Nos. 14-4151 and 14-4165

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.

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

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLEE URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Fed. R. App. P. 29(c), the undersigned certifies that amicus curiae Mountain States Legal Foundation is a non-profit organization that has no parent corporation(s) and no publicly held corporation owns 10% or more of its stock. A supplemental disclosure statement will be filed upon any change in the information provided herein.

DATED this 26th day of May 2015.

Respectfully submitted,

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GLOSSARY OF TERMS

APA – Administrative Procedure Act

Br. – Brief

CSA – Controlled Substances Act, 21 U.S.C. § 801 *et seq*.

ESA – Endangered Species Act, 16 U.S.C. § 1531 *et seq*.

FoA – Friends of Animals

FWS – Fish and Wildlife Service

MSLF – Mountain States Legal Foundation

NFIB – Nat'l Fed'n of Indep. Bus.v. Sebelius, 132 S. Ct. 2566 (2012)

PETPO – People for the Ethical Treatment of Property Owners

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

Central to the notion of a limited government is the constitutional principle of enumerated powers: those powers not explicitly delegated to the federal government are reserved to the States and the people. These limited powers include Congress's power to make rules regulating interstate commerce, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Legislation that reaches beyond Congress's constitutional authority results in a federal government that is no longer limited and ethical, and further erodes individual liberty, the right to own and use property, and the free enterprise system. Accordingly, MSLF has been actively involved in litigation challenging Congress's power under the

[1] Pursuant to Fed. R. App. P. 29(a), Appellee, People for the Ethical Treatment of Property Owners ("PETPO"), consents to the filing of this amicus curiae brief. Intervenor-Appellant, Friends of Animals ("FoA"), consents to the filing of this amicus curiae brief. Pursuant to Fed. R. App. P. 29(b), Defendants-Appellants, the U.S. Fish and Wildlife Service, *et al.* (collectively, "FWS") "do not object" to the filing of this amicus curiae brief. Pursuant to Fed. R. App. P. 29(c)(5), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than Mountain States Legal Foundation ("MSLF"), its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Commerce Clause. *E.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*") (amicus curiae).

MSLF has also been actively involved in the proper interpretation and application of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*. *E.g.*, *Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998) (represented livestock operator charged with unlawfully taking a grizzly bear); *U.S. Fish & Wildlife Serv. v. Lin Drake*, Docket No. Denver 99-1, 2001 WL 1769732 (2001), *aff'd sub nom. Lin Drake*, 29 O.H.A. 71 (2004) (represented landowner charged with unlawfully taking Utah Prairie dogs). More specifically, MSLF has sought to prevent the ESA from reaching activities on private land and purely intrastate species. *See, e.g.*, *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) (amicus curiae); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (amicus curiae); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (amicus curiae).

If the FWS's expansive interpretation of its authority under the ESA is adopted in this case, private property will cease to exist and the principles of federalism enunciated by the Supreme Court's distinction between "what is truly national and what is truly local" in *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) will be obliterated. Accordingly, MSLF submits this amicus curiae brief in support of PETCO urging affirmance.

STATEMENT OF THE CASE

The Utah prairie dog is a species of rodent and one of five species of prairie dogs native to North America. 77 Fed. Reg. 46,158, 46,160 (Aug. 2, 2012). It is found exclusively in southwestern Utah. *Id.* at 46,161. Current populations are susceptible to sylvatic plague and predation. *Id.* Historically, there is scant evidence regarding "actual numeric population reduction" due to human forces, but the FWS listed the Utah prairie dog as an endangered species in 1973. *See* 38 Fed. Reg. 14,678 (June 4, 1973). In 1984, the Utah prairie dog was downlisted to "threatened" status under the ESA in 1984. *See* 49 Fed. Reg. 22,330 (May 29, 1984). At that time, the population of Utah prairie dogs were causing such significant damage to private lands that FWS determined authorizing takes was "necessary for the management and proper conservation of the species." *Id.* at 22,331. The FWS thus adopted a special 4(d) rule providing for "takes" of prairie dogs on private lands under the direction of the Utah Division of Wildlife Resources.[2] *Id.* at 22,333; 50 C.F.R. § 17.40(g).

