No. 17-465

IN THE

Supreme Court of the United States

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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 business federation. The Chamber 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 country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing environmental statutes such as the Endangered Species Act ("ESA").

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("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.

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1. 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 *amici curiae*, its members, and its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Chamber and NFIB have substantial interest in the proper resolution of this case. Certain species threatened with extinction need protection. But that protection need not come from the federal government, especially when a species (such as the Utah prairie dog) is found entirely within one state and has no connection otherwise to interstate commerce. In situations such as this one, state and local governments are best positioned to balance species preservation and reasonable local concerns about safety, agriculture, development, and other community needs. The ESA imposes the massive costs of species preservation almost entirely upon private landowners and businesses. It is vitally important that the ESA not be permitted to impose these harms on the business community when, as here, the comprehensive regulation of purely intrastate species is neither constitutionally legitimate nor economically sensible.

SUMMARY OF 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 Tenth Circuit overrode that foundational principle by embracing a sweeping vision of the so-called aggregation principle that contradicts controlling precedent. The Court should grant review and reject the assertion of pervasive federal authority over purely intrastate, non-commercial activity merely because the overall legislation, at a general level, "substantially affects interstate commerce." Petition Appendix ("Pet. App.") 23a. Under that mistaken view, Congress has 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 fact that the Endangered Species Act may generally reach some conduct (although not the conduct at issue here) that has a substantial effect on interstate commerce cannot be decisive. The Article I inquiry must focus on the aspect of the legislation being challenged—not the omnibus law in which it is housed. The Crime Control Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, and the Patient Protection and Affordable Care Act all regulated interstate commerce, both generally and specifically through provisions that were not challenged as exceeding Congress's Article I authority. In each case, however, this Court examined the aspect of omnibus legislation challenged under the Commerce Clause and Necessary and Proper Clauses. In the decision below, the Tenth Circuit did not adhere to this mode of inquiry.

Instead, the Tenth Circuit held that *Gonzalez v. Raich*, 545 U.S. 1 (2005), dictates the outcome here. But that is incorrect. This Court would not have sustained

Congress's regulation of marijuana under the Controlled Substances Act based on the existence of an interstate market for cocaine or heroin. Likewise, the attempt to regulate the Utah prairie dog cannot be defended based on the existence of an interstate market for other threatened or endangered species such as bald eagles or red wolves. The pertinent question—and the one with which the Tenth Circuit refused to engage—is whether "takes" of the Utah prairie dog have a substantial effect on interstate commerce.

The answer to that decisive question is clear. The Utah prairie dog, unlike marijuana, is not an article of commerce and there is no interstate market for it. Unlike other endangered and threatened species, the Utah prairie dog does not cross state lines, it is not a commodity (its pelt is not traded, for example), it is not sought after by scientists and researchers, and its presence on private land in Utah is not a tourism draw. In short, there is no market—interstate or otherwise—for this particular species. That must be the end of the matter as far as Article I is concerned. If not, there is no limit to what Congress can regulate.

The practical ramifications of the decision for landowners are as severe as the doctrinal implications are for federalism. More than 70% of Utah prairie dogs are found on private land. Their burrowing activity can be particularly destructive to agriculture, cemeteries, airports, and other road projects. The listing of the Utah prairie dog thus imposes substantial burdens on Utah landowners and local businesses, requiring expensive (and frequently unsuccessful) solutions to protect their property, and limiting the number and frequency of

prairie dogs that can be captured and relocated. Further, the ESA regime shifts authority over who should receive permits for accidental "take" of those dogs away from local governments. The federal officials now in charge of issuing those permits are far removed from the concerns of those Utahns forced to shoulder the bulk of the costs associated with protecting this intrastate animal species.

The disproportionate burden the ESA imposes on landowners is neither a fluke nor an anomaly. There are myriad documented examples of private landowners suffering significant economic loss following a species' designation as endangered or threatened. Landowner compliance with the ESA can cost millions of dollars. Exacerbating this problem, the Fish and Wildlife Service has adopted the narrowest of possible views as to the role these economic considerations may play in its listing and enforcement decision-making processes. Especially because the federal government will not consider the full costs of compliance, it is vital that the Court ensure that Congress does not—as it did here—exceed its Article I authority in regulating purely intrastate activity under the ESA.

