Case No. 14-4151 and 14-4165

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.

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

BRIEF FOR AMICI CATO INSTITUTE AND PROFESSORS OF CONSTITUTIONAL LAW IN SUPPORT OF PLAINTIFF-APPELLEE

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No. 14-4151 & 14-4165 Caption: PETPO v. U.S. FWS and Friends of Animals

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6. Does this case arise out of a bankruptcy proceeding? NO

/s/ *Ilya Shapiro* May 26, 2015

Attorney for amici

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STATEMENT OF *AMICI* INTEREST[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs. The present case concerns Cato because the regulation at issue unconstitutionally expands Congress's limited powers and thus imperils the liberty of all Americans.

Jonathan H. Adler is the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law where he teaches courses in administrative, constitutional, and environmental law.

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[1] This brief is filed with the consent of the attorneys for Appellant and Appellees. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission.

James L. Huffman is the Dean Emeritus of the Lewis & Clark Law School. As a constitutional law professor of 40 years and the author of several articles on federalism and the enumerated powers of Congress, Professor Huffman has a deep interest in the judicial interpretation of the Commerce Clause. As a professor of natural resources law and environmental law, Professor Huffman has a particular interest in a proper understanding of the federal government's power to regulate natural resources.

Josh Blackman is a law professor at the South Texas College of Law/Houston. Professor Blackman's fields of expertise include constitutional law, the separation of powers, and federalism.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Endangered Species Act authorizes the Fish and Wildlife Service to prohibit through regulation the "taking" of a threatened species either directly or by modifying its habitat. But as the Supreme Court has repeatedly held, the Constitution creates a federal government of delegated, enumerated, and thus limited powers, a foundational principle that today is honored more in the breach than in the observance. This case presents such a breach. In an all-too-typical example of legal sophistry, the government says here that Congress's power to regulate "commerce . . . among the several states" authorizes it to prohibit the taking of an abundant, commercially irrelevant, and wholly intrastate rodent, without regard for whether such taking has any connection to economic activity, let alone commerce among the several states. The effect of this is to render plaintiffs-appellees all but powerless to control and use their property, even for many noncommercial purposes. The FWS regulation at issue here exceeds the scope of the federal government's constitutionally enumerated powers.

In applying the Endangered Species Act to the protection of intrastate species, federal appellate courts have issued erroneous and

inconsistent rulings[2] that threaten, as James Madison warned, to grant Congress "an indefinite supremacy over all persons and things," including, apparently, intrastate and commercially worthless rodents.

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[2] The decisions justify their holdings on a number of grounds, and some explicitly reject the other circuits' rationales. Two cases, *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) and *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), upheld the "take" regulation on Commerce Clause grounds—that the particular plaintiff's conduct was economic or commercial—and in so doing disregarded the fact that it is the nature of the regulated activity itself that matters. Two more, *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F3d 1250 (11th Cir. 2007) and *Nat'l Assoc'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), justified upholding the regulation of "takes" of intrastate species on Commerce and Necessary and Proper Clause grounds, aggregating all activities affecting all protected species and holding that these activities threaten biodiversity, which itself has a substantial effect on interstate commerce. This approach involves so much attenuation and aggregation that it forecloses any limiting principle, which *Lopez* and *Morrison* found to be a mandatory element of a valid exercise of the commerce power. The courts in *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) and *GDF Realty Investments, Ltd., v. Norton*, 326 F.3d 622 (5th Cir. 2003) upheld the regulation of "takes" of intrastate species on Necessary and Proper grounds—that doing so is an essential part of a comprehensive regulatory scheme that regulates activity with a substantial effect on interstate commerce. Yet, while those cases apply *Raich*, they go far beyond the aggregation of intrastate activity to the aggregation of non-economic activity—something the Commerce and Necessary and Proper Clauses cannot bear. Each of these courts struggles and fails to recognize a valid constitutional justification for the ESA's regulation of intrastate, noncommercial species. That is likely because "neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." *United States v. Morrison*, 514 U.S. 549, 580 (Kennedy, J., concurring). Regulating "intrastate" takes of animal species is simply not Necessary and Proper to regulating interstate commerce among the states. For more analysis of these cases, See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 406 (2005).

