No. 14-4151, 14-04165

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

v.

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

and

FRIENDS OF ANIMALS,
Intervenor-Defendant-Appellant

Appeal from the United States District Court for the
District of Utah, Central Division
Case No. 2:13-CV-00278-DB
Honorable Dee Benson, District Judge, Presiding

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

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The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy. The Center's mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life through participation in cases of constitutional significance, including cases such as this involving the foundational principle that We the People delegated to the national government only certain, specifically enumerated powers, reserving the bulk of sovereign power, including the police power at issue here, to the States or to the people. The Center previously represented the petitioner in *Rancho Viejo, LLC, v. Norton*, 334 F.3d 1158 (2003), and also served as *amicus curiae* in related cases addressing the scope of Congress's powers under the Commerce Clause including, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003), *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).[1]

[1] Pursuant to Rule 29(a), *Amicus Curiae* affirms that all parties have consented to the filing of this brief. Pursuant to Rule 29(c)(5). *Amicus Curiae* further affirms that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The Founders intended the Commerce Clause to allow Congress authority over trade with foreign nations, Indian tribes, and between two or more states. *Gibbons v. Ogden*, 22 U.S. 1, at 194 (1824). This interpretation of Congress' power remained unchanged for almost 150 years for the express reason that it maintained the line between federal commerce powers and state police powers. *United States v. E.C. Knight Co*., 156 U.S. 1, 13 (1895). In the wake of the great depression, the Supreme Court began to expand its definition of "commerce" as New Deal legislation stretched that word to its outer boundaries, but the Court continued to enforce the line between what is national and what is local. *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 37 (1937). The foundational cases for the issues here, *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), turn on the Court's reasoning giving effect to these concerns.

The Utah prairie dog, whose habitat is exclusively within the State of Utah, has been regulated as an endangered species since 1974. 50 C.F.R. § 17.40. The prairie dog has never been an item of commerce, and has been the subject of only a handful of scientific studies and books. *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 2, 12 (D. Utah 2014) ("*PETPO"*).

The conservation rule at issue here can only stand if it is directed at activity that substantially affects commerce under the test created in *Lopez* and confirmed in *Morrison*. *Morrison*, 529 U.S., at 608-09. However, the Service failed to focus the terms of the

regulation on commercial activity, and instead attempted to regulate *all* activity that may affect a "take" of the species regardless of whether the activity regulated is commercial in nature. 50 C.F.R. § 17.40(g). Additionally, the "take" reached by the regulations in this case is of an entirely non-commercial, intrastate species with no existing market, much less a national one like the interstate market in illicit drugs at issue in *Gonzales v. Raich.* 545 U.S. 1, 19 (2005).

The District Court correctly held that the Service has cast an untenably wide net that is unsustainable under the Commerce Clause and its ruling should be affirmed.

ARGUMENT

I. The Restrictions on Local Land Use Imposed as a Result of the Regulation of the Wholly Intrastate, Non-Commercial Species at Issue Here Exceed Congress's Powers Under the Commerce Clause, Both as Originally Understood and as Recently Interpreted by the Supreme Court.

A. "Commerce" As Originally Understood Was Trade.

At the time the Constitution was adopted, our nation's Founders considered "commerce" to be trade, and "commerce among the states" to be interstate trade. *See, e.g.*, *Corfield v. Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *Lopez*, 514 U.S., 585 (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes").

In *Gibbons v. Ogden*, Chief Justice Marshall specifically rejected the idea that

"commerce among the states" was intended to "comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." 22 U.S., 194 (quoted in *Morrison*, 529 U.S., 616 n.7). "Comprehensive as the word 'among' is," he noted, "it may very properly be restricted to that commerce which concerns more States than one." *Id*. With those words the *Gibbons* Court recognized that the Constitution decisively limited federal power over commerce to modes and instrumentalities of commerce involving at least two states. Congress' authority to trump local land use regulations merely due to the presence of an entirely intrastate species that is in no way an article of commerce would have been viewed as far outside the bounds of constitutional authority.

The Court was slow to change this interpretation, as evidenced by nearly a century and a half of decisions based in this constitutional understanding. In *E.C. Knight*, the Court held that manufacturing preceded commerce and was thus outside the definition of commerce; even "an article [that] is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." 156 U.S., at 13; *see also Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Court decisions limited the definition of "commerce" to trade involving more than one state. *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress' power to regulate interstate commerce); *see also*

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating intrastate retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

The Founders and the courts held a firm line on these definitions and federal regulations to ensure that the police powers remained reserved to the States and were not consumed under an ever-expanding commerce power delegated to Congress. *See, e.g.*, *E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.), at 210); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co. v. Kimball*, 102 U.S. 691 (1880); *Bowman v. Railway Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891); *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978).

