Case Nos. 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

From the United States District Court
for the District of Utah
Honorable Dee Benson, District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(c)(1) and 26.1, *amici curiae* the Chamber of Commerce of the United States of America and National Federation of Independent Business ("*Amici*") hereby submit the following corporate disclosure statement.

The Chamber of Commerce of the United States of America states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock.

The National Federation of Independent Business states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and business associations. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus curiae* briefs in cases raising issues of vital importance to the business community, including cases addressing environmental laws such as the Endangered Species Act ("ESA").

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and a legal resource for small business. It is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

[1] In accordance with Federal Rule of Appellate Procedure 29(c), no counsel for a party authored this brief in whole or in part, and no such 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, and its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

Amici and their members have a strong interest in this case. Certain species threatened with extinction need protection. But this task is not assigned to the federal government when a species (like the Utah prairie dog) is confined to one state and has no connection to commerce. In such circumstances, state and local governments must balance species preservation against local concerns about safety, agriculture, and other community needs. Allowing the ESA, which shifts nearly all the costs of statutory compliance to private landowners, to comprehensively regulate intrastate endangered and threatened species with no link to interstate commerce is neither constitutional nor economically sensible.

SUMMARY OF THE ARGUMENT

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Panel overrode that foundational principle by embracing a sweeping vision of the so-called aggregation principle, the "most unsettled, and most frequently disputed of the [Commerce Clause] categories," *United States v. Patton*, 451 F.3d 615, 622 (10th Cir. 2006), that is incompatible with controlling precedent. The full Court should reject the Panel's holding that purely intrastate, non-economic activity is subject to pervasive federal regulation merely because the overall legislation, at a general level, "substantially affects interstate commerce." Panel Opinion ("Op.") 32. If the decision stands, Congress—at least in this Circuit—will have the power to regulate intrastate activity that "by its terms has nothing to do with 'commerce' or any sort of

economic enterprise, however broadly one might define those terms." *United States v. Lopez*, 514 U.S. 549, 561 (1995).

The practical ramifications of the decision for landowners are as severe as the doctrinal implications are for federalism. The listing of the Utah prairie dog imposes massive burdens on Utah landowners and local businesses. Indeed, experience has proven that ESA regulations can cost landowners millions of dollars because, among other reasons, FWS will not consider the full costs of compliance in making listing and enforcement decisions. It is vital, therefore, to impose some limit on Congress's authority. As Utah's balanced approach to protecting its namesake prairie dog shows, drawing that line does not mean abandoning protection for intrastate endangered or threatened species. States have the same interest as Congress in ensuring that species unique to their ecosystems do not become extinct. The ESA's laudable goal can be achieved without "obliterat[ing] the distinction between that which is truly national and that which is local." *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 292 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc).

ARGUMENT

I. The Panel Adopted a Limitless Interpretation of the Commerce Clause That Conflicts with Supreme Court Precedent.

It is exceptionally important that the full Court correct the Panel Opinion. The Panel held, quite remarkably, that the United States Fish and Wildlife Service ("FWS") has the authority under the Commerce and Necessary and Proper Clauses to regulate

"take" of the Utah prairie dog even though: (1) it is not an article of commerce; (2) there is no interstate market for it; (3) it does not cross state lines; (4) the ESA has no jurisdictional limit; (5) Congress did not list this species as endangered; and (6) there were no legislative findings regarding this species. Simply describing the decision reveals its flaws. If the Panel is correct, "it is difficult to perceive any limitation on federal power." *Lopez*, 514 U.S. at 564.

The Panel reached this alarming conclusion because it ignored that the Supreme Court has previously "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000). The Panel ignored that admonition entirely, concluding that the Utah prairie dog's lack of any connection to commerce is irrelevant because it is "an essential part of a broader regulatory scheme that, as a whole, substantially affects interstate commerce (*i.e.*, has a substantial relation to interstate commerce)." Op. 21-22. In so holding, the Panel committed important mistakes that warrant correction by the full Court.

No Supreme Court decision authorized the Panel to hold that FWS's regulation of the Utah prairie dog is immune from challenge because it is part of the ESA's "broader regulatory scheme." *Lopez* and *Morrison* foreclose that conclusion. En Banc Petition ("Pet.") 13-14. The Gun-Free School Zones Act was not saved because it was housed in the Crime Control Act of 1990; nor was the Violence Against Women Act immunized from scrutiny because it was passed as part of the Violent Crime Control

and Law Enforcement Act of 1994. *Id.* The Panel portrayed these laws as somehow less "comprehensive" than the ESA. Op. 23-24. That is not only factually wrong, but it turns the constitutional inquiry into a word game. The Gun-Free School Zones Act and the Violence Against Women Act can be described in equally capacious terms. Pet. 14-15.

