

Nos. 14-4151, 14-4165

**In The United States Court of Appeals
for the Tenth Circuit**

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendants-Appellants,

and

FRIENDS OF ANIMALS,

Intervenor Defendant-Appellant,

v.

PEOPLE FOR THE ETHICAL
TREATMENT OF PROPERTY OWNERS,

Plaintiff-Appellee.

**On Appeal From The United States District Court
For The District Of Utah-Salt Lake City,
No. 2:13-cv-00278-DB, Hon. Dee Benson, Presiding**

**BRIEF OF CONSTITUTIONAL LAW PROFESSORS
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STEPHEN GARDBAUM, STEPHEN E. GOTTLIEB,
M. ISABEL MEDINA, AND STEVEN D. SCHWINN AS *AMICI
CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS**

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Amici Curiae’s Interest.....	1
Statement of the Case	1
Summary of Argument.....	2
Argument.....	4
I. The Endangered Species Act (ESA) and the Section 4(d) Rule Regulate Economic Activity, such as Crop Production, Construction, and Timber Harvesting	8
A. The ESA’s Literal Language Indicates that it Usually Regulates Economic Activities	8
B. The ESA Primarily Regulates Economic Activities “Taking” Protected Species by Impairing Their Habitats.....	10
C. Even Many Regulated Activities Not Harming Habitat, such as Farmers’ Pest Control and Commercial Hunting, are Economic	11
D. The Section 4(d) Rule Primarily Regulates Economic Activities.....	12
E. Economic Activities Do Not Lose Their Economic Character When They Harm a Protected Species.....	14
1. <i>Lopez</i> Treats Economic Actors’ Activities as Economic Regardless of the Content of the Statutory Prohibitions Limiting Their Activities.....	14
2. <i>Lopez</i> Requires Courts to Treat Economic Actors’ Activities as Economic, Even When Their Business Activities Harm Protected Species	19
II. ESA-Regulated Economic Activities Substantially Affect Interstate Commerce by Generating Interstate Shipments of Goods.....	22

TABLE OF CONTENTS – Continued

	Page
A. Agriculture Generates Interstate Food Shipments	22
B. Timber Harvesting Leads to Interstate Shipments of Wood Products	23
C. Construction Stimulates Interstate Commerce in Building Materials and Labor	23
D. The Commercial Activities that the ESA Regulates Substantially Affect Interstate Commerce Even Without Adding in Environmental Effects	24
III. The Commerce Clause Authorizes the ESA, Because All of the Activities it Regulates in the Aggregate Substantially Affect Interstate Commerce	24
IV. Although the ESA’s Constitutionality Establishes the Section 4(d) Rule’s Constitutionality, the Activities the Rule Regulates Substantially Affect Commerce by Generating Interstate Transactions and Travel	28
Conclusion.....	32
CERTIFICATE OF COMPLIANCE.....	I
CERTIFICATE OF DIGITAL SUBMISSION	II
CERTIFICATE OF SERVICE	III

TABLE OF AUTHORITIES

	Page
CASES	
<i>Alabama-Tombigbee Rivers Coal. v. Kempthorne</i> , 477 F.3d 1250 (11th Cir. 2007)	28
<i>Babbitt v. Sweet Home Chapter of Communities for a Great Oregon</i> , 515 U.S. 687 (1995)	3, 10, 11
<i>Champion v. Ames</i> , 188 U.S. 321 (1903).....	5
<i>Fed’n of Indep. Bus. v. Sibelius</i> , 132 S. Ct. 2566 (2012)	9
<i>GDF Realty Invs. v. Norton</i> , 326 F.3d 622 (5th Cir. 2003).....	28
<i>Gibbons v. Ogden</i> , 9 Wheat 1 (1824)	21
<i>Gibbs v. Babbitt</i> , 214 F.3d 483 (4th Cir. 2000).....	11, 14, 25
<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005).....	<i>passim</i>
<i>Headwaters, Inc. v. Bureau of Land Mgmt.</i> , 914 F.2d 1174 (9th Cir. 1990).....	23
<i>Heart of Atlanta Motel v. United States</i> , 379 U.S. 241 (1964).....	5, 16, 18, 19
<i>Hodel v. Indiana</i> , 452 U.S. 314 (1981).....	7, 9, 28
<i>Hodel v. Va. Surface Mining and Reclamation Ass’n</i> , 452 U.S. 264 (1981).....	<i>passim</i>
<i>Katzenbach v. McClung</i> , 379 U.S. 294 (1964)	16, 25
<i>Nat’l Ass’n of Home Builders (NAHB) v. Babbitt</i> , 130 F.3d 1041 (D.C. Cir. 1997).....	23, 26
<i>Perez v. United States</i> , 402 U.S. 146 (1971)	6, 16, 27
<i>Preseault v. ICC</i> , 494 U.S. 1 (1990).....	12
<i>Rancho Viejo, LLC v. Norton</i> , 323 F.3d 1062 (D.C. Cir. 2003).....	<i>passim</i>
<i>San Luis & Delta-Mendota Water Auth. v. Salazar</i> , 638 F.3d 1163 (9th Cir. 2011)	29
<i>Staton v. Mayes</i> , 552 F.2d 908 (10th Cir. 1977)	26

TABLE OF AUTHORITIES – Continued

	Page
<i>TVA v. Hill</i> , 437 U.S. 153 (1978).....	10
<i>United States v. Bolton</i> , 68 F.3d 396 (10th Cir. 1995).....	28
<i>United States v. Darby</i> , 312 U.S. 100 (1941).....	21, 26
<i>United States v. Haney</i> , 264 F.3d 1161 (10th Cir. 2001).....	19
<i>United States v. Jeronimo-Bautista</i> , 425 F.3d 1266 (10th Cir. 2005).....	25
<i>United States v. Lopez</i> , 2 F.3d 1342 (5th Cir. 1993).....	21
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	<i>passim</i>
<i>United States v. Morrison</i> , 529 U.S. 598 (2000).....	<i>passim</i>
<i>United States v. Patton</i> , 451 F.3d 615 (10th Cir. 2006).....	6, 7
 CONSTITUTIONAL PROVISION	
U.S. Const. art. I, § 8, cl. 3	30
 STATUTORY PROVISIONS	
<i>Endangered Species Act Provisions</i>	
16 U.S.C. §1531(a)(1)	8
16 U.S.C. §1531(b).....	28
16 U.S.C. §1533(d).....	9
16 U.S.C. §1538(a)(1)	9
<i>Gun-Free School Zones Act Exemptions</i>	
18 U.S.C. §922(q)(2)(B)(ii).....	7
18 U.S.C. §922(q)(2)(B)(v)	6
<i>Surface Mining Control and Reclamation Act of 1977</i>	
30 U.S.C. §1201 <i>et seq.</i> (1976 ed., Supp. III)	7, 15, 17
30 U.S.C. §1265(b).....	15