On August 2, 2012, the FWS amended the special 4(d) rule to the current version at issue here. *See* 50 C.F.R. § 17.40(g); 77 Fed. Reg. at 46,158 ("Utah

[2] Under the ESA, "take" means "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). "Harm" in the definition of "take" in the ESA means "an act which actually kills or injures wildlife . . . includ[ing] significant habitat modification or degradation . . . ." 50 C.F.R. § 17.3.

prairie dog regulation"). The Utah prairie dog regulation imposes significant restrictions on the takes of Utah prairie dogs on private property, requiring a permit and limiting permitted takes to: (1) agricultural lands; (2) private property within 0.5 miles of conservation lands; or (3) areas where Utah prairie dogs create serious human safety hazards or disturb the sanctity of significant human cultural or human burial sites. 50 C.F.R. § 17.40(g). Without a permit, no one is permitted to undertake any activity that would injure or kill a Utah prairie dog, or significantly impair its habitat, regardless of whether such activity is commercial or not. *Id.*

On April 18, 2013, PETPO, a membership organization that represents private property owners subject to overly burdensome regulations, filed suit against the FWS challenging the Utah prairie dog regulation. *PETPO v. U.S. Fish and Wildlife Service*, No. 13-278, 2014 WL 5743294, at *2 (D. Utah, Nov. 5, 2014).[3] PETPO alleged, *inter alia*, that the Utah prairie dog regulation violated the Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3. *See PETPO*, 2014 WL 5743294, at *2. Specifically, PETPO alleged that the Utah prairie dog is a wholly intrastate species and that takes of the prairie dog do not substantially affect interstate commerce. *Id.* Thus, PETPO moved for summary judgment on the ground that the Utah prairie dog regulation exceeds Congress's authority to regulate interstate commerce under the Commerce Clause. *Id.*

[3] FoA intervened on the side of the FWS. *Id.* at *1.

On November 5, 2014, the district court granted PETPO's motion, ruling, *inter alia*, that issuance of the Utah prairie dog regulation exceeded Congress's (and hence the FWS's) authority under the Commerce Clause. *Id.* at **6–7. The district court also ruled that the Necessary and Proper Clause could not salvage the Utah prairie dog regulation because the take of Utah prairie dogs on private lands "would not substantially affect the national market for any commodity regulated by the ESA." *PETPO*, 2014 WL 5743294, at *8. The FWS and FoA timely appealed.

ARGUMENT

I. A PROPER INTERPRETATION OF THE COMMERCE CLAUSE REQUIRES A CLEAR DISTINCTION BETWEEN ECONOMIC AND NONECONOMIC ACTIVITIES.

A. A Clear Distinction Between Economic And Noneconomic Activities Is Necessary To Preserve Federalism.

The Commerce Clause provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Despite its relatively straightforward grant of limited power, "[t]he path of our Commerce Clause decisions has not always run smooth[.]" *NFIB*, 132 S. Ct. at 2585. The Supreme Court recently cautioned that the Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power[]" because "'federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Id.* at 2578 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

When the Framers included the Commerce Clause in the Constitution, it is unlikely they anticipated that it would become such a central tool in pushing the bounds of federalism to its breaking point. The Framers built upon the Articles of Confederation, which provided that, "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, art. II. As James Madison explained:

> The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change *does not enlarge these powers*; it only substitutes a more effectual mode of administering them.

The Federalist No. 45, at 236 (Madison) (Buccaneer Books 1992) (emphasis added).[4] The Framers intended the Commerce Clause to empower Congress to "enter trade agreements with foreign nations[,]" "to establish free trade among the states[,]" and to reduce conflict among the states arising from "discriminatory trade

[4] In the same paper, Madison stated, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.*; *see also The Federalist No. 39*, at 194 (Madison) (Buccaneer Books 1992) (By assigning Congress power over "certain enumerated objects only," the Constitution "leaves to the several States a residuary and inviolable sovereignty over all other objects."); David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 Tul. L. Rev. 1069, 1071 (1996) ("[F]ederalism was the unique contribution of the Framers to political science and political theory.").

regulations." Scott Boykin, *The Commerce Clause, American Democracy, and the Affordable Care Act*, 10 Geo. L.J. & Pub. Pol'y 89, 92 (2012).