The Federalist No. 39, at 245 (C. Rossiter ed. 1961). This case presents this Court with an opportunity to properly apply the Commerce and the Necessary and Proper Clauses and, in so doing, ensure that federal efforts to conserve threatened species such as the Utah prairie dog do not transgress constitutional limits on federal power. This need not imperil federal species conservation efforts, but it will keep FWS regulations properly confined to constitutional boundaries.

All parties have acknowledged that the Utah prairie dog cannot itself be an object of Congress's commerce power insofar as it is not an item, channel, or instrumentality of interstate commerce. In any event, "the ESA regulates takings, not toads," *Rancho Viejo*, 323 F.3d at 1072, and the class of activities defined as takings, under either the ESA or the FWS regulation at issue here, is not "economic" in nature. The sole remaining justification for criminalizing actions that take the Utah prairie dog is that doing so is a necessary and proper means for carrying into execution Congress's power to regulate interstate commerce. See *Gonzalez v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) (distinguishing the core "commerce" that Congress can directly regulate from those things it regulates incidentally).

Such regulatory means, however, must be *both* necessary and proper for executing the commerce power. Thus, the "substantial effects" decisions of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *Wickard v. Filburn*, 317 U.S. 111 (1942), are "applications of the Necessary and Proper Clause in the context of the commerce power." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. L. & Liberty 581, 591 (2010). But as Chief Justice Roberts made clear in his majority opinion in *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012), the terms "necessary" and "proper" have meaningful content that cannot be ignored. After considering the original meanings of those terms, together with Supreme Court precedents ranging from *McCulloch v. Maryland* to *NFIB v. Sebelius*, it becomes evident that there are—and must be—real, enforceable limits on the extent of Congress's incidental or instrumental powers, and that the Utah prairie dog "take" regulation is on the wrong side of those limiting principles.

ARGUMENT

I. TO REACH NON-COMMERCIAL, INTRASTATE ACTIVITIES, THE POWER TO REGULATE INTERSTATE COMMERCE MUST BE AUGMENTED BY THE NECESSARY AND PROPER CLAUSE

As the Supreme Court affirmed in *Marbury v. Madison*, "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." 5 U.S. 137, 176 (1803). Among the powers the Constitution grants Congress is the power to "regulate Commerce . . . among the states." U.S. Const. art. I, § 8. In the words of Chief Justice John Marshall, Congress has been delegated "the power to regulate, that is, to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824). While the commerce power has been described as broad, there is a limited and discernable core of activities and things over which it directly extends—interstate commerce and those things that constitute it.[3]

[3] While many argue that the term "commerce" today is wrongly construed to constitute a far broader range of activities than was originally associated with the term, it suffices here to say that whatever "commerce" now means or meant at the founding, neither meaning includes the "take" of Utah prairie dogs. For more on the original meaning of "commerce," See

In *United States v. Lopez*, the Supreme Court noted "three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. 549, 558-59 (1995). These categories include: 1) the regulation of the channels of interstate commerce; 2) the regulation of the instrumentalities of, objects in, and persons engaged in interstate commerce; and 3) the regulation of activities that have substantial effects on interstate commerce. *Id*. The first two categories are the core of the Commerce Clause; Congress's commerce power can reach those things without augmentation by the Necessary and Proper Clause. To reach activities that have substantial effects on interstate commerce, however, Congress must resort to the Necessary and Proper Clause, which affords Congress those means that are "necessary and proper for carrying into Execution" its other powers, including the power to regulate commerce among the states. U.S. Const. art. I, § 8, cl. 18. Thus, this instrumental power augments the commerce power, enabling Congress to regulate things that do not themselves fall within its

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Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003); Robert G. Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 St. John's L. Rev. 789, 836-39 (2006); *Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring) (explaining that "commerce" at the time of ratification meant "selling, buying,

commerce power but may nevertheless be regulated in order to regulate interstate commerce. U.S. Const. art.1, §8. See, Barnett, *Commandeering the People*, *supra*, at 590-93; Brief of Authors of The Origins of the Necessary and Proper Clause as Amici Curiae at 5, *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, 618 (2002). The distinction is significant—and, as we will see, members of the Supreme Court have gone out of their way to say so.

In his concurring opinion in *Gonzalez v. Raich*, Justice Antonin Scalia highlighted the distinction between the core Commerce Clause and other incidental powers. 545 U.S. 1, 33 (2005) (Scalia, J., concurring). He noted that the "substantial effects" prong actually describes not the workings of the Commerce Clause, but the operation of the Necessary and Proper Clause:

> [U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72, 9 L.Ed. 1004, (1838), Congress's regulatory authority over intrastate activities that are not themselves part of

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and bartering, as well as transporting for these purposes.").

> interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.

Id. at 34 (Scalia, J., concurring).

Indeed, while many cases involving economic regulation by Congress are referred to as "Commerce Clause cases," this is often not technically accurate. Brief of Authors of The Origins of the Necessary and Proper Clause as Amici Curiae, *supra*, at 5 ("Many of the cases that drastically expanded Congress's regulatory reach during the New Deal are actually Necessary and Proper Clause cases.").

In *United States v. Darby*, the unanimous Court noted that the legal basis of the "affecting commerce" rationale used to regulate wholly intrastate conduct was actually the Necessary and Proper Clause. 312 U.S. 100, 118 (1941). The work of the Necessary and Proper Clause is evident in the Court's contradistinction of regulating "commerce among the states" and regulating "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them *appropriate means to the attainment of a legitimate end*." *Id.* at 118-19 (citing *McCulloch v. Maryland*, 17 U.S. 316, 421. (1819)) (emphasis added).

Likewise, in *United States v. Wrightwood Dairy Co.*, the Court upheld intrastate milk price controls, citing the source of its authority to do so as *McCulloch* and its test for incidental power. 315 U.S. 110, 118 (1942) ("[Congressional authority] extends to such control over interstate transaction . . . as is *necessary and appropriate* to make the regulation of the interstate commerce effective.") (emphasis added). Later in that same year, however, the *Wickard v. Filburn* decision took the substantial effects test a step further, but failed to cite *McCulloch* even once. 317 U.S. 111 (1942). An almost 60-year period of virtually unrestrained federal power followed.[4]

In *United States v. Lopez*, however, the Court revived the principle of limited federal power, doing so again five years later in *United States v. Morrison,* 529 U.S. 598 (2000). But in both cases, as in *Wickard*, the Court did not clearly state that *McCulloch* and the Necessary and Proper Clause is the fundamental—and only—source of congressional authority to regulate outside the core of the Commerce Clause. Instead, by establishing formalistic limitations on the "substantial effects" prong, *Lopez* and *Morrison* failed to articulate the restrictions inherent

[4] It was during this period that the Endangered Species Act and its

in the Necessary and Proper Clause.

In addition to Justice Scalia in *Raich*, other justices have also found that the Commerce Clause by itself does not reach things that substantially affect interstate commerce. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting) (explaining that it is the Necessary and Proper Clause through which "an intrastate activity affecting interstate commerce can be reached through the commerce power."); *Lopez*, 514 U.S. at 587-89 (Thomas, J., concurring) (arguing that the Commerce Clause alone cannot justify the substantial effects analysis, and that if Congress wanted the Commerce Clause to be so broad, they knew how to do so by virtue of prohibiting amendments that would "affect" slavery).

In *NFIB v. Sebelius*, the Court finally made it clear that the Necessary and Proper Clause creates strong limits on the implied powers of Congress. 132 S. Ct. 2566, 2591-93 (2012). Previous decisions had virtually bypassed *McCulloch* and the Necessary and Proper Clause entirely—and the enumerated powers revival of *Lopez* and *Morrison* failed to re-position *McCulloch* and the Necessary and Proper Clause as

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predecessor statutes were enacted.

the focus when Congress expands its commerce power to regulate non-commercial activities.

Because the Utah prairie dog "take" rule is not a regulation of core interstate commerce, its lawfulness rests on whether it is a necessary and proper means for Congress to carry into execution its power to regulate commerce among the states.

II. AS APPLIED TO THE UTAH PRARIE DOG, THE FEDERAL FISH AND WILDLIFE SERVICE'S "TAKE" RULE IS NEITHER NECESSARY NOR PROPER FOR EXECUTING CONGRESS'S COMMERCE POWER AND THUS IS AN UNCONSTITUTIONAL EXPANSION OF THAT POWER

Because it is not a regulation of interstate commerce, the "take" rule, if it is to be constitutional, must rest on that "last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause." *Printz v. United States* 521 U.S. 898, 923 (1997).

That clause grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its other powers, including its power to regulate commerce among the states. U.S. Const. art. I, § 8, cl. 18. Thus, it affords Congress the means to execute its other powers. But it also limits those means to those that are "necessary and proper," failing which Congress's instrumental

powers would be restrained only by the specific limits enumerated elsewhere in the Constitution.