TABLE OF AUTHORITIES – Continued

	Page
<i>Title II of the Civil Rights Act of 1964</i>	
Pub. L. 88-352, 78 Stat. 241	16
 ADMINISTRATIVE RULES	
50 C.F.R. §17.40(g)	1
50 C.F.R. §17.40(g)(3).....	13
Rule to Reclassify the Utah Prairie Dog as Threatened, 49 Fed. Reg. 22,330 (March 29, 1984).....	30
Finding on Petition to Reclassify the Utah Prairie Dog from Threatened to Endangered, 76 Fed. Reg. 36,053 (June 21, 2011)	12, 13
 OTHER MATERIALS	
Biodiversity II: <i>Understanding and Protecting our Biological Resources</i> 11 (Edmund O. Wilson ed. 1997).....	10
John Black et al., <i>Oxford Dictionary of Economics</i> 120 (4th ed., 2012)	8
Jan E. Crispin et al., <i>An Analysis of Long-Term Economic Growth in Southwest Utah: Past and Future Conditions</i> 5 (June 2008), http:// bebr.business.utah.edu/sites/bebr/Documents/studies/Southwestern UtahGrowth.pdf	31, 32
U.S. Census Bureau, <i>Statistical Abstract of the United States</i> 562 (2012).....	23
USDA, <i>Ag and Food Statistics: Charting the Essentials</i> , http://www.ers. usda.gov/data-products/ag-and-food-statistics-charting-the-essentials.aspx (last visited Apr. 12, 2015)	22
U.S. Dep't of Commerce, <i>February 2015 Construction at \$967.2 Billion Annual Rate (Current Release PDF)</i> (April 1, 2015), http://www. census.gov/construction/c30/c30index.html	23
Utah Econ. Council, <i>Economic Report to the Governor (Governor's Report)</i> 52 (2015), bebr.business.utah.edu/sites/default/files/2015_erg. pdf	30, 31

TABLE OF AUTHORITIES – Continued

	Page
<i>Utah Farmers Exporting Massive Amounts of Hay to China</i> (September 29, 2013) www.ksl.com/?nid=148&sid=27056998	30
Utah Governor’s Office of Planning and Budget, <i>Demographic and Economic Analysis, 2012 Baseline Projections, Population and Households by Area</i> , http://gomb.utah.gov/budget-policy/demographic-economic-analysis (last visited April 12, 2015)	31

Amici Curiae's Interest

The amici are law professors William C. Banks (Board of Advisors Distinguished Professor, Syracuse University College of Law), David S. Cohen (Associate Professor, Drexel University Thomas R. Kline Law School), Eric M. Freedman (Siggi B. Wilzig, Distinguished Professor of Constitutional Rights, Maurice A. Dean School of Law at Hofstra University), Stephen Gardbaum (MacArthur Foundation Professor of International Justice and Human Rights, UCLA Law School), Stephen Gottlieb (Jay and Ruth Caplan Distinguished Professor, Albany Law School), M. Isabel Medina (Ferris Family Distinguished Professor, Loyola University of New Orleans College of Law), and Steven D. Schwinn (Associate Professor, John Marshall Law School). They write about and teach constitutional law and have an interest in the appropriate development of Commerce Clause jurisprudence.¹

Statement of the Case

The District Court held that the section 4(d) rule (“rule”), 50 C.F.R. §17.40(g), is noneconomic, because the Fish and Wildlife Service (FWS) “regulates every activity” that harms the prairie dog. *People for the Ethical*

¹ The parties consented to this brief’s filing. No party or party’s counsel wrote any part of this brief or contributed to it financially. Syracuse University, which has no position on this matter, funded this brief’s costs.

Treatment of Prop. Owners (PETPO) v. U.S. Fish and Wildlife Serv., slip op. at 10-11 (D. Utah 2014).² The district court opinion identifies economic activities that the rule regulates, namely construction of single-family homes, development of car dealerships, and “other commercial development.” *Id.* at 7, n. 2. The opinion, however, does not identify any noneconomic activity that the rule regulates. *Cf.* Pl.’s Mot. Sum. J. at 15 (alleging some noneconomic activities); Def.’s Mot. Summ. J. at 11 (disputing this allegation).

The Court found FWS’ arguments about the prairie dog’s biological and commercial value too “attenuated” to justify the rule. *PETPO*, at 12. It considered the prairie dog’s effects on commerce in isolation from the ESA, because it found the prairie dog’s survival unimportant to any other species’ survival. *Id.* at 13-15.

Summary of Argument

The Endangered Species Act (ESA) regulates interstate commerce by addressing one of its side effects—species extinction. *Cf. Hodel v. Va. Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 268, 281 (1981) (upholding a statute protecting the environment from coal mining’s adverse effects). Congress found that economic growth and development, products of economic activities, cause extinction. Economic growth harming species often occurs because customers in

² This brief uses the pagination of the slip opinion found in the record, not the pagination of the record as a whole.

many states demand more interstate shipments of goods produced in states where protected species reside. This demand for more goods to be shipped between states often leads to increased crop production, timber harvesting, and other activities that harm protected species,³ usually by degrading their habitat. The ESA's limits on harming⁴ protected species temper these and other economic activities, and hence interstate commerce, in order to avoid more extinction, regardless of the protected species' location or geographic range.

Accordingly, the ESA regulates economic activities. These economic activities do not cease to be economic when they harm a protected species. *Lopez* defined economic actors' regulated activities as economic under statutes requiring them to address environmental harms or refrain from racial discrimination. This broad actor-centered approach requires courts to treat economic activities as such even when they harm species.

ESA-regulated economic activities substantially affect interstate commerce, not only because they affect protected species and their habitats, but also because ESA-regulated industries generate voluminous interstate shipments of goods.