Given the context in which the Constitution was drafted, it is obvious that the primary purpose of the Commerce Clause was to prevent restrictions on trade imposed by states to favor their residents over those of other states, while allowing the states to retain their police powers. *Id.* at 90; John Schreiner, *The Irony of the Ninth Circuit's Expanded (Ab)use of the Commerce Clause*, 33 W. St. U. L. Rev. 13, 16 (2005–2006) ("The Framers drafted the Commerce Clause in an age where states coined their own currency and imposed tariffs on one another."); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824) (The commerce power is properly "restricted to that commerce which concerns more States than one . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."); *State of South Carolina v. United States*, 199 U.S. 437, 499 (1905) ("Those things which are within [the Constitution's] grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded.").

The principle of limited and enumerated powers in the federal government was a foregone conclusion to the Framers,[5] and inclusion of the Commerce Clause was necessary because the Framers sought to limit the power of *state* governments as well. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) ("The 'negative' aspect of the Commerce Clause was considered the more important . . . ."). Indeed, for "nearly a century" after the Constitution was drafted, "the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce." *Lopez*, 514 U.S. at 553. The Supreme Court's early precedents are consistent with the Framers' view, and consistently recognized that the Constitution creates a federal government of limited and enumerated powers, beginning with the seminal case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), where Chief Justice Marshall explained: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." In *Gibbons*, one of the earliest Commerce Clause cases, the Court stated that the Constitution

[5] As Madison stated during the second Congress, "those who ratified the Constitution conceived—that this is not an indefinite government, deriving its powers from the general terms prefixed to the specified powers—but a limited government, tied down to the specified powers, which explain and define the general terms." 3 *Annals of Congress* 386 (1792), *available at* http://memory.loc.gov/ammem/amlaw/lwaclink.html.

"contains an enumeration of powers expressly granted by the people to their government." 22 U.S. at 187.

In interpreting the Commerce Clause, the Supreme Court has continued to emphasize that "the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000); *see also Lopez*, 514 U.S. at 552 ("Th[e] constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))). The issue presented by this case—whether Congress may regulate the noneconomic takes of a wholly intrastate, non-commercial species under the Commerce Clause—stands in sharp contrast to the uncontroversial origins of the Commerce Clause and the Framers' understanding that "structural protections of freedom [are] the most important ones . . . ." *NFIB*, 132 S. Ct. at 2676–77 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). Principles of federalism require this Court to determine what "outer limits," if any, are placed on Congress's power to regulate such intrastate activity as the noneconomic takes of Utah prairie dogs. *Lopez*, 514 U.S. at 557; *NFIB*, 132 S. Ct. at 2676–77 ("The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.") (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.); Schreiner, *The Irony*, 33 W. St. U. L. Rev. at 16

("The Commerce Clause was never intended to prevent the states from managing natural resources through the exercise of their police powers.").

B. The Distinction Between Economic And Noneconomic Activities Is Necessary To Maintain A Separation Between What Is National And What Is Local.

Although it is true that, for almost 60 years, the Supreme Court did not look favorably upon a Commerce Clause challenge, the Court dispensed with any notion that the Commerce Clause is toothless in *Lopez* and *Morrison*.[6] *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 390–91 (2005) (summarizing Commerce Clause jurisprudence between 1937 and 1995). In 1995, the Supreme Court held that, in order to maintain a "distinction between what is truly national and what is truly local," a Commerce Clause inquiry involves determining whether the regulated activity is economic or noneconomic. *Lopez*, 514 U.S. at 567–68. Congress's power under the Commerce Clause is limited to regulating economic activities because "the Constitution's enumeration of powers does not presuppose something not enumerated[.]" *Id.* at 567; *Holmes v. Jennison*, 39 U.S. 540, 571 (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no

[6] Most recently, in *NFIB*, the Supreme Court held that the Affordable Care Act exceeded Congress's power under the Commerce Clause, overturning decisions in the Sixth and D.C. Circuits. *NFIB*, 132 S. Ct. at 2587–89.

word was unnecessarily used, or needlessly added."). If the regulated intrastate activity is noneconomic, its regulation cannot be justified under the Commerce Clause. *Morrison*, 529 U.S. at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is *economic* in nature.") (emphasis added). If the regulated intrastate activity is economic, the question becomes whether that activity "might, through repetition elsewhere, substantially affect any sort of interstate commerce."[7] *Lopez*, 514 U.S. at 567. *Lopez* gleaned this principle from *Wickard v. Filburn*, 317 U.S. 111, 124–27 (1942), where the Court held that a farmer's growth of wheat for personal consumption, in the aggregate, would impact the national market for wheat.[8]

The limit on Congress's commerce power relies on the distinction between economic and noneconomic activities. *Lopez*, 514 U.S. at 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur . . . .")