But confining Congress to the limits of its power under Article I does not mean that conservation efforts for intrastate endangered or threatened species will be sacrificed. There is substantial evidence that the ESA itself is not particularly effective at preserving species. The federal government's heavy-handed, one-size-fits-all enforcement policies actually create perverse incentives to destroy habitat and suppress information about the existence of threatened or endangered species.

More importantly, States have the same interest as the federal government in ensuring that the species unique to their ecosystems do not become extinct. Utah's effort to protect its namesake prairie dog underscores that fact. Utah has enacted a comprehensive statutory and regulatory scheme that fully protects Utah prairie dogs. Unlike the ESA, however, it does so in a pragmatic and balanced way that is responsive to local concerns about safety, fairness to landowners, and preservation of important economic enterprise.

This case therefore demonstrates that the ESA's laudable goal can be achieved without unconstitutionally extending it to cover species, like the Utah prairie dog, which have no connection whatsoever to interstate commerce. The ESA's policy objectives, in other words, 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). The Court should grant this important petition.

ARGUMENT

I. Whether Congress has the power to regulate "take" of purely intrastate animal species for which there is no commercial market is an important federal question.

In the decision below, the Tenth Circuit held that that the United States Fish and Wildlife Service ("FWS") has the authority under the Commerce and Necessary and Proper Clauses of Article I to regulate "take" of

the Utah prairie dog despite the fact that: (1) it is not an article of commerce; (2) there is no interstate market for it; (3) it does not cross state lines; and (4) the ESA has no jurisdictional element linking the statute to interstate commerce. Merely describing the decision illuminates its flaws. This is a remarkable assertion of federal power over purely intrastate activity.

Yet the Tenth Circuit is not the first court to uphold the constitutionality of the ESA as applied to similar facts. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *Rancho Viego LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). To be certain, these courts have employed overlapping—and sometimes conflicting—rationales for their conclusions. *See* Petition for Writ of Certiorari ("Pet.") 22-24. But the bottom-line is the same. If these rulings are correct, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995).

Thankfully, these decisions are incorrect. *See, e.g.*, *GDF Realty Investments*, 362 F.3d at 287-93 (Jones, J., dissenting from denial of rehearing en banc); *Nat'l Ass'n of Home Builders*, 130 F.3d at 1060-67 (Sentelle, J., dissenting). This Court has "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). As the district court determined,

the intrastate activity at issue in this case—take of the Utah prairie dog—is not commercial. That factual finding has not been overturned and should have been decisive.

The Tenth Circuit, however, ignored that finding, concluding "the Commerce Clause authorizes regulation of noncommercial, purely intrastate activity that 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)." Pet. App. 23a. The court upheld the ESA as applied to the Utah prairie dog because "Congress had a rational basis to believe that such a regulation constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce." *Id.* That holding is indefensible.

No Supreme Court decision authorized the Tenth Circuit to hold that FWS's regulation of the Utah prairie dog is immune from constitutional challenge because it is part of a "broader regulatory scheme that, as a whole, substantially affects interstate commerce." *Lopez* and *Morrison* foreclose that conclusion. 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. The Tenth Circuit portrayed these laws as somehow less "comprehensive" than the ESA. Pet. App. 25a-27a. That is not only factually incorrect, 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. Nor does it matter that the statute, "in the aggregate, substantially

affects interstate commerce." The laws at issue in *Lopez* and *Morrison* obviously affected interstate commerce at a general level too.

Implicitly recognizing that *Lopez* and *Morrison* presented a formidable barrier, the Tenth Circuit held that its decision followed inexorably from *Gonzalez v. Raich*, 545 U.S. 1 (2005). Pet. App. 24a-30a. But this case is nothing like *Raich*. Because marijuana is indisputably an article of commerce, "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Raich*, 545 U.S. at 26. That is, while growing marijuana for personal consumption was not "itself 'commercial,' in that it is not produced for sale," there was in fact an "interstate market *in that commodity*." *Id.* at 18 (emphasis added). The federal ban on growing marijuana (even if only for in-state personal consumption) thus was constitutionally justified as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 36 (quoting *Lopez*, 514 U.S. at 561).