³ This brief uses the term "protected species" to refer to endangered or threatened species.

⁴ For ease of exposition, this brief usually uses the word "harm" as a synonym for the technical term "take." See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690-91, 704 (1995) (showing that the statutory definition of "take" focuses on various ways of harming, or attempting to harm, a protected species).

These interstate shipments establish the ESA's validity, regardless of the statute's environmental effects. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (relying solely on commercial real estate development's nonenvironmental effects on commerce to justify an ESA restriction). For *Lopez* affirms that Congress may regulate activities substantially affecting interstate commerce.

The FWS can apply the ESA to intrastate activities without establishing that each action it takes regulates a subset of activities that affect interstate commerce on their own. For the Constitution permits regulation even of trivial intrastate activity pursuant to a comprehensive regulatory scheme authorized by the Commerce Clause.

The rule, however, usually regulates economic activities, such as construction and agriculture, which substantially affect interstate commerce through interstate shipments. Accordingly, even if the substantial effects test applied to the rule itself, the rule would pass muster.

Argument

The ESA does not regulate prairie dogs or other protected species. *Cf. Rancho Viejo*, 323 F.3d at 1072 (the ESA does not regulate arroyo toads). Prairie dogs, clever though they may be, cannot read and obey the code of federal regulations. The ESA regulates human activities that harm protected species. *See*,

e.g., id. (identifying a real estate development harming arroyo toads as the regulated activity). Hence, *Lopez* requires a focus on those activities' aggregate effects on interstate commerce, not on the Utah prairie dog's state of residence. *Cf. id.* at 1069 (finding the arroyo toad's residence irrelevant).

The ESA passes muster because it addresses side effects of interstate commerce, *see Hodel*, 452 U.S. at 268, 281 (upholding a statute protecting the environment from coal mining's adverse effects, because coal moves in interstate commerce)—the destruction of habitats and the extinguishing of species. The Supreme Court has long held that Congress may regulate interstate commerce not only to promote commerce, but also to limit it in pursuit of economic or noneconomic purposes. *See Gonzales v. Raich*, 545 U.S. 1, 19-20 n. 29, 35 (2005) (the commerce power permits Congress to restrict commerce). Thus, Congress may exercise its commerce power to address moral and social issues such as gambling, *Champion v. Ames*, 188 U.S. 321, 355-57 (1903), racial discrimination, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250, 256-57 (1964), drug abuse, *Raich*, 545 U.S. at 12, 22, and environmental damage, *Hodel*, 452 U.S. at 268.

United States v. Lopez, while approving precedent affirming the use of the commerce power to achieve noneconomic goals, 514 U.S. 549, 559-60 (1995) (approving *Heart of Atlanta Motel* and *Hodel*), makes the economic nature of

regulated *activities* germane to Commerce Clause analysis. For *Lopez* reaffirms a long line of cases upholding *particular applications* of statutes regulating economic activities when all the activities regulated under a challenged statute cumulatively affect interstate commerce. *See Lopez*, 514 U.S. at 558 (*de minimis* nature of an *application* is of “no consequence” if the “*statute* bears a substantial relationship to interstate commerce”) (emphasis added); *see, e.g., Perez v. United States*, 402 U.S. 146, 150-53 (1971) (describing the substantial effects test as “the ‘class of activities’ test”). *Lopez* also affirms that courts must adjudicate this question of whether regulated activities affect commerce with an acceptance of the reality that economic activities usually affect interstate commerce, because our markets are interconnected. *See Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) (“Congress may regulate in the commercial sphere on the assumption that we have a single market . . .”). Thus, identification of regulated activities as economic under *Lopez* establishes “a heavy—perhaps . . . irrebuttable—presumption” that the Commerce Clause authorizes the law regulating those activities, *United States v. Patton*, 451 F.3d 615, 623-24 (10th Cir. 2006), regardless of that law’s purpose.

Lopez and *Morrison*, however, suggest reluctance to accept laws regulating *only* noneconomic activities when the claim that they cumulatively affect interstate commerce seems attenuated. *See United States v. Morrison*, 529 U.S. 598, 615 (2000) (suggesting an attenuated link between noneconomic activities and

commerce); *Lopez*, 514 U.S. at 564 (same); *cf.* 18 U.S.C. §922(q)(2)(B)(ii), (v) (2012) (exempting paid security guards' economic activity from the Gun-Free School Zones Act through school contract and qualified licensee exemptions). But is not clear that this reluctance goes beyond the context of federal statutes regulating ordinary crime, the family, or local schools. *See Morrison*, 529 U.S. at 517-19 (linking its conclusion to concern about allowing federal regulation of ordinary crime and marriage); *Lopez*, 514 U.S. at 564-66 (also expressing concern about federal regulation of local schools). *But see Hodel*, 452 U.S. at 275-76, 281 (rejecting argument that land restoration requirements impinging on traditional state authority over land use violate the Commerce Clause).

Hence, the first step in analyzing the rule's constitutionality involves asking whether the ESA regulates economic activities. *See Patton*, 451 F.3d at 624 (asking whether a regulated activity is commercial as step one). The second step involves assessing whether the activities the ESA regulates substantially affect interstate commerce, taking into account the economic nature of regulated activities. *See id.* at 626. Since this two-step analysis shows that the Constitution authorizes passage of the ESA, it follows that the FWS can regulate activities harming Utah prairie dogs, *cf. Hodel v. Indiana*, 452 U.S. 314, 329 n. 17 (1981) (declining to require a showing that specific Mining Act restrictions are related to

interstate commerce), which by themselves substantially affect interstate commerce.

I. The Endangered Species Act (ESA) and the Section 4(d) Rule Regulate Economic Activity, such as Crop Production, Construction, and Timber Harvesting.

The ESA's language, structure and history show that it regulates economic activity, and prairie dog protection's rationale and history show that the rule primarily regulates economic activity. Furthermore, the presumption in favor of constitutionality supports finding an almost exclusive focus on economic activity, absent proof to the contrary.

A. The ESA's Literal Language Indicates that it Usually Regulates Economic Activities.

The ESA, read as a whole, indicates that it regulates economic activities. The Act contains a finding that "untempered" economic growth and development have eradicated species. 16 U.S.C. §1531(a)(1) (2012). The term "economic growth" means an increase in economic activity, John Black et al., *Oxford Dictionary of Economics* 120 (4th ed., 2012) (economic growth reflects an increase in economic activity), and economic development likewise refers to economic activity. Hence, Congress found that economic activity eradicates species.