[7] The first two categories of activity that Congress may regulate under the Commerce Clause, the channels and instrumentalities of interstate commerce, *Lopez*, 514 U.S. at 558, are not at issue in this case.

[8] *Wickard* is viewed as the "most far reaching example of Commerce Clause authority over intrastate activity[.]" *Lopez*, 514 U.S. at 560; *NFIB*, 132 S. Ct. at 2588 ("The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce.").

(Kennedy, J., concurring). As the Supreme Court has acknowledged, "[t]hese are not precise formulations." *Id.* at 567; *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (Recognizing that Congress's power under the Commerce Clause is "necessarily one of degree."). However, a guiding principle is whether, considering our dual system of government, a regulation "embrace[s] effects upon interstate commerce so indirect and remote that . . . [it] would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557; *NFIB*, 132 S. Ct. at 2587 (Congress's commerce power does not justify regulation that "would carry us from the notion of a government of limited powers."); *see also United States v. Patton*, 451 F.3d 615, 628 (10th Cir. 2006) ("[A]ny use of anything might have an effect on interstate commerce, in the same sense in which a butterfly flapping its wings in China might bring about a change of weather in New York.").

If Congress is permitted to "pile inference upon inference" to make the connection between the regulated activity and interstate commerce, then there is no effective restraint on its power to regulate activities that fall within the states' "general police power."[9] *Lopez*, 514 U.S. at 567. Thus, the

[9] The problem in scope arises because, "[d]epending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565, 567 ("'There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center.

economic/noneconomic distinction is essential to preserve federalism, and aggregation of noneconomic activities results in unconstitutional infringement on those areas of regulation traditionally reserved to the states.

II. NEITHER THE EFFECTS ON THE ECOSYSTEM NOR THE IMPACT ON BIODIVERSITY MAY BE AGGREGATED TO JUSTIFY REGULATION OF TAKES OF THE UTAH PRAIRIE DOG.

In the case at bar, the FWS and FoA urge this Court to take the aggregation principle even farther than *Wickard*, the "most far reaching" example of Commerce Clause power so far. *Lopez*, 514 U.S. at 560. They argue that the Court should consider the potential future effects of extinction of endangered and threatened species on the ecosystem and/or biodiversity, which could in turn affect interstate commerce; and from that extrapolation, find that the regulation of takes of Utah prairie dogs within Congress's commerce power.[10] FWS Opening Brief ("FWS Br.") at 53–56;[11] FoA Opening Brief ("FoA Br.") at 29–30. The district court properly rejected the FWS's and FoA's attempts to pile inference upon inference, declining to aggregate the "biological value" of the Utah prairie dog because, "[i]f Congress could use the Commerce Clause to regulate anything that

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A society such as ours is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring))).

[10] Appellants do not explain how the Utah prairie dog itself is at danger of extinction from takes on private lands.

[11] All citations to filed documents reference the page numbers assigned by this Court's CM/ECF system.

might affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power under the Commerce Clause." *PETPO*, 2014 WL 5743294, at *6 (emphasis in original).

Both the ecosystem and biodiversity arguments suffer from several flaws. First, they redirect the inquiry from the regulated activity at issue, and whether it is economic or noneconomic, and focus instead on the broad policy justifications that may have spurred adoption of the regulation. *See, e.g.*, FoA Br. at 28. This quickly becomes an exercise in attempting to determine whether any activity that benefits from regulation of the Utah prairie dog, no matter how attenuated, may have some economic "value." *See id.* at 38–39 (Arguing that there is a scientist who has studied the Utah prairie dog and received grants for doing so, and that there have been media publications regarding his work—publications that "are all seeking a profit and are engaged in interstate commerce."). FoA's argument entirely ignores the Supreme Court and this Court's precedents stating that the object of a Commerce Clause inquiry is whether the *regulated activity* is commercial in nature.[12] *Morrison*, 529 U.S. at 613; *Patton*, 451 F.3d at 625. Even