Unlike marijuana, the Utah prairie dog is not a commodity. Pet. 6. Accordingly, the Tenth Circuit's *Raich* analogy fails at the outset. As to intrastate species with no commercial value—such as Utah prairie dogs—the FWS is not regulating "production, distribution, and consumption" of a commodity "for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 26. Cultivating marijuana—even for in-state personal consumption—could, in the aggregate, have "a substantial effect on supply and demand in the national market for that commodity." *Id.* at 19. But no multiple

of Utah prairie dog takes could substantially affect an interstate market for Utah prairie dogs. No such market exists anywhere in the world. The Tenth Circuit thus did not apply *Raich*. It extended the decision well beyond the breaking point.

Worse still, the Tenth Circuit was not writing on a blank slate. Such an expansive interpretation of *Raich*—which would effectively abrogate *Lopez* and *Morrison*—was squarely rejected by *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). No one could dispute that the Affordable Care Act qualifies as a "comprehensive regulatory scheme." Pet. App. 23a. The law "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 question, moreover, that many of those provisions govern economic activity and that the ACA, as a whole, affects interstate commerce. For the Tenth Circuit, then, the inquiry would have ended there. It would not have allowed the constitutional challenge because that would have required independent analysis of intrastate, non-economic activity (*i.e.*, the individual mandate) that is essential to a "comprehensive regulatory scheme" with a "substantial relationship" to interstate commerce (*i.e.*, the Affordable Care Act).

Of course, that is not what happened. The Court carefully reviewed the individual mandate—separate and apart from the rest of the ACA—and it held that the mandate exceeded Congress's Article I authority under the Commerce and Necessary and Proper Clauses. *See NFIB*, 132 S. Ct. at 2585-93 (Roberts, C.J.); *id.* at 2644-51 (joint dissent). The Tenth Circuit's decision cannot be reconciled with *NFIB* for this reason alone.

But *NFIB* also refutes the *Raich* analogy. In *Raich* "individuals sought an exemption from that regulation on the ground that they engaged in only intrastate possession and consumption." *Id.* at 2592 (Roberts, C.J.). The Court denied the "exemption" because "marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption." *Id.*

The four-Justice joint opinion agreed with The Chief Justice. In their view, *Raich* "held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug." *Id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). *Raich* merely "pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced." *Id.* at 2647. Nothing more.

Thus, there was no basis for the Tenth Circuit's conclusion that the non-economic character of Utah prairie dog take is irrelevant so long as the broader statutory scheme is economic in some generic sense. *NFIB* confirms that *Raich* did not repudiate *Lopez* and *Morrison*. Rather, *NFIB* holds that, had there been no interstate market for marijuana, *Raich* would have come out the other way. That understanding dictates the outcome here because there "is no link" between Utah prairie dog takes and "*any* sort of commerce, whether tourism, scientific research, or agricultural markets." *GDF Realty Investments*, 362 F.3d at 291 (Jones, J., dissenting from denial of rehearing *en banc*).

The Tenth Circuit tries to shrug off *NFIB* on the ground that "Chief Justice Robert's opinion was joined by no other member of the Court." Pet. App. 30a n.9. That is a serious error that independently warrants review. The five-Justice conclusion that the individual mandate exceeded Congress's authority under the Commerce and Necessary and Proper Clauses was a *holding*. It was that conclusion that compelled The Chief Justice to further analyze the individual mandate under the taxing power. *See NFIB*, 132 S. Ct. at 2600-01 (Roberts, C.J.) ("It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.").

