorial sea of the United States"). Moreover, the Act's definition of "take," quoted above, does not include any activities that

are intrinsically or necessarily economic. *See id*. § 1532(19). *See also GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003) ("Congress, through [the Endangered Species Act], is not directly regulating commercial development."); *Home Builders v. Babbitt*, 130 F.3d 1041, 1064 (D.C. Cir. 1997) (Sentelle, J., dissenting) (arguing that the Act's "take" prohibition "does not control a commercial activity" but rather is akin to the "criminal statute struck down in *Lopez*"); *Gibbs v. Babbitt*, 214 F.3d 483, 508 (4th Cir. 2000) (Luttig, J., dissenting) (arguing that the take of red wolves is not "an activity that has obvious economic character and impact").

To be sure, one can harm or injure a protected species for economic as well non-economic reasons. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring) (noting that the "take" of a protected species can but does not necessarily affect interstate commerce). But the same is true with gun possession or gender-motivated violence—both classes of activities surely cover some instances that are economically motivated—yet that obvious fact did not preclude the Supreme Court from holding that these types of activities are categorically non-economic. *Cf. Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. Indeed, both *Lopez* and *Morrison* involved *facial* challenges to the statutes in question. *See Lopez*, 514 U.S. at 551; *Morrison*, 529 U.S. at 618. In ruling

against the federal government in both cases, the Court necessarily came to the conclusion that no circumstance could arise in which the statute could be applied constitutionally. *See GDF Realty*, 326 F.3d at 634-35. Thus, the fact that a regulated activity as defined may tangentially capture some economic conduct cannot convert that activity into an "economic" one. *Cf. Lopez*, 514 U.S. at 565 ("[D]epending on the level of generality, any activity can be looked upon as commercial.").

It is possible to conceive of a "take" prohibition like that contained in the Act and its implementing regulations limited solely to economic conduct. For example, in *Raich* the Court cited the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d—which prohibits among other things the "take" of eagles, *id.* § 668(a)—as a reasonable exercise of Congress's power to control the possession and distribution of commercial commodities. *See Raich*, 545 U.S. at 26 n.36. That conclusion makes sense, given that eagle feathers and parts are valuable commodities. *See Andrus v. Allard*, 444 U.S. 51, 66 (1979) (observing that the Eagle Act's prohibition on the sale of eagle parts "prevent[s] the most profitable use" of the objects). More generally, it is reasonable to conclude that a take regulation limited to species that are valuable commodities would be categorically economic. But the take regulation challenged here applies to Utah prairie dogs, which are not

valuable commodities. *See* Final Rule to Reclassify the Utah Prairie Dog as Threatened, 49 Fed. Reg. 22,330, 22,333 (May 29, 1984) (determining that the Utah prairie dog has not been "[o]verutilized for commercial . . . purposes").

Thus, because the regulated activity—the take of Utah prairie dog—is non-economic, it cannot fall within the federal government's authority unless the regulation of that activity is essential to vindicating a larger economic regulatory scheme. But as the following section demonstrates, the Endangered Species Act is not such a scheme.

## II. The Endangered Species Act Is Not a Larger Regulation of Economic Activity

*Raich* teaches that the federal government may regulate non-economic activities only if the regulation of such activities is necessary to vindicate a market regulatory scheme. Although broad, the *Raich* rationale is limited by the requirement that the larger regulation of economic activity must itself be principally focused on economic activity. This reading of *Raich* squares with the Supreme Court's repeated admonitions that the federal government is a government of limited powers and, for that reason, its Commerce Clause power must be interpreted in such a way so as to maintain that limit.

With *Raich* thus interpreted, the Endangered Species Act cannot qualify as a larger regulation of economic activity. Its text reveals that the Act principally regulates non-economic concerns. It is true, of course, that the Act ensnares some economic activity. But to hold that a law is a "larger regulation of economic activity" simply because it regulates economic as well as noneconomic conduct would eliminate any real limitation on the Commerce Clause: Congress would be free to regulate anything as long as it did so broadly and comprehensively.