[12] Although ultimately decided on statutory interpretation grounds, the Supreme Court casted a wary eye on the federal government's attempt to justify regulation of intrastate ponds and mudflats based on a similar rationale to that posited by the FWS and FoA here. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001). Specifically, the Court found "significant constitutional questions" were raised by the government's argument that protection of migratory birds substantially affected interstate commerce

a case cited by the FWS and FoA that upheld take provisions of an intrastate species recognized that "a take can be regulated if—but only if—the *take itself* substantially affects interstate commerce." *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) ("Without this limitation, the Government could regulate as a take *any kind* of activity, regardless of whether that activity had any connection with interstate commerce.") (Ginsburg, J., concurring) (all emphasis added).

Second, the ecosystem and biodiversity arguments suffer from "the inability . . . to suggest a limiting principle" that prevents "every transaction in the American economy [from] be[ing] within Congress's reach." *United States v. Marrero*, 299 F.3d 653, 656 (7th Cir. 2002). The FWS argues that "[c]onserving endangered and threatened species facilitates commerce in a number of industries, including pharmaceuticals, agriculture, aquaculture, scientific study, hunting, fishing, and tourism, because it conserves individual species and biodiversity which are important resources for these industries, either now or potentially in the future." FWS Br. at 53. By its very terms, this argument has no stopping point. As one scholar observed, "[t]he biodiversity argument comes close to saying that

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because "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds." *Id.* Instead, the Court emphasized that "we would have to evaluate *the precise object or activity* that, in the aggregate, substantially affects interstate commerce" and cautioned that regulation would "result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 173–74 (emphasis added).

because the earth is necessary for interstate commerce, anything that adversely affects the earth can be regulated by Congress." John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. 174, 199 (1998). *Lopez* and *Morrison* both emphatically declined the government's urging to "follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615; *see also Patton*, 451 F.3d at 632 (The argument that "all crime hurts the economy" was "rejected in *Lopez* and *Morrison.*"); *Waucaush v. United States*, 380 F.3d 251, 258 (6th Cir. 2004) (Holding that prosecution of a Detroit street gang's intrastate, noneconomic activity was impermissible under the Racketeer Influenced Corrupt Organizations Act, even though "[the gang's] violent enterprise surely affected interstate commerce in some way—a corpse cannot shop, after all.").

In the cases relied on by the FWS and FoA, the courts failed to recognize the limitless reach of the interstate commerce power if protection of ecosystems or preservation of biodiversity were acceptable rationales for regulating any take of an intrastate species. *See Gibbs v. Babbitt*, 214 F.3d 483, 494 (4th Cir. 2000); *GDF Realty Invs. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053 (D.C. Cir. 1997). The fatal flaw of these strained interpretations is that they "typify the overly-attenuated rationales

Lopez and *Morrison* intended to abolish—engagement in intellectual exercises finding any chain of inferences linking the regulated activity, whatever its nature, to an effect on commerce, whatever its magnitude." Daniel J. Lowenberg, *The Texas Cave Bug and the California Arroyo Toad "Take" on the Constitution's Commerce Clause*, 36 St. Mary's L.J. 149, 182 (2004) (internal quotations omitted). This Court should decline the FWS's and FoA's urging to go down the same "rabbit hole" by following the "but-for causal chain" from intrastate, noneconomic takes of Utah prairie dogs "to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615.

Finally, the potential future effects on interstate commerce imagined by the FWS's and FoA's ecosystem and biodiversity arguments are not "substantial effects." A "substantial effect" is a present, demonstrable impact, and is what the Supreme Court's precedents require. *Lopez*, 514 U.S. at 563–67; *Morrison*, 529 U.S. at 612; *see also* Nagle, *The Commerce Clause*, 97 Mich. L. Rev. at 204 ("[T]he potential effect argument will always be available because anything is possible."). Recently, the Supreme Court affirmed such a limitation unequivocally: "The proposition that Congress may dictate the conduct of an individual today [under the Commerce Clause] because of prophesied future activity finds no support in our precedent." *NFIB*, 132 S. Ct. at 2590; *see also id.* at 2586 ("The power to *regulate* commerce presupposes the existence of

commercial activity to be regulated.") (emphasis in original). Thus, this Court should reject the FWS's and FoA's reliance on preservation of ecosystems or biodiversity as sufficient justification for Congress's regulation of noneconomic, intrastate takes of Utah prairie dogs.