The Chief Justice and the four Justices who issued the joint opinion had significant disagreements, but the proper interpretation of *Raich* was not one of them. The Chief Justice's opinion is thus controlling on this issue. *See, e.g.*, *United States v. Lott*, 912 F. Supp. 2d 146, 152 n.8 (D. Vt. 2012) (holding that "the entirety of the Chief [Justice]'s opinion, including the portions that address the Commerce Clause, is binding on this Court.").[2] Who

2. It appears that the Eighth Circuit may have made the same mistake as the Tenth Circuit did here. *See United States v. Anderson*, 771 F.3d 1064, 1068 n.2 (8th Cir. 2014) ("[T]here is no controlling opinion on the issue of whether provisions of the Affordable Care Act violated the Commerce Clause."); *but see id.* ("[W]e apply the opinion of Chief Justice Roberts because it articulates the narrowest grounds for upholding the individual mandate."). More broadly, lower courts appear to be confused and hesitant. *See, e.g.*, *United States v.*

joined which opinion is irrelevant. A majority of the Court interpreted *Raich* in a way that conflicts with the decision below.

* * *

There is simply no limit on Congress's authority under the Commerce and Necessary and Proper Clauses in the Tenth Circuit's view. The decision below severs the relationship between the Commerce Clause and interstate commerce. The federal statute does not need to be a "'comprehensive *economic* regulatory scheme' ... to pass muster under the Commerce Clause." Pet. App. 31a (quoting *San Luis & Delta-Mendota Water Authority*, 638 F.3d at 1177). And, the aspect of the statute being challenged need not be economic in nature either—the Tenth Circuit immunized from challenge all federal regulation of intrastate, non-commercial conduct captured by a broader piece of legislation. In its view, so long as the omnibus law "substantially affects interstate commerce" at a general level, every provision housed within it is valid under the Commerce and Necessary and Proper Clauses.

That cannot be right. In today's economy, it is difficult to imagine legislation that would flunk this test. The

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Robbins, 729 F.3d 131, 135 (2d Cir. 2013) ("Fortunately, we can avoid sorting holding's wheat from dicta's chaff simply by assuming for the sake of argument that the Chief Justice's statements with regard to commerce in *NFIB* constitute holdings and stand for exactly what Robbins says they do."); *United States v. Roszkowski*, 700 F.3d 50, 58 n.3 (1st Cir. 2012) ("We need not, and therefore do not, express our opinion as to whether the Chief Justice's Commerce Clause discussion was indeed a holding of the Court."). It is important for the Court to clear this issue up.

Tenth Circuit'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 Tenth Circuit 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). Congress sometimes 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 2646 (joint dissent). The Court should consider and reverse the Tenth Circuit's refusal to scrutinize the FWS regulation challenged here.

II. Allowing Congress to regulate local land-use issues in excess of its Article I power causes significant economic harm.

The practical consequences of the decision below are no less important than the doctrinal issues it raises. Overzealous enforcement of the ESA causes significant harm to the business community. Notwithstanding the ESA's noble goal to protect wildlife resources as a public good, the costs associated with compliance fall predominantly on private landowners. The Government Accounting Office reports that "about half of all threatened and endangered species have at least 80 percent of their habitat on non-federal land, the vast majority of which is privately-owned land."[3] Yet those landowners receive

3. *See* Michael Bean, *et al.*, *The Private Lands Opportunity: The Case for Conservation Incentives*, Center for Conservation Incentives, at 2 & n.4 (2003), https://goo.gl/j93Ao3.

no compensation for the restrictions placed on the use of their property when FWS bans even accidental "takes" of a listed animal and designates a "critical habitat" for those species.

The Utah prairie dog fits comfortably within that general trend. Previous surveys have suggested that 70% of the Utah prairie dog's population is located on private land.[4] Because the FWS regulations have limited their relocation and prevented their extermination, local municipalities were forced to construct elaborate (and expensive) fences and underground barriers to protect airport runways and cemeteries from damage—and to mixed results at best. *See, e.g.*, Jim Carlton, *In Utah, a Town Digs Deep to Battle Prairie Dogs,* Wall Street Journal (May 6, 2012), https://goo.gl/SSR3sk.