### A. The Act's Text Demonstrates That the Statute Is Principally a Conservationist Law, Not a Statute Directed to the Regulation of Markets

The Endangered Species Act's purpose is to preserve species, biodiversity, and habitat and not to regulate interstate markets in endangered species. Specifically, the Act is intended, first, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved"; second, "to provide a program for the conservation of such endangered species and threatened species"; and third, "to take such steps as may be appropriate to achieve the purposes of the treaties and conventions" dealing with the conservation of flora and fauna to which the United States is a party. *See* 16 U.S.C. § 1531(b). The first purpose reflects the Act's conservationist ethic. The second purpose sets

forth the means by which the first purpose is to be achieved. The third purpose simply reiterates existing treaty commitments. None of these statutory purposes necessarily concerns the regulation of interstate markets; and none mentions the need for regulation of interstate markets in endangered species. *Cf.* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. 174, 193 (1998) (observing that the Endangered Species Act contains "no findings which describe the effects of endangered species on interstate commerce"); Kevin Simpson, Note, *The Proper Meaning of "Proper": Why the Regulation of Intrastate, Non-Commercial Species under the Endangered Species Act is an Invalid Exercise of the Commerce Clause*, 91 Wash. U. L. Rev. 169, 195 (2013) ("The text of the legislation makes no attempt to rationally relate the protection of endangered species to the regulation of interstate commerce.").

To be sure, Congress identified economic activity as one cause for the decline of some species. *See* 16 U.S.C. § 1531(a)(1). Commercial overuse is an authorized ground for listing a species. *See id*. § 1533(a)(1)(B). And some provisions of the ESA (which Appellee People for the Ethical Treatment of Property Owners does not challenge) do regulate economic activity. *See id*. § 1538(a)(1)(A), (C)-(F) (prohibiting, inter alia, import and export, transport, delivery, or sale of endangered species). But the statute's

goals are neither a function of economic concerns nor do they depend on those concerns for their justification. *See id*. § 1531(a)(3) (noting that endangered "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people" with no mention of commerce or economics). A significant body of scholarly commentary agrees.[2] Accordingly, the Act's nexus to commerce or economics is tangential and coincidental.[3]

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[2] *See* Lee Pollack, Student Article, *The "New" Commerce Clause: Does Section 9 of the ESA Pass Constitutional Muster After* Gonzales v. Raich*?*, 15 N.Y.U. Envtl. L.J. 205, 241-42 (2007) (observing that the "legislative findings and statement of purpose of the ESA do not mention the potential commerce in endangered species specifically" and that "preserv[ation of] natural resources, [is] a non-commercial topic clearly outside of Congress' power to regulate under the Commerce Clause"); David W. Scopp, Comment, *Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court's Web of Confusion Traps More Than the Fly*, 39 U.S.F. L. Rev. 789, 814 (2005) ("Congress enacted the ESA with the intent of preserving individual species in order to protect biodiversity."); Daniel J. Lowenberg, Comment, *The Texas Cave Bug and the California Arroyo Toad "Take" on the Constitution's Commerce Clause*, 36 St. Mary's L.J. 149, 183 (2004) ("[R]easonably speaking, the design of the ESA is to regulate species—not commerce."); Justin Gregory Reden, Comment, *The Commerce Clause Appropriately Defined Within a Universe Without Distinction: The Federal Endangered Species Act's Unconstitutional Application to Intrastate Species*, 25 T. Jefferson L. Rev. 649, 667 (2003) ("Neither the purpose nor the design of the ESA has a commercial nexus."). *See also* Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 Envtl. L. 309, 350 (2004) (noting the "legislative history's proclamation that the ESA's 'essential purpose' is 'to protect the ecosystems upon which we and other species depend'") (quoting H.R. Rep. No. 93-412,

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### B. The Act Is Readily Distinguishable from What *Raich* Deemed to Be a Larger Regulation of Economic Activity

Beyond the Endangered Species Act's text, the statute's operation reveals that it is not what *Raich* would deem a market regulatory scheme. First, the Act is not a "comprehensive regime to combat the international and interstate traffic in [endangered species commodities]." *Raich*, 545 U.S. at 12. Although some endangered species are in commerce,[4] most are not

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at 6, 10 (1973)); Andrew P. Morriss & Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 Envtl. L. 309, 338 (2009) ("Former Interior Secretary Bruce Babbitt said that 'religious values are at the core of the 1973 Endangered Species Act' . . . ."); Jud Mathews, Case Comment, *Turning the Endangered Species Act Inside Out?*, 113 Yale L.J. 947, 952 (2004) ("[T]he ESA is not about monetizing endangered species; it is about preserving them in their natural state. . . . All the provisions of the Act are directed to the preservation of species without regard to their commercial possibilities.").

