Nos. 14-4151 and 14-4165

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PEOPLE FOR THE ETHICAL
TREATMENT OF PROPERTY OWNERS,

Plaintiff-Appellee,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendants-Appellants

and

FRIENDS OF ANIMALS,

Intervenor Defendant-Appellant.

On Appeal from the United States District Court
for the District of Utah
Honorable Dee Benson, District Judge

PETITION FOR REHEARING EN BANC

JONATHAN WOOD
Pacific Legal Foundation
3033 Wilson Blvd., Suite 700
Arlington, Virginia 22201
Telephone: (202) 888-6881
E-mail: jw@pacificlegal.org

M. REED HOPPER
DAMIEN M. SCHIFF
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: mrh@pacificlegal.org
E-mail: dms@pacificlegal.org

Attorneys for Plaintiff-Appellee

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I. FRAP 35(b)(1) Statement

People for the Ethical Treatment of Property Owners (PETPO) seeks *en banc* rehearing so that the entire Court can address questions of exceptional importance presented by this case. Those questions are:

1. Does the Commerce Clause authorize Congress to regulate noneconomic activity if it affects a species found in only one state with no appreciable tie to interstate commerce?
2. Do the Commerce and Necessary and Proper Clauses authorize the federal government to regulate any noneconomic activity pursuant to a comprehensive scheme, even if the regulation is not necessary to the government's ability to regulate commerce or the market for any commodity?

These questions go to the fundamental issue of whether the Constitution imposes meaningful limits on federal power and, thus, the entire Court should decide them.

II. Preliminary Statement

People for the Ethical Treatment of Property Owners petitions this Court for rehearing *en banc* pursuant to Federal Rule of Appellate Procedure 35.

People for the Ethical Treatment of Property Owners (PETPO) is a nonprofit organization consisting of more than 200 residents of southwestern Utah who, for decades, have been subject to federal regulations preventing them from using their property or doing anything that affects a ubiquitous local rodent. Aplt. App. at 159-62. The challenged regulation generally forbids them from doing anything, without a federal permit, that affects any of the more than 40,000 Utah prairie dogs in the region and restricts eligibility for those permits to only certain property owners. 77 Fed. Reg. 46,158 (Aug. 2, 2012).

The regulation forbids many from building homes because construction would disturb or harm prairie dogs who have overrun residential neighborhoods. Aplt. App. at 147-50. It forbids others from starting small businesses for the same reason. *See id.* at 151-54. In the case of the local government, the regulation also frustrates efforts to protect playgrounds, the municipal airport, and the local cemetery from the rodent, whose tunneling and barking is disruptive to each of these facilities. *See id.* at 142-46.

The regulation cannot be justified as an exercise of the Constitution's Commerce or Necessary and Proper Clauses. The district

court correctly held that it is not a regulation of economic activity that substantially affects interstate commerce nor is it necessary to Congress' ability to regulate commerce or the market for a commodity. Aplt. App. at 193-208. Without disagreeing with any of those conclusions, the panel reversed the decision, interpreting *Gonzales v. Raich* to permit Congress to regulate any activity for any purpose, so long as the regulation is part of a larger, comprehensive scheme with some connection to interstate commerce. Op. at 16-35; 545 U.S. 1 (2005). That is a dramatic expansion beyond *Raich*—which merely recognized that Congress may regulate possession of a commodity as part of a comprehensive scheme to regulate the market for that commodity—and cannot be squared with the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). The panel's theory has no limiting principle and, paradoxically, means that Congress can cure a constitutional violation of the enumerated powers by expanding its power even further.

PETPO supports protecting the prairie dog without imposing such severe burdens. Aplt. App. at 159-62. Since the district court declared the federal regulation unconstitutional, the State of Utah has developed a

conservation program that reduces conflict and protects the species by working with property owners to move prairie dogs from developed areas that cannot provide a long-term home to publicly owned conservation lands that can. *See* Brief of Utah, Alaska, Arizona, Colorado, Idaho, Kansas, Montana, South Dakota, and Wyoming as Amici Curiae in Support of Appellee at 13-17 (Brief of Utah, et al.). If the federal regulation is restored, however, continued implementation of this plan to manage the state's wildlife would not only be forbidden; it would be a crime. *See* 50 C.F.R. § 17.40(g); 16 U.S.C. § 1532(19); *see also Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896) (managing wildlife is an area of traditional state authority).