Echoing James Madison in *Federalist 44*,[5] Chief Justice Marshall, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), notes both the judicial duty to police Congress's use of its instrumental powers and the difficulties that attend that duty:

> The judiciary may, indeed, and must, see that what has been done is not a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon State sovereignty, or the rights of the people. For this purpose, it must inquire whether the means assumed have a connexion, in the nature and fitness of things, with the end to be accomplished. The vast variety of possible means, excludes the practicability of judicial determination as to the fitness of a particular means. It is sufficient that it does not appear to be violently and unnaturally forced into the service, or fraudulently assumed, in order to usurp a new substantive power of sovereignty.

McCulloch, 17 U.S. at 387.

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[5] "Few parts of the Constitution have been assailed with more intemperance than th[e Necessary and Proper Clause]; yet on a fair investigation of it, no part can appear more completely invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter. Those who object to the article, therefore, as a part of the Constitution, can only mean that the *form* of the provision is improper. But have they considered whether a better form could have been substituted?" The Federalist No. 44, at 285 (C. Rossiter ed. 1961). Madison goes on to consider the "four other possible methods which the Constitution might have taken on this subject," finding each inadequate to accomplish the dual functions of the Necessary and Proper Clause—authorization, yet restraint.

Unlike when Congress acts exclusively within the scope of an enumerated power, an exercise of incidental power pursuant to the Necessary and Proper Clause is constrained by its necessity and its propriety. These terms have independent meaning, requiring separate tests, which are essential for ensuring that Congress's incidental powers remain suitably restrained lest they "give Congress a police power over all aspects of American Life," *Lopez*, 514 U.S. at 585 (Thomas, J., concurring), or, as Chief Justice Marshall warned, they lead to the fraudulent usurpation of new substantive powers—the power, for example, to regulate the use of land in Utah under the pretense of regulating interstate commerce.

The specific terms of the Necessary and Proper Clause were chosen for their distinct, independent meanings, and they were well-known in the Founding-era legal community as terms of art governing a delegation of agency. Gary Lawson, Geoffrey Miller, Robert G. Natelson & Guy Seidman, *The Origins of the Necessary and Proper Clause* (Cambridge Univ. Press, 2010) (hereinafter "Origins"). This perspective clarifies the structural role of the clause and underscores the fact that the Utah prairie dog "take" regulation is not a valid exercise of a power

incidental to the regulation of interstate commerce.

A. Congress's Incidental Powers Must Be Both Necessary and Proper for Carrying Into Execution Its Other Enumerated Powers.

If the wording of the Necessary *and* Proper Clause were not itself sufficient, the clause's history and original public meaning make it plain that it does indeed work two separate tests against an assertion of incidental power. First, the fact that the clause features the two distinct words separated by a conjunction should weigh strongly in favor of the separate applicability and against the superfluity of its terms. *Knowlton v. Moore*, 178 U.S. 41, 87 (1900) (noting an "elementary canon of construction which requires that effects be given to each word of the constitution"). This is made all the more evident by the fact that the Federal Convention's Committee of Detail added "proper" separately and later than "necessary." 2 The Records of the Federal Convention of 1787, at 144 (Max Farrand, ed., rev. ed., 1937).

But second, Supreme Court precedents from *McCulloch* to *NFIB* support the independence of necessity and propriety as separate tests. In *McCulloch*, Chief Justice Marshall parsed the clause as follows: "Let the end be legitimate, let it be within the scope of the constitution, and

all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. at 421. Two of those four characteristics pertain clearly to necessity, and two to propriety. In his *Raich* concurrence, Justice Scalia wrote that "even when the end is constitutional and legitimate, the means must be 'appropriate' and 'plainly adapted' to that end. Moreover, they may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" 545 U.S. 1, 39 (2005) (Scalia, J., concurring). Most recently, in *NFIB*, 132 S. Ct. at 2592, Chief Justice Roberts's majority opinion demonstrated that "propriety" has independent effect—since it was precisely the restraint of propriety that kept the Affordable Care Act's individual mandate from being upheld as necessary and proper to the regulation of interstate commerce.