The take prohibition considered in light of this finding regulates economic activities. The take prohibition generally forbids all activities harming an

endangered species and limits activities harming a *threatened* species, like the Utah prairie dog. See 16 U.S.C §§1533(d); 1538(a)(1). The activities harming species, however, drive their eradication. So, the language of the take provision considered in light of Congressional findings about the nature of the activities driving species extinction suggests that the take prohibition usually applies to economic activities.

Reading the take prohibition without reference to the Congressional findings does not aid application of *Lopez*'s economic/noneconomic distinction to the ESA. Considered in isolation, the take provision does not state whether the activities harming a protected species and therefore subject to regulation under the ESA are economic or noneconomic. Cf. *PETPO*, at 10-11 (the FWS is regulating every activity harming the Utah prairie dog "regardless of its nature"). Hence, a court analyzing whether the ESA regulates economic activities must consider the legislative findings in order to apply the economic/noneconomic distinction.

The presumption of constitutionality implies that a court must find that this prohibition usually regulates economic activities even if the entire statute were silent absent contrary proof. See *Fed'n of Indep. Bus. v. Sibelius*, 132 S. Ct. 2566, 2579 (2012) (Roberts, J.) (challengers must "clearly demonstrate" a statute's unconstitutionality); *Indiana*, 452 U.S. at 323-24 (applying the presumption of constitutionality to a Commerce Clause challenge). Reading the take prohibition in

light of the ESA's findings identifying *only* economic activity as causing species extinction and the presumption of constitutionality suggests that take restrictions apply overwhelmingly to economic activities.

B. The ESA Primarily Regulates Economic Activities “Taking” Protected Species by Impairing Their Habitats.

Although statutory limits on taking protected species apply to a variety of activities, the ESA primarily regulates activities harming protected species' habitat. The statute defines the term “take” broadly to include actions harming a protected species by degrading its habitat. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690-691, 704 (1995). And Congress understood that modification of habitat constitutes the most significant cause of species extinction. *See TVA v. Hill*, 437 U.S. 153, 179 (1978) (summarizing testimony before Congress identifying habitat destruction as the leading cause of species loss); *see also Biodiversity II: Understanding and Protecting our Biological Resources* 11 (Edmund O. Wilson ed. 1997) (describing habitat destruction as “by far the biggest problem” for biodiversity). Accordingly, the vast majority of activities regulated under the ESA impair habitat.

Companies and individuals rarely destroy protected species' habitat out of malice. *See Babbitt*, 515 U.S. at 701 (describing habitat modification as an activity “not intended to harm an endangered species”). Instead, they usually destroy

habitat as an unintended byproduct of ordinary economic activity. *See, e.g., id.* at 696 (assuming that the logging companies “have no desire to harm” endangered species but “merely wish to continue logging”). Timber harvesting, mining, crop production, building, and many other commercial activities tend to disturb lands in ways that can damage habitat that protected species depend on for survival. When they do, the ESA authorizes regulation of those economic activities. The ESA primarily regulates economic activities harming a protected species’ habitat.

C. Even Many Regulated Activities Not Harming Habitat, Such as Farmers’ Pest Control and Commercial Hunting, are Economic.

The take prohibition also applies to killing a protected animal directly, by shooting or poisoning it. *See id.* at 691. Many of these takes also constitute economic activities. For example, hunting a species in order to sell its hide to a furrier constitutes an economic activity. Similarly, farmers often kill protected species to protect their crops, equipment, or livestock. Such protection of production from predators constitutes an economic activity. *Accord Gibbs v. Babbitt*, 214 F.3d 483, 489, 492 (4th Cir. 2000) (characterizing taking red wolves as an economic activity because farmers and ranchers usually shoot wolves to protect crops or livestock). Farmers trying to raise a crop plant the crop, grow it, and harvest it. Growing a crop includes watering it and protecting it from insects and predators. The economic activity of farming includes the full panoply of activities

needed to produce crops (or livestock). *See Lopez*, at 560 (characterizing sowing, harvesting, and use of wheat as an economic activity); *Raich*, 545 U.S. at 25-26 (defining economics as including “production. . . of commodities”). Hence, the ESA routinely regulates economic activities that do not destroy habitat.

D. The Section 4(d) Rule Primarily Regulates Economic Activities.

The rule primarily regulates economic activities. The District Court suggested that the rule regulates all activities harming the prairie dog. *PETPO*, at 10-11. Thus, one identifies the economic character of regulated activities under the rule by looking at what activities harm the prairie dog. The FWS identified the activities harming the prairie dog when it rejected a petition to list the prairie dog as an endangered, not just a threatened, species, and those activities are overwhelmingly economic. *See Finding on Petition to Reclassify the Utah Prairie Dog from Threatened to Endangered*, 76 Fed. Reg. 36,053, 36,061 (June 21, 2011) (listing threats to the prairie dog). In particular, it identified construction (denominated urbanization); agriculture; livestock grazing; oil, gas, and mineral development and seismic exploration as primary threats to the prairie dog. *Id.* In effect, it found that the vast majority of human activities harming the prairie dog are economic. *See id.* (describing these economic activities along with off-highway vehicle use as “the reason the Utah prairie dog remains listed”); *cf. Preseault v.*

ICC, 494 U.S. 1, 17-19 (1990) (the Commerce Clause permits federal regulation to promote recreation).

Consistent with the ESA’s finding that “economic development” drives species extinction and with plaintiff’s affidavits complaining of restrictions on construction, the FWS denominated urbanization as “one of the largest threats to” the Utah prairie dog’s survival. 76 Fed. Reg. at 36,061; Aplt. App. at 139 ¶¶ 4-6; Aplt. App. at 148 ¶¶ 5-8. Accordingly, the FWS regulates construction projects impacting prairie dog habitat. 76 Fed. Reg. at 36,059.