III. THE NECESSARY AND PROPER CLAUSE DOES NOT JUSTIFY REGULATION OF TAKES OF THE UTAH PRAIRIE DOG BECAUSE SUCH REGULATION IS NOT PART OF A BROAD ECONOMIC REGULATORY SCHEME.

The Necessary and Proper Clause allows Congress to "make all Laws which shall be necessary and proper for carrying [them] into Execution." U.S. Const. art. I, § 8, cl. 18. As the Supreme Court recently reaffirmed, the Clause "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *NFIB*, 132 S. Ct. at 2591 (quoting *McCulloch v. State*, 4 Wheat 316, 411, 421 (1819)) (alteration in original). Instead, it allows the courts to defer to Congress's determination that a regulation is actually "necessary" for carrying out an *enumerated* power. *Id.* at 2591–92. The esteemed Justice Story explained the Necessary and Proper Clause thusly:

> It has been said, that the constitution allows only the means, which are *necessary*; not those, which are merely *convenient* for effecting the enumerated powers . . . . It would swallow up all the delegated powers, and reduce the whole to one phrase. Therefore it is, that the constitution has restrained them to the *necessary* means; that is to say, to those means, *without which the grant of the power would be nugatory*. A little difference in the degree of convenience cannot constitute the necessity, which the constitution refers to.

Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1239 (1833) (all emphasis in original).

The FWS and FoA argue that, even if the Utah prairie dog regulation is directed at noneconomic activity which cannot be aggregated under *Lopez* and *Morrison*, its constitutionality can still be salvaged by the broader scheme doctrine set forth in *Gonzales v. Raich*, 545 U.S. 1 (2005). FWS Br. at 50–54; FoA Br. at 26–27. In *Raich*, the Supreme Court upheld the application of the federal Controlled Substances Act ("CSA") to intrastate use of medical marijuana under the rationale that the CSA was a broad regulatory scheme that sought to regulate a national, albeit illegal, market in marijuana. 545 U.S. at 6–7, 30–33. Because the regulation of intrastate marijuana use was "*essential* to a comprehensive regulation of interstate commerce," its regulation was permissible under the Necessary and Proper Clause. *Id.* at 36–37 (emphasis added). The district court properly rejected the FWS's and FoA's assertions that the ESA's broad statutory scheme is analogous to the CSA, holding that "[a]lthough the ESA itself regulates some economic activity, the rule in question is not necessary to the statute's economic scheme." *PETPO*, 2014 WL 5743294, at *7.

Importantly, the Necessary and Proper Clause does not authorize Congress to "reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." *NFIB*, 132 S. Ct at 2592–93.

Raich stands for the somewhat unremarkable proposition that, if Congress already has authority to regulate an interstate market in a commodity, then incidental regulation of noneconomic intrastate activity is permissible if such regulation is essential to the larger regulatory regime. *See* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 Vill. L. Rev. 1325, 1331–32 (2001) (arguing that such a principle "is at least as old as the Shreveport Rate Cases"). However, *Raich* does not eviscerate the principle that there are "[s]ome matters—those not within the bounds of the enumerated powers—[that] are simply beyond the reach of federal hands." Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 389 (2005).

The cases relied on by the FWS and FoA suffer from the fatal flaw of attempting to "draw within [the EPA's] regulatory scope" activities which would otherwise be outside it. *NFIB*, 132 S. Ct. at 2592–93. In effect, those cases engaged in the circular reasoning of: (1) assuming that the ESA is a broad regulatory scheme directed at economic activity; *and* (2) assuming that regulating the take of any individual, intrastate species is essential to the ESA as a whole. Both of those assumptions are incorrect. For example, in *GDF Realty*, the Fifth Circuit first concluded that the legislative history of the ESA demonstrated an intent "'to halt and reverse the trend toward species extinction,'" including halting threats from the pressures of trade. 326 F.3d at 362 (quoting *Tennessee Valley*

Authority v. Hill, 437 U.S. 153, 184 (1978)). Then, despite the fact that the loss of the cave bugs at issue would have a "negligible" effect on any commercial enterprise, and aggregating takes of the cave bug would "render meaningless any 'economic nature' prerequisite to aggregation[,]" the court upheld the regulation by invoking the ESA's "national scope" and the assertion that the takes of any species threatens the "interdependent web" of all species. *Id.* at 637–40. Importantly, six Fifth Circuit judges dissented from the denial of rehearing en banc, recognizing that "the panel crafted a constitutionally limitless theory of federal protection" and noting the absurdity of reasoning that "all takes are essential, therefore, all takes have a substantial commercial effect." *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 287, 293 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc).