A. The Endangered Species Act

The Endangered Species Act charges the U.S. Fish and Wildlife Service with listing and protecting species at risk of extinction. A species that is "in danger of extinction" is listed as endangered and take of the species is forbidden. 16 U.S.C. §§ 1532(6), 1533(a), (b), 1538. "Take" is capaciously defined to include, among many other things, harassing, harming, or capturing a member of the species. 16 U.S.C. § 1532(19). It is not limited to intentionally causing an adverse effect on an endangered

species; any otherwise lawful activity with an incidental effect on a member of a species or its habitat is also forbidden. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 (1995). Take is a federal crime punishable by fines of up to $100,000 and a year in prison. 16 U.S.C. § 1540(b)(1); *see* 18 U.S.C. § 3571(b)(5).

A threatened species is not in danger of extinction but is "likely to become an endangered species within the foreseeable future." 16 U.S.C. § 1532(20). Congress chose not to prohibit the take of threatened species in the statute, but a regulation generally extends the prohibition to threatened species. 16 U.S.C. § 1538; 50 C.F.R. § 17.31. The Service also sometimes adopts species-specific regulations to tailor the take prohibition to threatened species. *See, e.g.,* 77 Fed. Reg. at 46,159.

The constitutionality of this broad take prohibition has long been controversial. Several Circuits have upheld it, but have adopted conflicting rationales. *Compare Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003), *with GDF Realty Invs. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003); *see also Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (noting the conflict and that the D.C. Circuit's

precedent "seems inconsistent with the Supreme Court's holdings"). Many scholars have also argued that the take prohibition is unconstitutional, at least as applied to species found in only one state with no tie to interstate commerce.[1]

B. The Utah prairie dog regulation

The Utah prairie dog has been listed as threatened since 1984. 77 Fed. Reg. at 46,159. Then, the population was just shy of 24,000 prairie dogs. *Id.* at 46,169. Since then, it has nearly doubled, with the Service estimating it at more than 40,000 in 2012. *Id.* The species is found only in Utah, with approximately 70% of Utah prairie dogs residing on private property. 77 Fed. Reg. at 46,167.

There is no market for Utah prairie dogs. Aplt. App. at 206. Nor are they used in any economic activity or to create any object of commerce. *Id.* at 200-07. Nevertheless, the Service issued a regulation in 2012,

[1] *See* Jeffrey H. Wood, *Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC*, 19 J. Land Use & Envtl. L. 91, 118-20 (2003); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. 174, 208-14 (1998); *see also* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 406 (2005).

forbidding (with a few exceptions) take of any Utah prairie dog, without a federal permit. 77 Fed. Reg. at 46,158-59. The regulation also significantly restricts eligibility for those permits. *Id*. Absent a permit, it is a federal crime to disturb, catch, or inadvertently harm any of the creatures. *See* 16 U.S.C. § 1540(b)(1).

C. The district court strikes down the Utah prairie dog regulation as unconstitutional

In 2013, People for the Ethical Treatment of Property Owners filed this lawsuit challenging the constitutionality of the Utah prairie dog regulation. Aplt. App. at 14-35. After both sides moved for summary judgment, the district court ruled for PETPO. *Id*. at 193-208. First, the court held that PETPO has standing because the regulation injures its members and enjoining enforcement on private property would relieve those injuries. *Id*. at 198-200. Second, the court ruled that the federal regulation exceeds the power granted by the Commerce Clause because take is noneconomic activity, the Utah prairie dog is found in only one state, and the species has no significant connection to interstate commerce. *Id*. at 202-05. Finally, the court ruled that the regulation exceeds the Necessary and Proper Clause because it is not necessary to

avoid frustrating the federal government's ability to regulate economic activity or the market for any commodity. *Id*. at 205-07.

D. A panel of this Court reverses

On appeal, the panel agreed with the district court that PETPO has standing to challenge the constitutionality of the federal regulation. Op. at 11-16. But, without disagreeing with the district court's conclusion that the regulation is not necessary to the government's ability to regulate economic activity or the market for a commodity, the panel reversed. Op. at 16-35. It disagreed that a regulation need be necessary to Congress' ability to regulate commerce to be constitutional under *Raich*. *Id*. at 32. Instead, it is enough that denying Congress this power would frustrate some general government purpose underlying a comprehensive scheme. *Id*. According to the panel decision, Congress can regulate any intrastate, noneconomic activity affecting the Utah prairie dog because denying Congress this authority "would severely undercut the ESA's *conservation purposes*." *Id*. (emphasis added).