Regardless, the Panel ignored *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). The Affordable Care Act meets any definition of a "comprehensive regulatory scheme." Op. 24. It "contain[s] hundreds of provisions" that, together, are designed "to increase the number of Americans covered by health insurance and decrease the cost of health care." *NFIB*, 132 S. Ct. at 2580 (Roberts, C.J.). There is no doubt, moreover, that many of those provisions govern economic activity and that the ACA, as a whole, affects interstate commerce. According to the Panel, then, the inquiry should have ended right there: a challenge to the individual mandate impermissibly would require separate analysis of intrastate, non-economic activity essential to a "comprehensive regulatory scheme" with a "substantial relationship" to interstate commerce. Op. 30. Yet that is not what happened. The Court reviewed the individual mandate—separate and apart from the rest of the ACA—and held that it exceeded Congress's authority under the

Commerce and Necessary and Proper Clauses. *NFIB*, 132 S. Ct. at 2585-93 (Roberts, C.J.); *id.* at 2644-51 (joint dissent).[2] The Panel Opinion cannot be reconciled with *NFIB*.

The Panel instead focused myopically on *Gonzalez v. Raich*, 545 U.S. 1 (2005). Op. 22-33. But the Panel did not follow *Raich*—it expanded the decision beyond the breaking point. Under the Panel's view, the Controlled Substances Act's regulation of marijuana could have been sustained based on the existence of an interstate market for cocaine or heroin. *Raich* does not endorse pushing the Commerce Clause that far. Instead, the Court examined the specific aspect of the legislation subject to challenge to decide if it was part of a "class of activities" that was "within the reach of federal power." *Id.* at 23. Marijuana was the "article of commerce" upon which the Court focused, *id.* at 26, and it was the "substantial impact" that marijuana "locally cultivated for personal use" could have "on the interstate market for this extraordinarily popular substance," that sustained regulation of non-economic, intrastate possession, *id.* at 28; *see NFIB*, 132 S. Ct. at 2592-93 (Roberts, C.J.) (interpreting *Raich*); *id.* at 2647 (joint dissent) (same). None of those factors is present here, Pet. 11, 17, and the Panel did not suggest otherwise.

[2] The five-Justice conclusion in *NFIB* that the individual mandate violates the Commerce Clause is a holding; it was that conclusion that compelled the Chief Justice to further analyze it under the taxing power. *See* 132 S. Ct. at 2600-01 (Roberts, C.J.) ("Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.").

At bottom, there will be no limit on Congress's authority under the Commerce and Necessary and Proper Clauses in this Circuit if the full Court does not intervene. The Panel has severed the relationship between the Commerce Clause and interstate commerce. According to the Panel, after all, the federal statute does not need to be a "'comprehensive *economic* regulatory scheme' ... to pass muster under the Commerce Clause," Op. 30 (quoting *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011)). And, as explained above, the aspect of the law being challenged need not be economic in nature either—the Panel immunized from challenge all federal regulation of intrastate, non-economic conduct captured by the broader legislation. In short, at no point in the constitutional inquiry does Congress *ever* have to show that "the activity at which the statute is directed is commercial or economic in nature." *Patton*, 451 F.3d at 623 (citation and quotations omitted). So long as the overall legislation "substantially affects interstate commerce"—even accidentally—every statutory provision housed within it is valid under the Commerce Clause. Op. 32.

That cannot be right. In today's economy, it is difficult to imagine legislation that would flunk this test. The Panel's approach thus "would open a new and potentially vast domain to congressional authority." *NFIB*, 132 S. Ct. at 2587 (Roberts, C.J.). There is no precedent for interpreting the Commerce Clause, as the Panel did here, to allow "congressional powers" to "become completely unbounded by linking one power to another *ad infinitum*." *United States v. Comstock*, 560 U.S. 126, 150 (2010) (Kennedy, J.,

concurring); *see Patton*, 451 F.3d at 623 ("If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless."). Sometimes Congress goes too far. That is why there must always be "careful scrutiny of regulations that do not act directly on an interstate market or its participants." *NFIB*, 132 S. Ct. at 2587 (Roberts, C.J.). The Panel's refusal to scrutinize the FWS regulation challenged here should be considered and reversed by the full Court.