Similarly, in *Nat'l Ass'n of Home Builders*, the D.C. Circuit relied on the flawed view that "[a] species whose worth is still unmeasured has what economists call an 'option value'—the value of the possibility that a future discovery will make useful a species that is currently thought of as useless." 130 F.3d at 1053. Based on that flawed assumption, the D.C. Circuit reached the spurious conclusion that regulation of takes of the insect at issue was "necessary to enable the government to control the transport of the endangered species in interstate

commerce" because "the extinction of animals substantially affects interstate commerce[.]" *Id.* at 1046–47, 1054.

The Necessary and Proper Clause simply cannot be stretched to justify such attenuated connections between the regulated activity at issue and interstate commerce. Neither the ESA generally nor the Utah prairie dog regulation is directed at interstate commerce that just happens to "ensnare[] some purely intrastate activity." *Raich*, 545 U.S. at 22; *NFIB*, 132 S. Ct. at 2592 ("Each of our prior cases upholding laws under [the Necessary and Proper] Clause involved exercises of authority derivative of, and in service to, a granted power."); *Nat'l Ass'n of Home Builders*, 130 F.3d at 1066 ("The Commerce Clause empowers Congress to regulate 'commerce,' not habitat.") (Sentelle, J., dissenting).

The legislative findings and statement of purpose of the ESA do not mention potential commerce in endangered species specifically, and "*Lopez* seems to indicate that the absence of such findings might be nearly dispositive." Lee Pollack, *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) ("[A]ny commercial effects of the [ESA] would be purely incidental to the core of the statutory scheme, which is to preserve natural resources, a non-commercial topic clearly outside of Congress'[s] power to regulate under the Commerce Clause."); *see also* Comment, *Turning the Endangered Species Act*

Inside Out?, 113 Yale L.J. 947, 952–53 (2004) (Arguing that the Fifth Circuit in *GDF Realty* erred in "making [the ESA's] master narrative a story about economics [because] the ESA is not about monetizing endangered species; it is about preserving them in their natural state . . . . The ESA's regulation of interstate commerce is merely circumstantial[.]").

Indeed, despite the FWS's and FoA's best attempts to find some connection to commerce in the ESA's legislative history or text, they can point only to broad values of biodiversity, conserving natural resources, the interdependence of species, and preventing "the killing of animals and destruction of their natural habitat by humans." FWS Br. at 42–46; FoA Br. at 30, 42. Such values are indistinguishable in kind from those advanced by the statutes in both *Lopez* and *Morrison*, except that they concern plants and animals rather than humans. *Lopez*, 514 U.S. at 561 (rejecting government's arguments that the costs of violent crime are spread throughout the population and violent crime reduces the willingness of individuals to travel, which collectively has an adverse effect on the nation's economic well-being); *Morrison*, 529 U.S. at 614 (holding insufficient Congressional findings regarding the economic impact of gender-motivated violence on victims and their families; including impacts on travel, economic productivity, increased medical costs and decreased demand for interstate products). It would be patently absurd to extend to rodents protection that could

not be constitutionally accorded to "the school children in *Lopez* and the rape victim in *Morrison*." *GDF Realty*, 362 F.3d at 287 (Jones, J., dissenting from denial of rehearing en banc).