The terms of the Necessary and Proper Clause were known in the Founding-era legal community not only to articulate two separate tests, but also, when taken together, to constitute a legal term of art governing a delegation of power to a fiduciary agent. *Origins* at 77-78. Moreover, of the five most common forms such delegations took, the

Framers chose the form that prescribes the most restrictive grant of power. *Id*. at 72-78. Lawyers of the time would have understood each word to carry distinct weight.

1. The Original Public Meaning of "Necessary"

The word "necessary" implies that incidental powers are implicated. There was a well-established legal doctrine of incidental powers long predating the drafting of the Necessary and Proper Clause. The purpose of that doctrine was to describe the relationship between principal powers granted and the incidents "necessary" to carrying them out. *Origins* at 60.

The doctrine was composed of criteria against which an unstated power was judged to be truly incidental to the delegated principal power. Among those criteria were the requirements that an incidental power had to be both inferior to the express power, and so connected to it by custom or need as to justify inferring that the parties intended the inferior power to accompany the express power. Brief of Authors of Origins of the Necessary and Proper Clause as Amici Curiae, *supra*, at 19.

An incidental power must first be inferior to the express power to

be considered "necessary" for executing the express power. This rule was applied in *McCulloch*, as Chief Justice Marshall considered whether the power to establish a bank was "like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to other powers or used as a means of executing them." 17 U.S. at 417. In explaining the case to the general public, Marshall again pointed out that an incident was always less "worthy" than the enumerated powers it supported. *John Marshall's Defense of McCulloch v. Maryland*, at 171 (Gerald Gunther ed., 1969).

An incidental and inferior power must also be so connected to the principal power by custom or need that its independent expression would be unnecessary. This includes when the inferior power is indispensable to carrying out the principal, when it is so valuable that the principal power would be greatly prejudiced by its unavailability, or when the inferior power is a recognized, customary way of executing the principal power. Brief of Authors of Origins of the Necessary and Proper Clause as Amici Curiae, *supra*, at 24.

2. The Original Public Meaning of "Proper"

A law is proper within the original meaning of the Necessary and Proper Clause and the doctrine of incidental power only if the law conforms to the fiduciary norms of public trust—that is, with such duties as impartiality, good faith, and due care, and with the obligation to remain within the scope of granted authority. *Id.* at 32.

Founding-era political discourse commonly applied fiduciary standards of "public trust" when assessing governmental rules and actions, see *Origins* at 52-56; Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004), and Founding-era speakers frequently used "proper" and "improper" to denote actions that complied or did not comply with fiduciary norms, especially at the 1787 Federal Convention. *Origins* at 89-91. Furthermore, the Founding generation often viewed the Constitution as a kind of corporate charter, and corporate charters of the period used "proper"—particularly in conjunction with "necessary"—to indicate the existence of fiduciary obligations. *Id.* at 174.

B. The "Take Rule" is Neither Necessary Nor Proper

Supreme Court precedent unquestioningly forecloses the possibility that the regulation of the taking of a wholly intrastate animal species can be justified as a necessary and proper means for carrying into execution the regulation of interstate commerce.

1. The Take Rule Is Not Necessary.

The first examination of "necessity" was in *McCulloch v. Maryland*, wherein Chief Justice Marshall painted an ostensibly broad picture of necessity such that any "convenient, or useful" law should be upheld. *McCulloch*, 17 U.S. at 413. Responding to his opinion in *McCulloch*, however, Marshall said the following: "The court does not say that the word 'necessary' means whatever may be 'convenient' or 'useful.' And when it uses 'conducive to,' that word is associated with others plainly showing that no remote, no distant conduciveness to the object, is in the mind of the court." John Marshall, A Friend to the Union No. 2, in *John Marshall's Defense of McCulloch, v. Maryland* 78, 100 (Gerald Gunther ed., 1969). Nevertheless, it was too late, and a broad, deferential interpretation of "necessary" has held precedential sway ever since, sharply reducing the effectiveness of the Necessary and

Proper clause as a check on incidental powers.