III. Reasons Why the Petition Should Be Granted

This case presents questions of exceptional importance that the entire court should decide. The panel's decision significantly expands

beyond the holding of *Raich* and cannot be reconciled with *Lopez* and *Morrison*. The panel's theory has no logical stopping point; it would allow the federal government to regulate any activity for any purpose, so long as it placed the regulation in a larger scheme. Paradoxically, it also encourages Congress to regulate as broadly as possible, by reducing the constitutional scrutiny a regulation receives under the enumerated powers as the government regulates more. Finally, the panel's decision raises significant federalism concerns, by allowing Congress to intrude on an area of traditional state authority and, in this very case, undermine a state program to protect wildlife without unduly burdening residents.

A. The panel interpreted Congress' power significantly beyond what the Supreme Court upheld in *Raich*

In *Gonzales v. Raich*, the Supreme Court held that Congress may constitutionally forbid the possession of a commodity, in that case marijuana, as part of a comprehensive scheme to regulate the market for that commodity, even though mere possession is not itself economic activity. *See* 545 U.S. at 22; *see also Lopez*, 514 U.S. at 561 (possession of a gun is not economic activity substantially affecting interstate commerce). It explained that Congress may regulate this noneconomic

activity because, otherwise, its ability to regulate the market for a commodity would be frustrated. *See* 545 U.S. at 22, 30-32.

Raich is not clear on whether this power is from the Commerce Clause or the Necessary and Proper Clause. The opinion suggests the Necessary and Proper Clause, stating that it is "well within [Congress'] authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.'" *Id.* at 22. In a concurrence, Justice Scalia expressed his view that this authority existed solely under the Necessary and Proper Clause. *Id.* at 34-38 (Scalia, J., concurring). Subsequently, *National Federation of Independent Businesses v. Sebelius* reiterated that *Raich* is a Necessary and Proper Clause case. *See* 132 S. Ct. 2566, 2591-92 (2012). That reading of *Raich* conforms to this Court's precedents. *See United States v. Carel*, 668 F.3d 1211, 1219 (10th Cir. 2011) (describing *Raich* as a Necessary and Proper Clause case); *United States v. Patton*, 451 F.3d 615, 626 (10th Cir. 2006) ("[P]ossession of a good is related to the market for that good, and Congress may regulate possession as a *necessary and proper* means of controlling its supply or demand." (emphasis added)). Of course, these decisions also discuss the Commerce Clause. But that is because the

Necessary and Proper Clause depends on the other enumerated powers. *See* U.S. Const. art. I, § 8, cl. 18 (". . . necessary and proper *for carrying into Execution the foregoing Powers* . . ." (emphasis added)).

Understood as an application of the Necessary and Proper Clause, *Raich*'s focus on the impacts of denying Congress the power to regulate the possession of a commodity on its ability to regulate commerce makes sense. 545 U.S. at 22, 30-32. When applying the Necessary and Proper Clause, courts look to whether a particular power is necessary to ensure that Congress can fully exercise another enumerated power, not whether it is convenient to Congress' pursuit of some general purpose. *See Reid v. Covert*, 354 U.S. 1, 66 (1957) (Harlan, J., concurring) ("[C]onstitutionality . . . must be tested, not by abstract notions of what is reasonable 'in the large,' so to speak, but by whether the statute, as applied in these instances, is a reasonably necessary and proper means of implementing a power granted to Congress by the Constitution.").

The panel's decision, however, eschews this limit, holding that *Raich* permits Congress to regulate—or authorize an administrative agency to regulate—intrastate, noneconomic activity as part of a comprehensive scheme, so long as there is a rational basis to believe that

the particular regulation furthers some government purpose. *See* Op. at 32. The panel did not disagree with the district court's finding that the Utah prairie dog regulation is not necessary to Congress' ability to regulate commerce or the market for a commodity, but held that this does not matter. According to the panel decision, it is sufficient that denying Congress this power would undermine Congress' conservation goals. *Id.*

This theory is virtually indistinguishable from the limit that the Due Process Clause places on the states' police powers. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955) (state regulation is constitutional if there is a rational basis to believe that it furthers any legitimate government purpose); *see also Morrison*, 529 U.S. at 618-19 (Congress' power cannot be interpreted as coextensive with the states' police power). It is also a significant expansion beyond *Raich*, inconsistent with the text of the Necessary and Proper Clause, and, as explained below, vitiates any meaningful limit on Congress' power.