This kind of expense and burden to landowners is commonplace in the aftermath of ESA listing decisions:

- Efforts to protect the three-inch delta smelt, a small fish that lives in the San Joaquin-Sacramento River Delta, have resulted in water pumping restrictions that have devastated agricultural production in Northern California, even before the state began to feel the effects of its recent, historic drought. Economic assessments of the impact on the pumping restrictions estimated the direct and indirect cost at

4. *See* S. Nicole Frey, *Managing Utah Prairie Dog on Private Lands*, Utah State University Extension, at 2 (Feb. 2015), https://goo.gl/y7k39r.

more than $500 million annually even before California's drought reached its critical stages—in an area where unemployment ran in the double digits.[5]

- Efforts to protect the northern spotted owl in the Pacific Northwest have led to logging restrictions on hundreds of thousands of acres of private land (in addition to millions of acres of federal land). These restrictions have led to a massive decline in the region's logging industry and the loss of tens of thousands of jobs.[6] Despite the logging restrictions, the spotted owl now faces significant competition from other species, which prompted, among other things, proposals by FWS to kill hundreds of barred owls each year.[7]

- In central Texas, the listing of the golden-cheeked warbler led the value of 15 acres owned by one woman, Margaret Rector, to decline from $991,862 to $30,360 due to severe development restrictions and

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5. *See* David Sunding, *et al.*, *Economic Impacts of the Wagner Interim Order for Delta Smelt*, Berkeley Economic Consulting (Dec. 8, 2008), https://goo.gl/FxPXnD.

6. *See* Randy T. Simmons and Kimberly Frost, *Accounting for Species: The True Costs of the Endangered Species Act*, Property and Environment Research Center, at 14, https://goo.gl/pAUrSs.

7. *See* Craig Welch, *The Spotted Owl's New Nemesis*, Smithsonian Magazine (Jan. 2009), https://goo.gl/3r795X.

permitting requirements.[8] This is a recurring problem in Texas, a "hot spot" for many listed species. One study determined that in Travis County alone, the ESA had diminished property values by $74 million.[9]

- The appearance of the Delhi Sands flower-loving fly led to the FWS requirements that stalled for decades a wide variety of economic development projects in eastern California, including a 218-acre retail and residential development, a recycling plant, and more than a dozen other projects.[10]

These examples are not unusual or cherry-picked. They are the foreseeable result of a statutory scheme that severely restricts the extent to which economic costs can be taken into account at the listing stage. *See, e.g.*, *Tenn. Valley Authority v. Hill*, 437 U.S. 153 (1978). And although economic costs are taken into account when FWS designates critical habitats, it has adopted a narrow approach to that mandate. Indeed, FWS has approved final regulations making clear the agency's consideration of economic impacts at the critical-habitat stage are

8. *See* Brian Seasholes, *Bad for Species, Bad for People: What's Wrong with the Endangered Species Act and How to Fix It*, National Center for Policy Analysis, at 6 (Sept. 2007), https://goo.gl/DQdJjp.

9. *See id.* at 7.

10. *See, e.g.*, *Endangered Fly Stalls Some California Projects*, New York Times (Dec. 1, 2002), https://goo.gl/MQvwtL; Leslie Parrilla, *Colton to Finally Develop on Land on Hold Due to Endangered Fly*, San Bernardino Sun (Feb. 5, 2015), https://goo.gl/ENQcUx.

limited to the incremental effects of that designation, and will exclude any economic impacts that FWS determines arose from the original listing decision. *See* Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat, 78 Fed. Reg. 53,058 (Aug. 28, 2013); 50 C.F.R. § 424.19. Hence, there is little chance that economic effects—no matter how severe—can ever serve as an effective brake on FWS's implementation of the ESA.

Moreover, FWS is in the midst of an extraordinary undertaking that could result in massive expansion of listed species within the next four years. As part of a 2011 settlement with several environmental groups and resulting consent decrees, FWS has committed to reviewing 757 candidate species for listing as endangered or threatened, and to make a final decision on more than 251 pending species by 2018.[11] Because the current list of ESA-protected animals has only about 1,450 species on it, this effort could constitute a major expansion of the ESA's reach. If the history recounted above is any guide, the resulting economic impact on private landowners will be measured in billions of dollars. This looming threat to people, their land, and their livelihoods requires that courts enforce, rather than ignore, the clear constitutional limits on FWS's authority to list intrastate species.