II. The Panel's Sweeping Decision Will Cause Significant Economic Harm to Landowners.

Although "take" of the Utah prairie dog is the focus here, the Court should not lose sight of the significant economic ramifications that overzealous enforcement of the ESA has more generally for the business community. The economic consequences following a listing decision are often devastating—especially for private landowners. The GAO reports that "[a]pproximately half of listed species have at least *80 percent* of their habitat on private lands,"[3] yet those landowners receive no compensation for the severe restrictions placed on the use of their property.

[3] *See* Michael Bean, et al., *The Private Lands Opportunity: the Case for Conservation Incentives*, at 2 & n.4 (Environmental Defense 2003), *available at* http://www.fws.gov/southeast/grants/pdf/2677_ccireport.pdf.

The Utah prairie dog fits comfortably within that trend. 70 percent of Utah prairie dogs are located on private land.[4] Because FWS regulations have limited their relocation and prevented their extermination, localities have been forced to construct elaborate (and expensive) fences and underground barriers to protect airport runways and cemeteries from damage—with mixed results. *See* Jim Carlton, *In Utah, a Town Digs Deep to Battle Prairie Dogs,* Wall Street Journal (May 6, 2012). This kind of expense to landowners is commonplace in the aftermath of ESA listing decisions.[5]

And although economic costs are accounted for when FWS designates critical habitat, agency regulations confirm that consideration of economic impacts at the critical-habitat stage are limited to the *incremental* effects, and excludes any economic impacts that arose from the original listing decision. *Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat,* 78 Fed. Reg.

[4] *See* S. Nicole Frey, *Managing Utah Prairie Dog on Private Lands,* NR/Wildlife/ 2015-01pr (February 2015), *available at* http://extension.usu.edu/files/publications/ publication/NR_Wildlife_2015-01pr.pdf.

[5] *See* SuRandy T. Simmons & Kimberly Frost, *Accounting for Species: The True Costs of the Endangered Species Act*, at 14 (Property and Environment Research Center), *available at* http://www.perc.org/sites/default/files/esa_costs.pdf; Brian Seasholes, *Bad for Species, Bad for People: What's Wrong with the Endangered Species Act and How to Fix It,* NCPA Policy Report No. 303, at 6 (National Center for Policy Analysis September 2007), *available at* http://www. ncpa.org/pdfs/st303.pdf.

53058 (Aug. 28, 2013); 50 C.F.R. § 424.19.[6] Accordingly, there is little chance that the economic effects—no matter how severe—can ever serve as an effective brake on FWS's implementation of the ESA.

None of this means, however, that making Congress and FWS operate within constitutional parameters will prevent the goals of the ESA from being realized. There is good reason to question whether FWS's no-costs-barred approach is even effective at protecting listed species. The ESA has a thin record of success: only 78 species have been removed from the threatened and endangered list (which now includes more than 1,500 domestic animal and plant species), and of even that small number, 10 were removed due to extinction and another 19 were removed due to data errors, as opposed to successful recovery.[7] In the meantime, the ESA is widely known to have encouraged landowners to take extreme steps to keep a listed species from inhabiting (and thus devaluing) their private property. "[U]nder the ESA, economic theory and increasing empirical evidence suggest that, at least in the context of private land, land use regulations are likely doing more harm than good." Jonathan H. Adler, *Money or Nothing:*

[6] In doing so, FWS has rejected *New Mexico Cattlegrowers Ass'n v. FWS*, 248 F.3d 1277 (10th Cir. 2001), which refused to defer to a similar approach the agency took in the absence of any formal rulemaking.

[7] *See* FWS delisting report, *available at* https://ecos.fws.gov/ecp0/reports/delisting-report.

The Adverse Environmental Consequences of Uncompensated Land Use Controls, 49 B.C. Law Rev. 301, 364 (2008).

Regardless, this case illustrates that drawing a constitutional line need not undermine preservation of an endangered or threatened species. The Utah prairie dog enjoys extensive protection under state law. Pet. 19-20. Utah's measured approach to the management of prairie dogs, which balances the importance of preserving the species with the needs for agriculture and economic development, underscores that the ESA is not the only option to protect fragile species. The delegation of intrastate matters to the States was the motivation behind the Constitution's enumeration of limited congressional powers. Utah's sensible regulatory approach demonstrates that respecting those constitutional limits need not come at the cost of any threatened or endangered species.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains no more than the 2,600 words authorized by this Court's rules for an amicus brief in support of an en banc petition, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2013 in Garamond 14-point font.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing brief as submitted in digital form via the court's ECF system is an exact copy of the written document filed with the Clerk, and has been scanned for viruses, and, according to the program, is free of viruses. In addition, I certify that the brief contains no information subject to the privacy redaction requirements of 10th Cir. R. 25.5.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2017, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Tenth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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