The FWS continues to regulate agriculture as well. Agriculture and farmers’ efforts to eradicate the prairie dog have historically been a major cause of the species’ decline. Aplt. App. at 115. Although the FWS has relaxed regulation of agriculture over the years, the rule regulates shooting, poisoning, and removing Utah prairie dogs to protect agricultural activities, *see* 50 C.F.R. § 17.40(g)(3), so that agriculture remains regulated. Accordingly, PETPO alleged that the rule prevents one of its members from protecting his farm equipment—vital to operating a farm—from prairie dogs. Aplt. App. at 156 ¶¶ 6-9. Purchasing, using, maintaining, and protecting farm equipment constitutes part of the commercial activity of farming. Thus, the rule regulates a variety of economic activities.

E. Economic Activities Do Not Lose Their Economic Character When They Harm a Protected Species.

Economic activities may harm species. When they do, they do not magically cease to be economic activities. *See PETPO*, at 13 (recognizing that the ESA regulates some economic activity).

For example, commercial development constitutes an economic activity. When commercial development in a particular location harms an endangered species, it nevertheless remains commercial development—an economic activity. *See Rancho Viejo*, 323 F.3d at 1065, 1068 (characterizing commercial housing development as an economic activity). Similarly, pest eradication to protect crop production constitutes an economic activity and remains an economic activity when the pest eradicated happens to be a protected species. *See Gibbs*, 214 F.3d at 489, 492 (characterizing taking red wolves as an economic activity). Economic activities remain economic activities, even if they harm a protected species.

1. *Lopez* Treats Economic Actors' Activities as Economic Regardless of the Content of the Statutory Prohibitions Limiting Their Activities.

Lopez defines activities as economic when regulated parties are conducting business or a commercial transaction when they become subject to regulatory restrictions. It does not permit an approach that bases the characterization of activities on the words of statutory prohibitions considered in isolation.

Thus, the *Lopez* Court characterized the Surface Mining Control and Reclamation Act of 1977 (Mining Act), 30 U.S.C. §1201 *et seq.* (1976 ed., Supp. III), as regulating the “economic activity” of “intrastate coal mining.” *See Lopez*, 514 U.S. at 559 (citing *Hodel*, 452 U.S. 264).⁵ In doing so, the Court implicitly rejected the idea that the Mining Act only regulates the arguably noneconomic activity of pollution, and thus the idea that the nature of the harms a regulating statute seeks to prevent limits the concept of regulated economic activities. *Cf. Lopez*, 514 U.S. at 629 (Breyer, J., dissenting) (suggesting that the Mining Act could be viewed as a regulation of pollution). The Mining Act, by its terms, requires “restoration of land after mining to its prior condition.” *Hodel*, 452 U.S. at 269 (citing 30 U.S.C. §1265(b)). The *Lopez* Court, however, did not define the activities the Mining Act regulates in terms of its express requirements as regulating the activity of land restoration. Rather, it looked beyond the statute’s literal requirements to determine who has a duty to restore land. Since the Mining Act imposes its duties on mining companies, the *Lopez* Court characterized the Mining Act as regulating the economic activity of mining, *Lopez*, 514 U.S. at 559, even though the statute aims to protect the environment by explicitly ordering land restoration.

⁵ The *Lopez* Court characterized the Mining Act as regulating economic activity through citation to *Hodel*, which upheld the Mining Act. *Hodel*, 452 U.S. at 268.

Similarly, the *Lopez* Court characterized Title II of the Civil Rights Act of 1964 (Civil Rights Act), Pub. L. 88-352, 78 Stat. 241, as regulating hotels and restaurants using interstate supplies, both of which it recognized as “economic activit[ies].” *See Lopez*, 514 U.S. at 559.⁶ In so doing the *Lopez* majority did not characterize the activities the Civil Rights Act regulates in terms of the noneconomic conduct the statute by its terms proscribed—racial discrimination. *Cf. Heart of Atlanta Motel*, 379 U.S. at 248, 250-52, 264 (describing the Civil Rights Act as forbidding racial discrimination in public accommodations); *Lopez*, 514 U.S. at 628 (Breyer, J., dissenting) (suggesting that the Civil Rights Act regulates noncommercial activity because it forbids “race-based exclusion”).

The concept of economic activity developed in *Lopez* also includes cases where the law regulates economic transactions. Accordingly, the *Lopez* Court characterizes “extortionate credit transactions” as economic activities, treating criminals making loans as economic actors. *See Lopez*, 514 U.S. at 559 (citing *Perez*, 402 U.S. 146).

Thus, *Lopez* defines regulation of commercial enterprises as regulation of economic activity, even when the relevant statutory restriction addresses social

⁶ The *Lopez* Court characterized the Civil Rights Act as regulating economic activity through citation to *Heart of Atlanta Motel*, 379 U.S. 241 and *Katzenbach v. McClung*, 379 U.S. 294 (1964), both of which upheld the Civil Rights Act.

harms. Instead of focusing exclusively on the statutory command's language, it focuses on whether the command applies to economic actors.

Lopez's broad actor-centered approach to the characterization of economic activity in prior cases played a central role in constructing a rationale for invalidating the Gun-Free School Zones Act as consistent with prior precedent. The *Lopez* Court struck down that Act as a criminal statute having “*nothing* to do with . . . any sort of economic enterprise.” *Id.* at 561 (emphasis added); *see also id.* at 551 (identifying Lopez as a 12th grader who brought a gun to school). For that reason, the Court held that the Act could not be sustained under the cases, such as the Civil Rights and Mining Act cases, upholding regulation of economic activities. *Id.* at 561. In other words, the Court treated regulation of activities having *something* to do with economic enterprises as regulation of economic activities and different from regulation of gun possession.

This broad approach to the characterization of economic activities played a central role not only in constructing the rationale for *Lopez*'s result, but also in garnering the support of Justices O'Connor and Kennedy, whose votes were needed to form a majority. They concurred because the majority opinion's broad approach to the characterization of activities as economic justified the result in *Lopez* without violating *stare decisis*. *See Lopez*, 514 U.S. at 573-74 (Kennedy, J., concurring).