Indeed, as recently as *NFIB v. Sebelius* and *United States v. Comstock*, 560 U.S. 126 (2010), the Supreme Court has upheld the broad and deferential usage of "necessary."[6] Yet in his concurring opinion in *Comstock*, Justice Alito raised an objection to the Court's abdication of its duty to police "necessity": "Although the term 'necessary' does not mean 'absolutely necessary' or indispensable, the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress. . . . And it is an obligation of this Court to enforce compliance with that limitation.'" *Id.* at 1970 (quoting *McCulloch*, 17 U.S. at 415). Justice Kennedy also concurred with the *Comstock* majority; but, like Justice Alito, he also wrote separately to express his discomfort with the Court's use of "rational basis" language to assert that means-end rationality is an appropriate limiting factor on the breadth of the Necessary and Proper

[6] See *United States v. Comstock*, 560 U.S. 126, 133-34 (2010) ("Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'); *See also NFIB*, 132 S. Ct. at 2592 ("As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is 'necessary.' We have thus upheld laws that are "convenient, or useful' or

Clause. *Id.* at 152.

Here, however, the "take" regulation of the Utah prairie dog, far from being incidentally necessary for Congress's regulation of interstate commerce, is nonetheless a "great substantive and independent power," especially since it entails vast federal power over local private land use. *NFIB*, 132 S. Ct. at 2591 (quoting *McCulloch*, 17 U.S. at 411). The take regulation, by its terms, reaches conduct that has no relationship whatsoever to commerce among the several states. There is no jurisdictional element or other provision that confines the prohibition to constitutionally regulatable conduct. An individual landowner can violate the take prohibition here simply by modifying private land in such a way as to take a Utah prairie dog, even if such actions are taken for aesthetic or other non-economic purposes.

The taking of Utah prairie dogs is no more an economic class of activities than was the possession of a gun in a school zone in *Lopez*. Alfonso Lopez's gun possession was "commercial," in that he was paid to deliver the gun, *see United States v. Lopez*, 2. F.3d 1342, 1345 (5th Cir. 1993), yet the Supreme Court voided his conviction because the

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'conducive' to the authority's 'beneficial exercise.').

regulated activity—gun possession in or near a school—was not in any way economic or related to commerce. So too here, the class of activities subject to the take prohibition is not economic in character or otherwise related to commerce. That the take prohibition reaches some conduct by plaintiffs-appellees that is economic in nature is of no more relevance than Lopez's participation in a gun transaction. The FWS is purporting to regulate takes, not economic or commercial activity that results in the taking of species.

If Congress has power over a non-commercial, wholly intrastate activity, such as private land use that may incidentally harm a creature like the Utah prairie dog, then it is worth asking what sorts of activities are outside Congress's commerce power. After all, every human activity has some environmental effect, and if identifiable environmental consequences are all that is necessary to justify commerce power regulation, then the power asserted is actually a power over the entire ecosystem and all of its components. Were the federal government given the broad power to regulate any activity that can harm any species of wildlife or the entire ecosystem, that power would have been enumerated separately, not embedded in the Commerce and Necessary

and Proper Clauses. Unlike the power to establish a bank pursuant to the power to regulate interstate commerce, the power to regulate the ecosystem, far from being "incidental" to regulating interstate commerce, would seem to be an independent, substantive power of the kind that Chief Justice Marshall warned about finding in the Necessary and Proper Clause.

The regulation of the taking of animal species, as a class, is in no way indispensable to, required to avoid great prejudice to, or a customary way of regulating interstate commerce. Certainly regulating the taking of a non-commercial, intrastate animal is hardly "customary" to regulating commerce. The prairie dog is not even an item of commerce. Under the original public meaning of "incidental powers," there seems little doubt that the claimed authority does not fit within the category of powers incidental to the regulation of interstate commerce. At the very least, the government has not shown that its regulation of interstate commerce would be impossible or even difficult without the "take" rule, while plaintiffs-appellees have made a compelling case concerning the rule's restrictions on their liberty.

2. The Take Rule Is Not Proper.

The meaning of "proper" has been clarified in the recent Supreme Court cases of *United States v. Comstock* and *NFIB v. Sebelius*. Its main use in the courts has, to a degree, comported with its original purpose: protecting the states and the people from unprincipled and unbounded assertions of power.[7] This is likely due to *McCulloch*'s warning that means employed pursuant to the Necessary and Proper Clause "may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *McCulloch*, 17 U.S. at 421. This is a much more useful definition, and one more faithful to the original meaning.