As the Court noted in *E.C. Knight*, it was essential to the preservation of the States and therefore to liberty that the line between the two powers be retained. 156 U.S., at 13; *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936) (quoting *E.C. Knight*); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

B. Recent Evolutions in Commerce Clause Jurisprudence Have Expanded Congressional Power Without Granting Police Powers to the Federal Government.

The economic crisis that gave rise to New Deal legislation presented the courts with numerous challenges to their longstanding understanding of the Commerce Clause. Although the Supreme Court eventually upheld much of that legislation under a broader interpretation of the Constitution's Commerce Clause than it had previously recognized, it nevertheless remained vigilant in enforcing the subtle, but important line between federal commerce power and the states' police power. Thus, in *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 37 (1937), the Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Justice Cardozo seconded this concern in *Schechter Poultry*, 295 U.S., at 554 (Cardozo, J., concurring), noting that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce."

The foundational cases for the issue here, *Lopez* and *Morrison*, turned on these concerns and the jurisprudential foundation created in preceding cases. *See Lopez*, 514 U.S., at 566; *Morrison*, 529 U.S., at 608. The expansion of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2013) ("ESA"), at issue here does not regulate the

channels or instrumentalities of interstate commerce. *See Lopez*, 514 U.S., at 567. Moreover, the Supreme Court has repeatedly made clear that when grounds for the exercise of Commerce Clause power have no "judicially enforceable outer limit" they cannot be sustained. *See id*. (rejecting an "inference upon inference" assertion of power that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *Morrison*, 529 U.S., at 615.

More recently, in rejecting the Government's argument in *National Federation of Independent Business v. Sebelius* ("*NFIB*") that the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), was a valid exercise of Commerce Clause power, Chief Justice Roberts reasserted that courts must read the Commerce and Necessary and Proper Clauses "carefully to avoid creating a general federal authority akin to the police power." 132 S. Ct. 2566, 2578 (2012) (opinion of Roberts, C.J.). And on this aspect of the case he was joined by four justices who noted that the Commerce Clause, "even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. *Id*. at 2646 (joint dissenting opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) ("Joint Dissent"). The Joint Dissent further argued that congressional action exceeds the scope of the Necessary and Proper Clause both when it "directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power." *Id*. The Joint Dissent concluded by noting that *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Court upheld the regulation of wheat grown for personal consumption because it sufficiently affected commerce, has

"always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence." *Id.*, at 2643.

Thus, even under the expanded view of Congressional power under the Commerce Clause that has been in place since the New Deal, the expansion of the ESA proffered by the U.S. Fish and Wildlife Service ("Service") remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people. *See id.*

II. The District Court Correctly Held the Service's Regulation of the Wholly Intrastate Utah Prairie Dog Fails the Tests Set Forth in *Lopez* and confirmed in *Morrison.*

The Utah prairie dog population is found exclusively within the State of Utah and has never been an article of commerce (*cf.* Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (16 U.S.C. 668 et seq.)) or even an article of tourism (*cf. Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000)). Rather it has merely been the subject of a handful of scientific studies and books. *PETPO*, 57 F. Supp. 3d., at 2, 12. Since 1974, the federal government has issued regulations designed to protect the Utah prairie dog under the ESA, prohibiting any unsanctioned "take," possession, sale, delivery, transportation, or receipt of the animals. 16 U.S.C.§ 1538(a)(1)(A)-(F). "Take" is defined in the statue as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

In 2012, the Service revised the rule governing the Utah prairie dog's habitat to its

current form, which authorizes a take "only by permit and only on agricultural lands, [private property] within [.5 miles] of conservation lands, and areas where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites." *PETPO*, 57 F. Supp. 3d., at 2 (citing 50 C.F.R § 17.40(g) ("rule")) (internal quotation marks omitted). The rule prohibits any alteration of the Utah prairie dog habitat on all other private land and all federal land. *Id*.

In *Lopez* the Supreme Court limited Congress' power under the Interstate Commerce Clause to authority over: 1) "the use of the channels of interstate commerce"; 2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and 3) "those activities having a substantial relation to interstate commerce … i.e., those activities that substantially affect interstate commerce." 514 U.S., at 558-59 (citations omitted). The Court subsequently reaffirmed that formulation in *Morrison*, 529 U.S., at 608-09, further clarifying what qualified as "a substantial relation to interstate commerce." *Id*.