[3] This is a distinction that the Ninth and Eleventh Circuit Court of Appeals have missed in upholding Endangered Species Act regulation under the Commerce Clause. The mere fact that a statute has economic aspects does not necessarily mean that the statute is substantially concerned with those economic aspects. *But see San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F. 3d 1163, 1176-77 (9th Cir. 2011); *Alambama-Tombigbee Rivers Coal. v. Kepthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007). *Cf.* Dan A. Akenhead, *Federal Regulation of Noncommercial, Instrastate Species under the ESA after* Alabama-Tombigbee Rivers Coalition v. Kempthorne & Stewart & Jasper Orchards et al. v. Salazar, 53 Nat. Resources J. 325, 354 (2013) (observing that the Ninth and Eleventh Circuits in these cases expanded the *Raich* rationale).

[4] *See Alabama-Tombigbee*, 477 F.3d at 1273-74 (noting the substantial black market in some endangered species, as well as recreational and medicinal uses for other species). But "[i]ndiscriminately lumping together [non-commercial species] with every other protected species to claim an
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fungible commodities for which an established (or even inchoate) market exists.[5]

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economic impact would pave the way to federal regulation of nearly everything." Simpson, *supra*, at 200. *Cf. Morrison*, 529 U.S. at 617-18. The Eleventh Circuit seemed impressed in particular with the medicinal properties of endangered plants. *See Alabama-Tombigbee*, 477 F.3d at 1274 (noting that the rosy periwinkle nearly went extinct before scientists discovered that it could be used to treat several serious illnesses). Yet under the Endangered Species Act, the prohibition on taking endangered plants is substantially less broad, *see* 16 U.S.C. § 1538(a)(2)(B); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781-82 (9th Cir. 2010), and thus embodies a vision of federal power more consistent with those who seek to limit the Act's scope.

[5] *See, e.g.*, Bradford C. Mank, *After* Gonzales v. Raich*: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. Colo. L. Rev. 375, 428 (2007) ("About half of all endangered or threatened species have habitats limited to one state, and many intrastate species have little economic value in interstate commerce."); Scopp, *supra*, at 791 ("[M]any . . . listed species are isolated to one state and have no 'economic' value . . . ."); Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. Colo. L. Rev. 487, 559 (2003) ("The most recent data on the market value of endangered species reveal that given current technology, there simply is not much that can be made from any of them."); Nelson Goodell, Comment, *Making the "Intangibles" Tangible: The Need for Contingent Valuation Methodology in Environmental Impact Statements*, 22 Tul. Envtl. L.J. 441, 452 (2009) (observing that "no [supply and demand] market exists for the buying or selling of landscapes or endangered species"); Pollack, *supra*, at 241 ("[M]any if not most of the animals currently listed (and certainly the majority of the listings that have made headlines in recent years) would not be in any sort of commerce even if they were not listed."); Reden, *supra*, at 667 ("It is logically impossible to analyze whether there is a substantial affect upon the national market for endangered species, as no market exists."); Michael J. Bean, *Comment on Trading Species: A New Direction for Habitat Trading Programs*, 38 Envtl. L. Rep. News & Analysis 10,550,
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Second, for that reason, the Endangered Species Act is unlike the Controlled Substances Act or the Agricultural Adjustment Act, the primary purposes of which are "to control the supply and demand" of commodities. *See Raich*, 545 U.S. at 19. *Cf.* 16 U.S.C. § 1531(b). As noted in the preceding section, the principal purposes of the Endangered Species Act are non-economic. *See supra* n.2. *See also* Mathews, *supra*, at 953 ("The [Act]'s regulation of interstate commerce is merely circumstantial . . . .").