As Justice Scalia's concurrence in *Raich* put it, a law is not "proper for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional] principle of state sovereignty." 545 U.S. at 39 (quoting *Printz*, 521 U.S. at 923-24) (internal quotation marks omitted). Acknowledging these limitations—though not explicitly linking them to propriety—the *Comstock* Court included traditional control over the

[7] Founding-era jurists including Chief Justice Marshall and St. George Tucker, as well as President Andrew Jackson, held "proper" to be a shield for the states against the intrusion of the federal government into their domain. Gary Lawson & Patricia Granger, *The "Proper Scope" of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 301-08 (1993).

relevant subject matter and accommodation of state interests among factors to be considered when applying the Necessary and Proper Clause. 560 U.S. 126, 153 (2010) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause.").

In the most recent high-profile case to feature application of "propriety," *NFIB v. Sebelius*, Chief Justice Roberts's majority opinion analyzed the propriety of the Affordable Care Act's individual mandate and found it lacking. 132 S. Ct. at 2592. Roberts noted that "[e]ach of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power." *Id.* at 2593. Applying the principles of "propriety" to the individual mandate, the Court found that the breadth of the mandate precluded it from satisfying the *Comstock* concern with being "narrow" and the *McCulloch* requirement that the power be "incidental." *Id.* While the Court emphasized that the activity/inactivity distinction was the largest doctrinal problem for the mandate, it is clear from its reasoning that the exercise of any "great, substantive, and independent power" under

the pretext of subsidiarity to a narrower core power is of highly questionable propriety. *Id.* (quoting *McCulloch*, 17 U.S. at 411).

Using a broad, substantive power neither delegated to Congress expressly nor justified as incidental to an enumerated power is utterly improper. The regulation of the taking of an intrastate species like the Utah prairie dog, which effectively is a regulation of private property, tramples on federalism and the traditional state sovereignty over both wildlife and property. See *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) ("The wild game within a State belongs to the people in their collective sovereign capacity."). Although the doctrine of state ownership of wild game has been eclipsed by *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the idea that regulation of intrastate species primarily falls on the state (*e.g.*, hunting licenses) has not. The regulation of the Utah prairie dog is improper because it tramples on those traditional principles of federalism—to say nothing of the rights of local owners.

In addition, whether a law is proper calls for an analysis of how it affects the separation of powers. In *Printz* the Court stressed that while the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state

governments' regulation of interstate commerce." *Printz*, 521 U.S. at 924 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)). The Court expanded on this principle in *Bond*, explaining that "[n]o law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'" *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring). The propriety of a law, as in *Printz* and *Bond*, must be judged with respect to background principles of the bounds of Congress's powers.

One of these bounds—particularly relevant in this case—is the Takings Clause of the Fifth Amendment. As an original matter, the federal eminent domain power was perhaps best understood as an implied power. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1749-55 (2013). It is perverse that the federal government now relies on the Necessary and Proper Clause as a means to *evade* the requirement of paying just compensation for an indefinite moratorium on development—simply because the rodent *could* scurry anywhere on the "parcel as a whole." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002) citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Congress's

expansion of power beyond the bounds of the Bill of Rights—in derogation of the Takings Cause—is hardly necessary, and cannot be deemed proper.

When a federal regulation dictates land use or proscribes children throwing rocks at a non-commercial, intrastate animal in their backyard, that regulation has lost sight of "what is truly national and what is truly local." *Lopez*, 514 U.S. at 568. Here, as in *Lopez*, the Court must "pile inference upon inference" to uphold the "take" regulation. Our federalism jurisprudence and the original meaning of the Necessary and Proper Clause counsel against doing so.

Any construction of the Necessary and Proper Clause that upholds the "take" regulation of the Utah prairie dog necessarily upholds a broad, unenumerated power to regulate the ecology of each individual state. This regulation is both unnecessary and improper. "[W]hatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress." James Madison, Speech on the Bank Bill, House of Representatives, Feb. 2, 1791, in James Madison, Writings 480, 484 (Jack N. Rakove, ed. 1999). The people never delegated such a power to Congress, nor can any such power be derived

from the Necessary and Proper Clause. This Court recently put its finger squarely on such acts as this "take" regulation: "merely acts of usurpation which deserve to be treated as such." *Printz*, 521 U.S. at 924 (quoting The Federalist No. 33) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the district court ruling striking down the Utah prairie dog "take" regulation.

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/s/ *Ilya Shapiro* Dated: May 26, 2015

Attorney for amici

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The undersigned, attorney of record for amici, hereby certifies that on May 26, 2015, an identical electronic copy of the foregoing amici brief was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

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