A. Neither The Utah Prairie Dog Nor its Habitat Are A Channel Nor An Instrumentality of Commerce.

The "channels" prong identified in *Lopez* supports only regulation of the methods of transport used in interstate commerce, thus, at most it lends support for the ESA's ban on transporting endangered species in interstate commerce, 16 U.S.C. § 1538(a)(2)(A), (C). The "instrumentalities" prong of *Lopez* at most supports the ESA's ban on hunting, trapping, capturing and collecting endangered species that were destined for interstate commerce, 16 U.S.C. §§ 1532(19), 1538(a)(2)(B). 514 U.S., at 558-59. *Lopez* does not

provide support, however, for the Service's ban on habit modifications that result in the "take" of Utah prairie dogs, for it is only with respect to the former activities that the Service can be said to be regulating "an item bound up with interstate attributes." *See United States v. Wilks*, 58 F.3d 1518, 1521 (10th Cir. 1995).

The *regulation at issue* here does not address the ESA's restrictions on the interstate shipment of endangered species. 15 U.S.C. § 1538(a)(1)(E) (making it unlawful to transport endangered species in interstate or foreign commerce). Nor does the regulation at issue here address retail sales of goods that have moved in interstate commerce. Rather, it aims at *any activity*, without regard to its commercial nexus, that might cause "harm" to prairie dogs that have never been articles of commerce, 50 C.F.R § 17.40(g), and thereby indirectly regulates entirely intrastate, local land use far removed from not just the Founders' understanding of "commerce among the states," but from the expanded, post-New Deal understanding of that constitutional provision as well.

The Utah prairie dogs the Service seeks to protect are not articles of commerce, so the regulations at issue here are readily distinguishable from regulations designed to protect species that actually are articles of commerce. *Cf.* Black Bass Act, ch. 346, 44 Stat. 576 (1926); Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (16 U.S.C. 668 et seq.). The Commerce Clause is inapplicable to both the land use being regulated and the species being protected as neither of them are in any way articles of commerce.

Lopez warns against upholding Commerce Clause contentions that require inference to be piled upon inference "in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."

514 U.S. at 567. Moreover, augmenting the Commerce power with the Necessary and Proper Clause does not save the ESA regulations at issue here because the Constitution:

> enumerates not federally soluble problems, but federally available powers. The Federal Government can address whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce. None of our cases say anything else. Article I contains no whatever-it-takes-to-solve-a-national-problem power.

NFIB, 132 S.Ct., at 2650 (Joint Dissent). The Supreme Court's limitation in *Lopez* of Congress' authority under the Commerce Clause gives no support for expanding the ESA to protect the habitat of the wholly intrastate, non-commercial species here as a regulation of "commerce among the states." Federal law that fails to rest on constitutional provisions are "merely acts of usurpation, and [] deserve to be treated as such." The Federalist No. 33, at 200 (A. Hamilton) (Clinton Rossiter ed., 1961) (quoted in *NFIB*, 132 S.Ct., at 2592).

B. Applying the Four Factors Set Forth in *Lopez* and Confirmed in *Morrison*, Habitat Modifications Resulting in A Take of Utah Prairie Dogs Do Not Substantially Affect Interstate Commerce.

In *Morrison*, the Supreme Court elaborated on *Lopez*'s "substantial effects" requirement by providing four factors to consider: 1) is the regulation one of "economic activity"; 2) does the statute have an "express jurisdictional element"; 3) were there legislative findings regarding the effects on interstate commerce; and, 4) was the link between the regulated activity and the effect on commerce so attenuated as to leave no stopping point to Congress' Commerce Clause power. 529 U.S. 598, 610-13.

In the case below, the government did not dispute that the rule has no jurisdictional element, or that Congress failed to offer legislative findings regarding the effects of a Utah prairie dog take on interstate commerce. *PETPO*, 57 F. Supp. 3d, at 10. Standing alone, the absence of those two factors—"significant considerations" under *Lopez* and *Morrison*, 529 U.S. at 609—seriously weakens the Service's argument.

1. The prohibition on habitat modifications resulting in a "take" of the Utah Prairie Dog reaches non-commercial activity.

The rule giving rise to this case can stand only if it is *directed at activity* that "substantially affects commerce." *Lopez*, 514 U.S., at 559.

In both *Lopez* and *Morrison* the Supreme Court focused on the regulated activity *as described by the terms of the statutes*—gun possession in a school zone in *Lopez*, and gender-motivated violence in *Morrison*, neither of which *by their terms* had anything to do with commerce. *See Morrison*, 529 U.S., at 610. And contrary to the Service's interpretation of the Fifth Circuit's holding in *GDF Realty*, that court was quite clear in explaining that neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that Congress may regulate activity under the substantial effects prong solely because non-regulated conduct by the actor engaged in the regulated activity will have some connection to interstate commerce:

> To accept [such an] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate interstate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.

GDF Realty, 326 F.3d, at 634-35.