Third, the Act's regulatory approach cannot fit within *Raich*'s narrow definition of economic activity. *See Raich*, 545 U.S. at 25 ("economics" means "'the production, distribution, and consumption of commodities'") (quoting Webster's Third New International Dictionary 720 (1966)). *See also* Randy Barnett, *Foreword: Limiting* Raich, 9 Lewis & Clark L. Rev. 743, 749 (2005) (*Raich*'s definition of "economic" "would exclude any personal conduct that does not involve 'the production, distribution, and consumption of commodities.'"); Note, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 Yale L.J. 456, 469

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10,550 (Aug. 2008) ("[R]obust markets for endangered species are unlikely to develop."); Eric Brignac, *The Commerce Clause Justification of Federal Endangered Species Protection:* Gibbs v. Babbitt, 79 N.C. L. Rev. 873, 883 (2001) ("[M]any of the animals on the endangered species list are insects, clams, or other animals whose independent commercial value is highly speculative at best.") (footnote omitted).

(2006) (noting "*Raich*'s narrow definition of 'economics,'" and observing that, because the Supreme Court "has repeatedly equated economic regulation with regulation of specific commodities, . . . this poses a serious threat for environmental regulation," including the ESA).

### C. The Act's Protection of Biodiversity or Unknown Markets Cannot Convert the Statute Into a "Larger Regulation of Economic Activity"

It is no doubt true that Congress, in enacting the Endangered Species Act, wished to protect biodiversity and, in so doing, preserve whatever hidden value may lie within protected species. *See also Alabama-Tombigbee Rivers Coal. v. Kepthorne*, 477 F.3d 1250, 1274-75 (11th Cir. 2007). But these legislative aims cannot transform the Act into a market regulatory scheme. As the Supreme Court has emphasized, regulation cannot be upheld under the Commerce Clause using attenuated causal reasoning to reach the desired interstate market result. *See Lopez*, 514 U.S. at 567 (rejecting "pil[ing] inference upon inference" approach); *Morrison*, 529 U.S. at 615 (rejecting a "but-for causal chain" approach to reach "every attenuated effect upon interstate commerce"). To hold otherwise would convert the Commerce Clause into the "'[h]ey, you-can-do-whatever-you-

feel-like Clause.'" *See* Alex Kozinski, *Introduction to Volume Nineteen*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995).

Yet a biodiversity or "unknown markets" theory would obliterate any distinction between "what is truly national and truly local." *Morrison*, 529 U.S. at 617-18. To argue that Congress can regulate biodiversity because, after all, life depends on it and without life one cannot have commerce, would leave no limit to Congress's authority. *See, e.g.*, Nagle, *supra*, at 199 ("Such a loss of resources [or biodiversity] argument proceeds from the same premises that would justify the application of the Earth Preservation Act to any human activity. It would, in short, allow Congress to do anything."); Mathews, *supra*, at 951 ("If Commerce Clause analysis were a matter of imagining whether a statute could hypothetically generate some economic value that might not exist absent the statute, it is hard to imagine any law that would fail the test."). *See also GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 293 (5th Cir. 2004) (Jones, J., dissenting from the denial of rehearing en banc) ("[The proposition] that all takes of all species necessarily relate to an ecosystem, which by its very grandiosity must at some point be 'economic' in actuality or in effect . . . is precisely the reasoning rejected by the Supreme Court."). For surely in that instance Congress would be entitled to conclude (and reasonably so) that violent

crime, marriage, divorce, and childrearing all, in the aggregate, have a substantial impact on the Nation's economy, though such activities are not always economic. *Cf. Morrison*, 529 U.S. at 615-16. And at that point, the federal government would retain under the Commerce Clause the very police power that the Founders denied to it. *See id*. at 618.

The same result obtains with an argument based on "unknown markets." Such a theory would have no logical stopping point, given that any non-commercial object can become a commercial object. *See GDF Realty*, 326 F.3d at 638 ("The *possibility* of future substantial effects . . . on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation to pass constitutional muster."); *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting) ("A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce," but then there would be "no stopping point" to regulation.). *Cf. Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) ("the power to regulate commerce, though broad indeed, has limits").

Ultimately, any justification for the Endangered Species Act's application in this case must fail, given that the statute is simply not about

economics, or commodities, or markets. In fact, it is precisely because the Act does not by and large regulate commodities markets that its defenders have developed a "market failure" theory to support its constitutionality. *See* Mollie Lee, Note, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 Yale L.J. 456, 490-92 (2006). But any relation between the Act and markets is necessarily insubstantial and attenuated. Therefore, regulation of non-economic activities like the take of Utah prairie dog falls outside the *Raich* rationale.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

DATED: May 26, 2015. Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 5,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 26, 2015.

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Dated: May 26, 2015.

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