The majority's rationale commanded their assent, precisely because the majority opinion recognized that Congress can regulate actors engaged in economic activity (i.e., commercial actors) defined quite broadly, regardless of what the challenged statute demands of them. Thus, the concurring Justices accepted the majority's characterization of earlier cases as regulating economic activity because they involved *either* commercial actors *or* commercial conduct. *Cf. Morrison*, 529 U.S. at 613 (striking down the Violence Against Women Act because "gender-motivated crimes" do not constitute economic activity "*in any sense of the phrase*") (emphasis added). The concurring Justices found the Gun-Free School Zones Act distinguishable because "*neither* the actors *nor* their conduct has a commercial character." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) (emphasis added). They thus recognized that Congress may regulate commercial actors as a regulation of economic activity. And they considered the majority opinion consistent with the Court's "commitment to the practical conception of the commerce power" because the majority did not "call into question" cases such as *Heart of Atlanta Motel*, but instead endorsed a "practical conception of commercial regulation." *Id.* at 573-74. This broad practical conception of commercial activity and thus commercial regulation led the concurring Justices to find the result in *Lopez* consistent with their strong

commitment to *stare decisis* in this area. *See id.* at 574 (discussing the legal system’s “immense stake” in the Commerce Clause jurisprudence’s stability).

2. *Lopez* Requires Courts to Treat Economic Actors’ Activities as Economic, Even When Their Business Activities Harm Protected Species.

Just as statutes prohibiting racial discrimination and limiting pollution damage regulate economic activities when the actors discriminating and polluting carry out economic activities, the ESA’s prohibition of activities taking species regulates economic activities when those harming species do so while carrying out economic activities. *Lopez*’s actor-centered approach precludes allowing the language of statutory prohibitions to substitute for analysis of what activities those subject to the prohibition are engaged in. *See United States v. Haney*, 264 F.3d 1161, 1170 (10th Cir. 2001) (defining “economic activity . . .broadly to include activities . . . closely linked to commercial transactions”).

Instead of carrying out the necessary inquiry into whether economic actors harm protected species and therefore become subject to ESA regulation, the District Court held that the ESA regulates “some” economic activity, but that the *rule* is “noneconomic.” *PETPO*, at 10, 13. Numerous cases, including *Heart of Atlanta Motel*, *Hodel*, and *Raich*, show that the Commerce Clause authorizes noneconomic rules—rules that have a social rather than a purely economic purpose. *See, e.g., Heart of Atlanta Motel*, 379 U.S. at 250 (describing the Civil

Rights Act’s “fundamental object” as vindicating “personal dignity”). The District Court based its conclusion about the rule’s noneconomic character on an observation that the FWS regulates every activity harming the prairie dog. *PETPO*, at 10-11. This observation begs the question of whether the activities harming the prairie dog (and therefore subject to regulation) are economic or not, but the uncontested facts before the Court on summary judgment showed economic activities as did the administrative record of FWS prairie dog protection.

The *Lopez* and *Morrison* Courts did not reach their conclusions about the noneconomic character of ordinary criminal activity by blinding themselves to the record before them, all experience under the statutes they examined, and pertinent legislative findings. *Cf. Morrison*, (reviewing legislative findings and discussing the facts); *Lopez*, 514 U.S. at 551 (stating that Lopez was a 12th grader carrying a gun to school). *PETPO* suggested below that *Lopez* demands record-blind review by claiming that the Supreme Court stated that Lopez was paid \$40 to carry a gun to school. *See* Pl.’s Mot. Sum. J. 17 (citing *Lopez*, 514 U.S. at 551). The Supreme Court, however, did not mention the payment to Lopez. *See Lopez*, 514 U.S. at 551.

Even if the Supreme Court had considered the \$40 payment mentioned in the Court of Appeals decision, that consideration would not undermine the actor-centered focus at the heart of the Supreme Court’s rationale. An individual gave

Lopez \$40 to deliver a gun to another individual who planned to use it in a gang war. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). Accepting a payment to carry a gun into school to facilitate a crime is not an ordinary commercial activity. *Cf. Morrison*, 529 U.S. at 610 (characterizing the “noneconomic, *criminal* nature of the conduct at issue” in *Lopez* as “central” to the *Lopez* decision) (emphasis added). In any case, speculation about why a fact mentioned below is omitted in a Supreme Court decision cannot defeat *Lopez*’s express rationale, which features a broad actor-centered approach to analyzing regulation of ordinary transactions and enterprises. Nor can it defeat the precedent that preceded *Lopez*, which the *Lopez* Court specifically affirmed.

Lopez’s broad approach to characterization of economic activities serves the judicial policy of respecting Congress’ plenary authority to choose the purposes of Commerce Clause regulation. *See United States v. Darby*, 312 U.S. 100, 115 (1941) (characterizing the selection of regulatory aims as matters for “legislative judgment” unrestricted by the Constitution and free from judicial control); *Lopez*, 514 U.S. at 555-58 (quoting and citing *Darby* repeatedly). If the judiciary instead characterized commercial activity as “noneconomic” whenever a statutory restriction imposed on a commercial enterprise was phrased to prohibit socially undesirable conduct, it would cast into doubt many statutes limiting commerce to serve moral or social purposes. *Cf. Gibbons v. Ogden*, 9 Wheat 1, 189 (1824)

(describing the judicial role in adjudicating Commerce Clause cases as defining the *subject* of commerce). *Lopez* confirms what common sense suggests—agricultural production, construction, and other economic activities do not lose their economic character when they harm species.

II. ESA-Regulated Economic Activities Substantially Affect Interstate Commerce by Generating Interstate Shipments of Goods.

The Act’s finding that economic growth and development extinguish species implies, in light of markets’ interconnected nature, that increased production harming species causes substantial shipments of goods in interstate commerce to customers outside the producing states. *See generally, Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) (Congress can assume we have “a single market”). Not surprisingly, the activities harming protected species affect interstate commerce by generating large volumes of shipments.

A. Agriculture Generates Interstate Food Shipments.

Food and forage gets shipped across the country. Agriculture and related industries contributed \$775 billion to U.S. GDP in 2012. USDA, *Ag and Food Statistics: Charting the Essentials*, <http://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials.aspx> (last visited Apr. 12, 2015).

B. Timber Harvesting Leads to Interstate Shipments of Wood Products.

Timber harvesting not only impairs habitat for spotted owls and other protected species, *see Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1184-85 (9th Cir. 1990) (Ferguson, J., dissenting) (discussing regulation of timber harvesting to protect the spotted owl), it also leads to substantial shipments of goods in interstate commerce. These goods include furniture, paper, and construction materials—worth \$277 billion in 2007. U.S. Census Bureau, *Statistical Abstract of the United States* 562 (2012).