This analysis is consistent with *Solid Waste Agency of N. Cook County. v. U.S. Army Corps of Engineers*, in which the Supreme Court, albeit in *dictum*, noted that aggregation based on the nature of the actor, rather than on the activity that was the object of the regulation, would "raise significant constitutional questions." 531 U.S.159, 173-74 (2001) ("*SWANCC*"). The Court in *SWANCC* found it is necessary "to evaluate the *precise object or activity* that, in the aggregate, substantially effects interstate commerce," with a focus on the activity "to which the statute *by its terms* extends." *Id*. (emphasis added). Thus, here the court should look to the specific regulated activity—takes through habitat modification—and not the potentially commercial nature of the actor undertaking that activity.

Thus the District Court correctly held the rule the Service seeks to uphold is non-economic because it "regulates *every activity*, regardless of its nature, if it causes harm to a Utah prairie dog." *PETPO*, 57 F. Supp. 3d, at 10. The Commerce Clause does not stretch so far.

The Service argues that the ESA has various goals, "but the objects of regulation are no less commercial or economic." FWS Opening Brief at 31, *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service*, No. 14-04165 (10th Cir. April 14, 2015) ("FWS Brief"). It concludes that Congress' non-economic motives "do not undercut Congress's power to act." *Id*., at 31 n. 18. Congress' non-economic motives were made clear in its declared purpose "to provide a means whereby the ecosystems

upon which endangered species and threatened species depend may be conserved," including providing a conservation program and taking appropriate steps to achieve conservation. 16 U.S.C. § 1531(b).

The Service likewise established that the objects of the rule's regulation were any activity on private lands that would "harass" or "harm" the animals. 50 C.F.R. § 17.40(g)(4). The Service throws an untenably wide net and captures local land uses spanning from single family homes and cemeteries to developing land for commercial purposes, rather than targeting specific economic activities that might provide it with "judicially enforceable outer limits" as required by *Lopez.* 514 U.S. at 566; *see also NLRB* 301 U.S. at 37.

In *Morrison* the Court took pains to assign no significance to Alfonso Lopez's commercial motivation—bringing his gun to school *to sell*—precisely because "neither the purposes nor the design *of the statute* ha[d] an evident commercial nexus." *Morrison*, 529 U.S., at 611 (quoting *Lopez*, 514 U.S., at 580 (Kennedy, J., concurring)) (emphasis added).

The purpose and design of the Gun Free Schools Zone Act at issue in *Lopez*—protecting school zones—did not change merely because the particular person prosecuted was engaged in a commercial action. Neither does the ESA's purpose and design of protecting endangered species (as applied to non-commercial species) change merely because some of the activities covered by the statute might be economic in nature.

2. The District Court correctly held that the link between "takes" of the Utah Prairie Dog and the effect on commerce was so attenuated as to leave no stopping point to Congress' Commerce Clause power.

The District Court correctly ruled that "all of [the Service's] arguments" offered to "establish a link between Utah prairie dog takes and a substantial effect on interstate commerce are attenuated." *PETPO*, 57 F. Supp. 3d., at 11. This holding is firmly grounded in *Morrison*, where the Supreme Court explained that in every case in which it has "sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S., at 611 n.4.

Gonzales v. Raich provides no support for the Service's position that the rule at issue here is permissible because the Supreme Court in that case allowed Congress to regulate the purely local growth and consumption of marijuana as a "necessary and proper" means of giving effect to the prohibition of interstate commerce in the illicit drug. 545 U.S. 1 (2005). Instead, what the Court emphasized in *Raich* is that a national market for marijuana *already existed*, and local production could easily be drawn into that market, much as the wheat at issue in *Wickard* could have been. *Raich*, 545 U.S., at 2207. Regulating the local market was thus a valid means of regulating the interstate market. Here, in contrast, as the district court correctly recognized, "takes of Utah prairie dogs on non-federal land—even to the point of extinction—would not substantially affect the national market for any commodity regulated by the ESA" because there is no market in Utah Prairie Dogs. *PETPO*, 57 F. Supp. 3d., at 14.

CONCLUSION

That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of Utah provides no constitutional title for them to

do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are almost exclusively borne by the people of Utah. Our Constitution leaves such decisions to the States for good reason. The inference-upon-inference reasoning offered by the Service should not be allowed to alter that fundamental constitutional structure.

Dated: May 26, 2015

Respectfully submitted,

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FED. R. APP. 32(a)(7) AND TENTH CIRCUIT RULES

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7), the attached Brief of Amici Curiae Center for Constitutional Jurisprudence is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 4,217 words.

I further certify that all privacy redactions have been made.

I further certify that all paper copies submitted to this Court are exact copies of this version, which is being submitted electronically via the Court's CM/ECF system.

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Date: May 26, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2015, I electronically filed the foregoing Brief of *Amicus Curiae* Center for Constitutional Jurisprudence 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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