None of this means, however, that the goals of the ESA cannot be realized even if Congress and FWS must operate within constitutional parameters. As an initial

11. *See* William L. Kovacs, Statement of U.S. Chamber of Commerce, Submission for the Record on Hearing "Examining the Endangered Species Act" by the House Committee on Oversight and Government Reform, at 3 (Feb. 27, 2014), https://goo.gl/qhLkCz.

matter, there is good reason to question whether FWS's no-costs-barred approach is even effective at protecting listed species. The ESA has a paper-thin record of success: only 80 species have been removed from the threatened and endangered list (which now includes more than 2,250 domestic animal and plant species), and of even that small number, 10 were removed due to extinction and another 20 were removed due to data errors, as opposed to successful recovery.[12]

In the meantime, the ESA is widely known to have incentivized landowners to take extreme steps in order to prevent a listed species from inhabiting (and inevitably devaluing) their 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: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. Rev. 301, 364 (2008). One analysis of landowner patterns in North Carolina during the 25-year period of ESA listing of the red-cockaded woodpecker found that "the ESA has led some forest landowners to preemptively harvest timber in order to avoid costly land-use restrictions," resulting in the reduction of suitable habitat for the species on private land. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J. L. & Econ. 27, 51-52 (2003); *see also* Adler, *supra*, at 314 (noting that "the studies conducted to date uniformly support the hypothesis that … the ESA harms species conservation efforts on private land because of the incentives it creates").

12. *See* U.S. Fish & Wildlife Service, Delisted Species Report, https://goo.gl/sMbj8R (last accessed Oct. 30, 2017).

But setting aside the ESA's limited effectiveness at achieving its goals, this case illustrates that enforcing constitutional limits need not result in any harm to efforts to preserve an endangered or threatened species. The Utah prairie dog enjoys extensive protection under Utah law. The applicable wildlife protection law and related regulations generally prohibit the taking of a Utah prairie dog without permission, and provide a layered enforcement approach depending in part upon the type of land at issue,[13] the local population of prairie dogs,[14] and the identity of the person engaged in the taking.[15] Utah law provides for capture and relocation of Utah prairie dogs interfering with certain activities (when feasible).[16] Between 2009 and 2012, state wildlife officials relocated more than 3,200 Utah prairie dogs from roughly two dozen

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13. *See* Utah Admin. Code R657-70-5–70-12 (providing regulations for the taking of Utah prairie dogs in "Inhabited Structures on nonfederal Land," "Unmapped Land" "Developed Land" "Developable Land," "Agriculture Land," and "Rangeland"); *but see* Taking Utah Prairie Dogs, 2017 Utah Reg. Text 468,526 (Sept. 15, 2017) (repealing these regulations as preempted by the ESA following the Tenth Circuit's decision).

14. *See* Utah Admin. Code R657-70-9 (imposing limits on overall taking on some types of lands); *id.* R657-70-11(2)(c)(i)(A)-(D) (providing for maximum take on Agricultural Land tied to annual productivity based on population counts).

15. *See* Utah Admin. Code R657-70-8 (authorizing procedures for local law enforcement taking of Utah prairie dogs that present health threat).

16. *See* Utah Admin. Code R657-70-10(b)(ii) (providing that if "prairie dogs are discovered on [developable land], the division will first attempt to trap and relocate the animals to the extent feasible and in coordination with the project proponent.").

sites to 11 new locations, resulting in the establishment of new colonies and repatriation of the species to areas from which it had disappeared.[17]

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. And it is telling that Utah's Division of Wildlife Services announced that it was "happy" about the district court's decision in this case, because of the state's "strong history of successfully protecting and conserving sensitive wildlife species," and its goal "to work cooperatively, with local officials and property owners in southern Utah, to ensure that the species continues to be an important part of the landscape."[18]

Delegation of intrastate matters to the States was the impetus for the Constitution's enumeration of limited congressional powers. Respecting those limits need not come at the cost of any threatened or endangered species, as Utah's regulatory approach illustrates.

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17. *See* Frey, *supra*, at 4.

18. Brett Brostrom, *Court Stops Federal Agency Interference in Utah Prairie Dog Issues on State, Private Lands*, St. George News (Nov. 9, 2014), https://goo.gl/6Ajdwm.

CONCLUSION

The petition for writ of certiorari should be granted.

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