B. The panel's opinion admits to no logical limit on federal power

This Court and the Supreme Court have repeatedly cautioned against any interpretation of Congress' powers that has no logical limit. *See Morrison*, 529 U.S. at 618-19 ("'[W]e *always* have rejected readings of

. . . the scope of federal power that would permit Congress to exercise a police power.'" (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)); *Patton*, 451 F.3d at 622 ("If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless."). But the panel was either unmindful of this warning or dismissive of it; its rationale would permit Congress to regulate anything for any purpose, so long as it placed the regulation within a larger statutory scheme.

Consider the difficulty in reconciling the panel's holding with the Supreme Court's decisions in *Lopez* and *Morrison*. In each of those cases, the Court held that a criminal provision contained within an omnibus crime bill—a comprehensive scheme to regulate crime—was unconstitutional because it regulated intrastate, noneconomic activity that did not substantially affect interstate commerce. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 560-61. The panel offered two bases to distinguish those cases. First, the panel relied on *ipse dixit*—those comprehensive crime laws were not comprehensive because *Lopez* and *Morrison* said so. *See* Op. at 24. Second, the panel declared that those laws did not qualify as comprehensive because they include too much,

including "subjects as diverse as international money laundering, child abuse, and victims' rights." *Id.* In other words, those statutes crossed some undefined threshold making them too comprehensive to be comprehensive schemes.

The panel's theory cannot be reconciled with *Lopez* and *Morrison*. To reiterate, the panel's theory is that Congress may regulate any intrastate, noneconomic activity as part of a larger comprehensive scheme, if the scheme has some connection to interstate commerce and there is a rational basis to conclude that denying Congress that power would frustrate some general purpose. *Id.* at 28-33. Under this theory, *Lopez* and *Morrison* were wrongly decided. In *Lopez*, for instance, the Gun Free School Zones Act was a single provision within the larger scheme of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990). The Crime Control Act was related to commerce as it criminalized a variety of economic activities and crime generally affects commerce. *See id.*; *see also Lopez*, 514 U.S. at 563-66 (acknowledging that crime generally affects interstate commerce but refusing to uphold the provision on that basis); *compare* Op. at 30-31 *with Lopez*, 514 U.S. at 563-66. And Congress could have rationally believed that its general

crime-control purposes would be frustrated if it could not regulate gun possession in school zones. *See Lopez*, 514 U.S. 563-66. Yet the Supreme Court held that the provision was unconstitutional. *Id*. at 561.

The same is true of the Violence Against Women Act at issue in *Morrison*, which was a small part of the comprehensive Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). This Court has likewise determined that *Raich* does not support a provision prohibiting felon possession of body armor, which was a small part of the 21st Century Department of Justice Appropriations Authorization Act. *See* Pub. L. No. 107-273, 116 Stat. 1758 (2002); *Patton*, 451 F.3d at 624-25 (holding that a ban on possession of body armor could not be upheld under *Lopez* and *Raich*, but could be upheld under a different line of precedent not applicable here).

The panel's theory undermines the doctrine of enumerated powers by encouraging Congress to regulate as broadly as possible. It does so by insulating regulations from constitutional scrutiny as Congress regulates more. In effect, the panel encourages Congress to engage in bootstrapping, allowing it to regulate any noneconomic activity for any purpose within a comprehensive scheme that also regulates economic

activity for the same purpose. Op. at 32. When you combine this bootstrapping with precedent allowing Congress to regulate economic activity for any purpose,[2] the result is that Congress can regulate any intrastate, noneconomic activity for any purpose, if it pairs it with economic activity under a larger scheme.

For instance, Congress could enact a comprehensive criminal code and every crime contained within it would be constitutional so long as the comprehensive scheme itself had some effect on interstate commerce and limiting Congress' power would frustrate its crime-control goals. *But see Lopez*, 514 U.S. at 564. Congress could enact a comprehensive scheme authorizing a federal agency to control land use throughout the country, which would obviously affect interstate commerce and excluding any lands could undermine Congress conservation goals. *But see Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001); *GDF Realty Invs. v. Norton*, 362 F.3d 286, 292 (5th Cir. 2004) (Jones, J. dissenting from denial of rehearing en banc).

[2] *See Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981) (Congress may use the Commerce Clause to regulate economic activity for noncommercial purposes.); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (same).