C. Construction Stimulates Interstate Commerce in Building Materials and Labor.

Construction activity generates substantial interstate commerce, because it creates demand for interstate shipments of supplies and frequently attracts laborers from outside the state where a project is underway. *See Nat’l Ass’n of Home Builders (NAHB) v. Babbitt*, 130 F.3d 1041, 1048, 1058 (D.C. Cir. 1997) (hospital construction would use materials from outside of the state); *Rancho Viejo*, 323 F.3d at 1069 (construction of housing development likely uses out-of-state supplies and construction workers). The U.S. Census Bureau estimates current construction spending at \$967 billion annually. U.S. Dep’t of Commerce, *February 2015*

Construction at \$967.2 Billion Annual Rate (Current Release PDF) (April 1, 2015), <http://www.census.gov/construction/c30/c30index.html>.

D. The Commercial Activities that the ESA Regulates Substantially Affect Interstate Commerce Even Without Adding in Environmental Effects.

Any one of these ESA-regulated industries substantially affects interstate commerce and collectively ESA-regulated industries have an enormous impact. Even if one only considered the interstate shipments generated by the particular industry operations that happen to harm protected species, those operations' impact on interstate commerce would be very substantial. *Cf. Lopez*, 514 U.S. at 559 (viewing the Civil Rights Act as regulation of hotels and restaurants even though its prohibition on discrimination would only change conduct in hotels and restaurants carrying out discrimination). Thus, even if regulated activities' environmental impacts had no effect on commerce, regulated commercial activities would still substantially affect interstate commerce.

III. The Commerce Clause Authorizes the ESA, Because All of the Activities it Regulates in the Aggregate Substantially Affect Interstate Commerce.

Lopez and *Raich* affirm that Congress may regulate economic activities that substantially affect interstate commerce and do not limit the effects courts must consider when a plaintiff seeks to invalidate a statute or its applications. The District Court, however, only considered regulated activities' environmental

effects. The harms motivating a regulatory scheme may, of course, properly justify a conclusion that regulated activities substantially affect commerce. *See, e.g., Heart of Atlanta Motel*, 379 U.S. at 257 (relying on racial discrimination's affects on commercial intercourse). But, as the District Court recognized, the *Lopez* inquiry does not focus on the question of whether the statutory *restrictions* substantially affect interstate commerce; it focuses on whether the regulated *activities* substantially affect interstate commerce. *See PETPO*, at 11. The courts have long considered regulated activities' direct economic effects even when a statute adopted under the Commerce Clause aims to advance a moral or social purpose. *See, e.g., Hodel*, 452 U.S. at 281 (holding that Congress may regulate the conditions under which coal is produced because coal is shipped in interstate commerce); *McClung*, 379 U.S. at 303 (interstate food flows justify forbidding racial discrimination in restaurants); *United States v. Jeronimo-Bautista*, 425 F.3d 1266 (10th Cir. 2005) (Congress may prohibit conducting and photographing a sexual assault, not because the assault harms the victim, but because the photographs could have been sold in interstate commerce). Indeed, the appellate courts have relied on regulated activities' direct economic impacts in upholding the ESA. *See Rancho Viejo*, 323 F.3d at 1069 (possibility of out-of-state purchasers, construction workers, and supplies justifies ESA regulation of commercial housing development under the Commerce Clause); *Gibbs*, 214 F.3d at 495 (justifying red

wolf taking restrictions as valid Commerce Clause regulation because of ranchers' connections to "interstate markets for agricultural products and livestock"); *NAHB*, 130 F.3d at 1043, 1048, 1058 (Commerce Clause authorizes an ESA restriction on hospital construction because the construction would use materials and the hospital would probably treat patients and hire workers from outside the state). A full consideration of effects is essential to maintaining Congress' plenary authority over interstate commerce, lest the analysis be biased against laws regulating commerce among the several states for moral or social purposes. Just as our elected representatives may regulate interstate commerce in order to increase it, they may temper it in order to address its negative effects. *See Darby*, 312 U.S. at 122 (suggesting that Congress may "prohibit or control" activities under the Commerce Clause).

In fairness to the District Court, the parties emphasized the environmental effects below. But this emphasis does not prevent this Court from applying the substantial effects test completely and evenhandedly as required by Supreme Court precedent to the issue raised below—whether the ESA as applied to protect the prairie dog through the FWS rule violates the substantial effects test. *Cf. Rancho Viejo*, 323 F.3d at 1069 (because of presumption of constitutionality, plaintiff's failure to argue that its construction project and others like it lack "substantial interstate effect" is "fatal"); *Staton v. Mayes*, 552 F.2d 908, 909-10, 915 (10th Cir.

1977) (considering argument that a board should have made findings when it dismissed a school superintendent when the proceeding below focused on whether the dismissal violated due process but not specifically on the lack of findings). Because regulated commercial activities substantially affect interstate commerce through shipments of goods, those effects when added to regulated activities' environmental effects substantially affect interstate commerce.

Adding in the effects of any regulated noneconomic activities does not lessen the regulated activities' aggregate effects and therefore does not alter this conclusion. Just as Congress may regulate the noncommercial activities of marijuana possession and growing wheat for home consumption under statutes regulating activities substantially affecting interstate commerce, *Raich*, 545 U.S. at 18, 38-40 (majority and concurring opinions respectively), it may regulate some noneconomic activities in seeking to protect species when the entire class of activities harming species substantially affects commerce, *see Perez*, 402 U.S. at 154 (a law may reach "more than the precise thing to be prevented" in order to prevent a targeted evil). Even if the Constitution contained a prohibition on federal regulation of noneconomic activity, that would not justify invalidating an entire statute or a rule primarily regulating commercial activity. *Cf. Raich*, 545 U.S. at 38-39 (Scali, J., concurring) (*Lopez* and *Morrison* do not make "noneconomic. . . activities . . . categorically beyond" the federal government's reach). It would, at

best, justify a challenge to enforcement of a rule against a person engaged in noneconomic activity.

IV. Although the ESA's Constitutionality Establishes the Section 4(d) Rule's Constitutionality, the Activities the Rule Regulates Substantially Affect Commerce by Generating Interstate Transactions and Travel.