Contrary to FoA's argument, the Utah prairie dog regulation, which restricts *all* takes of Utah prairie dogs indiscriminately, is not directed at commerce. 50 C.F.R. § 17.40(g). FoA's argument that the Utah prairie dog is "commercial[ly] exploit[ed]" by sport shooters (who must buy ammunition in order to shoot) and commercial exterminators is humorous. FoA Br. at 42–43. First, if the gun in *Lopez* was not *ipso facto* an item in interstate commerce, *a fortiori,* neither is ammunition used for sport shooting.[13] Second, any species that wreaks havoc on private property will naturally be the subject of attempts to dissuade such destruction, including extermination, whether private or commercial. As the district court recognized, the Utah prairie dog regulation indiscriminately bans takes that result from activities ranging from gardening to maintenance of recreational sports fields. *PETPO*, 2014 WL 5743294, at *6. It is clear that the

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[13] It is unclear why FoA believes sport shooting currently poses a threat to the Utah prairie dog. FoA Br. at 42; Appellants' Joint Appendix at 183–84 (describing hunting of other species of prairie dogs in other states). Although the 1984 "threatened" listing acknowledged that "[f]armers in the area traditionally poisoned, shot, or trapped nuisance prairie dogs[,]" there is no indication that *sport* shooting posed a significant threat to the Utah prairie dog, then or now. *See* 49 Fed. Reg. at 22,330–31. It can be assumed that state hunting regulations would prohibit individuals from decimating Utah prairie dog colonies for sport. *See* Utah Admin. Code 657-70 (2015) (Utah wildlife regulations governing Utah prairie dogs).

Utah prairie dog regulation does not seek to comprehensively regulate any commodity or market. *See Patton*, 451 F.3d at 627 (Where a statute is "not part of a comprehensive scheme of regulation" of a fungible commodity, federal regulation of "purely intrastate noneconomic activity" cannot be justified under the Necessary and Proper Clause.).

Finally, the FWS and FoA have failed to demonstrate that the Utah prairie dog regulation's restrictions on the takes of Utah prairie dogs is "necessary" to accomplish the goals of the ESA, even assuming the ESA were a statute directed at the regulation of economic activity. *Raich*, 545 U.S. at 35. The FWS's sky-is-falling assertion that the 68% of all listed species will now be exempt from take restrictions merely because they are wholly intrastate is simply unrealistic. *See* FWS Br. at 36. It does not follow that, merely because the FWS has failed to demonstrate that regulating the takes of Utah prairie dogs is necessary to implementation of the ESA, it will always be unable to demonstrate that intrastate takes of a species is either economic and may be aggregated under *Lopez* and *Morrison*, or is noneconomic and regulation is still necessary to effectuate the ESA under *Raich*.

As PETPO demonstrates, the ESA already regulates trade of protected species, and would apply were a market for Utah prairie dogs to develop in the

future.[14] PETPO Br. at 48 (citing 16 U.S.C. § 1538(a)(1)(E)). Furthermore, the FWS's and FoA's arguments assume that federal regulation is necessary to advance environmental values, which is both untrue and cannot serve as an end to justify the means. *See* Adler, *Judicial Federalism*, 90 Iowa L. Rev. at 474 (Arguing that "[t]here is more than one way to advance environmental values . . . [c]onstitutional limits can often make it more difficult or costly to achieve desired public ends" but, as with federal efforts to combat terrorism, "it is generally accepted that the Constitution does—and should—constrain the manner in which these goals are pursued."); *NFIB*, 132 S. Ct. at 2579 ("Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed."). There is simply no basis for finding that the Utah prairie dog regulation is necessary to implementation of the ESA, even if the ESA is construed as a statute directed at commercial activity.

CONCLUSION

This Court should affirm the judgment of the district court because the Utah prairie dog regulation is outside the scope of Congress's power under the

[14] The lack of necessity is further illustrated by the fact that the state of Utah remains free to regulate the takes of Utah prairie dogs pursuant to its "traditional and primary power over land and water use." *Solid Waste Agency*, 531 U.S. at 174; *see also Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("[T]he States have broad trustee and police powers over wild animals within their jurisdictions.").

Commerce Clause and is not necessary to any broader scheme of regulation directed at commerce under the Necessary and Proper Clause.

DATED this 26th day of May 2015.

Respectfully submitted,

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DATED this 26th day of May 2015

/s/ Steven J. Lechner
Steven J. Lechner

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I certify that, pursuant to Fed. R. App. P. 29, Fed. R. App. P. 32, and Tenth Circuit Rule 32, the attached Amicus Curiae Brief has a typeface of 14 points or more and contains` 6,655 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

DATED this 26th day of May 2015.

/s/ Steven J. Lechner
Steven J. Lechner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on this 26th day of May 2015.

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