Congress could even adopt a "Federal Police Power Act" comprehensively regulating society to protect public health, safety, and welfare. *But see Morrison*, 529 U.S. at 618-19. Under the panel's rationale, this statute would be immune to constitutional challenge precisely because its breadth sweeps in so much activity within *and beyond* Congress' enumerated powers and imposing any limit could undermine some general government purpose.

The Court need not embrace this result. *Raich* can be reconciled with *Lopez* and *Morrison*. *Raich* stands for the straightforward proposition that regulating possession of a commodity is a necessary and proper means of regulating the market for that commodity, the denial of which would frustrate Congress' ability to regulate commerce. *See* 545 U.S. at 22; *see also Patton*, 451 F.3d at 626. The criminal provisions at issue in *Lopez*, *Morrison*, and *Patton* did not qualify under this standard—not because the omnibus crime bills were too comprehensive or not comprehensive enough—but because the particular provisions were not necessary to Congress' ability to regulate commerce. *See, e.g., Lopez*, 514 U.S. at 561 (The Gun Free School Zones Act "is not an essential part of a larger regulation *of economic activity*, in which the

regulatory scheme could be undercut unless the intrastate activity were regulated." (emphasis added)).

The same goes for the Utah prairie dog regulation. As the district court held (and the panel did not question), Congress' lack of authority to regulate noneconomic activity affecting the Utah prairie dog does not frustrate its ability to regulate economic activity or the market for any commodity. Aplt. App. at 205-07. The Endangered Species Act is easily distinguishable from the Controlled Substances Act at issue in *Raich*. The Controlled Substances Act regulates commodities for which there is an existing, albeit illicit, market, whereas the Endangered Species Act regulates any activity affecting any listed species, including species like the Utah prairie dog for which there is no market nor any other substantial connection to interstate commerce. *See id.* at 204-07. Therefore, the Necessary and Proper Clause does not permit Congress to regulate this activity or delegate the authority to do so to an administrative agency. *Id.*

C. The panel's opinion raises significant federalism concerns and undermines Utah's efforts to protect its wildlife without unduly burdening its residents

The panel's decision also raises significant federalism concerns. In the Supreme Court's enumerated powers cases, federal intrusion on an area of traditional state authority has been a preeminent concern. *See, e.g., Solid Waste Agency*, 531 U.S. at 173-74; *Lopez*, 514 U.S. at 580-81. Regulation of wildlife is such an area of traditional state authority. *See Geer v. Connecticut*, 161 U.S. at 527-28; *see also Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979).[3] The panel's decision significantly changes this allocation of state and federal power by allowing Congress to regulate any activity affecting any species of wildlife, so long as it does so within a larger scheme. Op. at 31; *see GDF Realty Invs.*, 362 F.3d at 292 (Jones, J., dissenting).

The panel's decision directly creates the sort of federalism conflicts that the courts have sought to avoid. As explained in its amicus brief,

[3] *Hughes* has been often cited for its statement that the decision preserves states' traditional authority over wildlife "in ways not inconsistent with the Commerce Clause[.]" *See* 441 U.S. at 335-36. In context, the court was saying that states cannot exercise this authority in ways that violate the Dormant Commerce Clause. *See id*. *Hughes* does not suggest that the Commerce Clause assigns the power to regulate wildlife to Congress, rather than the states. *See id*.

Utah responded to the district court returning authority over the Utah prairie dog to the state by adopting a conservation program that is more sensitive to the impacts on Utah's residents. Brief of Utah, et al., at 13-17. In particular, Utah works with property owners to move prairie dogs from backyards, airports, cemeteries, and other developed areas and relocate them to public conservation areas where they can be permanently protected. *Id.* By restoring the federal regulation, the panel's decision would frustrate this state conservation program by restoring the criminal prohibition on catching a Utah prairie dog. 50 C.F.R. § 17.40(g); *see* 16 U.S.C. § 1540. States do not retain their traditional authority to manage wildlife if the federal government can make it a crime for them to engage in any activity related to that wildlife.

IV. Conclusion

This case presents exceptional questions about the scope of Congress' Commerce Clause and Necessary and Proper Clause powers. The panel adopted an expansive interpretation that goes far beyond anything previously accepted by this Court or the Supreme Court, cannot be reconciled with Supreme Court precedent, and undermines

federalism. For those reasons, the Petition for Rehearing *en banc* should be granted.

DATED: May 15, 2017.

Respectfully submitted,

M. REED HOPPER
DAMIEN M. SCHIFF
JONATHAN WOOD

s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Plaintiff-Appellee