The ESA's constitutionality establishes the rule's validity under the Commerce Clause, because that rule bears a rational relationship to the ESA's purposes of conserving ecosystems and species. *See* 16 U.S.C. § 1531(b) (2012); *Indiana*, 452 U.S. at 327-29 (upholding various Mining Act requirements under the Commerce Clause because they bear a rational relationship to the statute's environmental and other purposes); *cf. Raich*, 545 U.S. at 36-37 (Scalia, J., concurring) (locating the authority to regulate even noneconomic local activity "reasonably adapted to the achievement of a legitimate end" in the Necessary and Proper clause). *Lopez* simply does not require the FWS to show that the activities regulated under the rule affect interstate commerce. *See United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (*Lopez* does not require "the government to show that *individual* instances of . . . regulated activity substantially affect commerce") (emphasis in the original); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1272-77 (11th Cir. 2007) (upholding Alabama sturgeon listing because the Constitution does not authorize excising individual ESA applications); *GDF Realty Invs. v. Norton*, 326 F.3d 622, 637-41 (5th Cir. 2003) (upholding protection

of insects living only in Texas caves having an *insubstantial* relationship to interstate commerce because the ESA passes the substantial effects test); *San Luis & Delta-Mendota Water Auth. v Salazar*, 638 F.3d 1163, 1168, 1175-77 (9th Cir. 2011) (upholding protection of the intrastate delta smelt because the ESA as a whole regulates interstate commerce).

The District Court's exclusive focus on environmental effects led the Court to an approach under which decisions about whether to excise applications of a constitutional environmental statute depend on a federal judge's conclusions about which strands in the web of life are not essential to the whole. Under this approach, a federal judge without training in ecology or genetics chooses whether or not to aggregate ESA-regulated activities' effects based on the judge's views, devoid of any deference to Congress or the expert agency implementing the ESA, of the strength of ecological links between one protected species and others. *See PETPO*, at 13-16 (finding argument that protected commercial species prey on the prairie dog insufficient to justify aggregation). Acceptance of such an approach would mean that sometimes district court judges would evaluate ESA actions in isolation and sometimes not, depending on the judges' scientific judgments. This approach not only conflicts with precedent limiting the judicial role in Commerce Clause cases to adjudicating the validity of statutes, it is unnecessary in light of the

straightforward nonenvironmental links between the activities that the rule regulates and interstate commerce.

Utah agriculture, for example, generates a large volume of agricultural exports, worth \$61.5 million in 2013. *See* Utah Econ. Council, *Economic Report to the Governor (Governor's Report)* 52 (2015), bebr.business.utah.edu/sites/default/files/2015_erg.pdf; *see generally* U.S. Const. art. I, § 8, cl. 3 (commerce power includes commerce “with foreign nations”). A significant portion of these shipments comes from alfalfa farms, a prime target of regulation to protect the prairie dog because the Utah prairie dog prefers to eat alfalfa. *See* Rule to Reclassify the Utah Prairie Dog as Threatened, 49 Fed. Reg. 22,330, 22,330 (March 29, 1984) (because “alfalfa . . . is a preferred food of the prairie dog” this “major crop” has generated “serious conflict” between the Utah prairie dog and agricultural interests); *Utah Farmers Exporting Massive Amounts of Hay to China* (September 29, 2013), www.ksl.com/?nid=148&sid=27056998 (farmers have “rak[ed] in tens of millions of dollars a year” exporting alfalfa to China). The prairie dog has cost ranchers “\$1.5 million annually” in economic damages, 49 Fed. Reg. at 22,330, which shows that the value of agriculture affected by the rule exceeds that amount. Thus, farms regulated under the rule substantially affect interstate and foreign commerce through exports of agricultural products.

Construction in Utah similarly generates interstate shipments of building materials and leads to additional interstate transactions and travel. *See generally Governor's Report* at 3 (valuing Utah construction at \$4.7 billion in 2014). For example, one of plaintiff's members claims that the "4(d) rule" has prevented him from building a car dealership. Aplt. App. 139 ¶¶ 4-9. By regulating construction of a car dealership, the rule not only regulates an activity generating interstate sales of construction materials; it also regulates an activity leading to interstate shipments of automobiles.

Regulated residential development in prairie dog country likewise generates interstate transactions. Over the last twenty-five years, Southwest Utah has experienced a significant population increase. *See Utah Governor's Office of Planning and Budget, Demographic and Economic Analysis, 2012 Baseline Projections, Population and Households by Area*, <http://gomb.utah.gov/budget-policy/demographic-economic-analysis> (last visited April 12, 2015) (showing past increases and projecting a population increase in Iron County from 20,927 in 1990 to 105,797 in 2050). New residents from outside of Utah have driven a significant portion of this increase. *See Jan E. Crispin et al., An Analysis of Long-Term Economic Growth in Southwest Utah: Past and Future Conditions* 5 (June 2008), <http://bebr.business.utah.edu/sites/bebr/Documents/studies/SouthwesternUtahGrowth.pdf> (approximately 35.3 percent of Iron County residents moved into the area

since 1995, approximately half from outside of Utah). This population growth has supported a “sudden and dramatic rise in residential construction” in Iron County. *Id.* at 98-99, 111. Construction activities in Southwest Utah generate interstate transactions through the shipment of construction materials and attract even more new residents to the area. *See Rancho Viejo*, 323 F.3d at 1069 (possibility of out-of-state purchasers serving as a justification for ESA regulation of commercial housing development under the Commerce Clause). Thus, Utah construction affects interstate commerce because this economic activity produces interstate activities during and after construction. Because the economic activities regulated under the rule substantially affect interstate commerce, it follows that they affect interstate commerce when combined with the effects of any regulated noneconomic activities on interstate commerce.

Conclusion

The ESA and the section 4(d) rule regulate interstate commerce by addressing one of its side effects, extinguishing species. Conversely, the ESA and the rule regulate activities that substantially affect interstate commerce by generating interstate shipments of goods. Because the Commerce Clause authorizes the ESA and the rule, we ask the Court to reverse the District Court’s judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief complies with the applicable volume limitation: it is proportionally spaced and contains 6,915 words. I relied on Word for Mac Version 14.4.9 to obtain this count:

I certify that this information is true and correct to the best of my knowledge.

/S/ David M. Driesen
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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, has been scanned for viruses with Microsoft Center Endpoint Protection, Virus Definition Version 1.197.73.0, dated: 4/21/2015, 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 April 21, 2015, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following parties:

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