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 STATES OF UTAH, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, NEVADA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Do the Commerce Clause and Necessary and Proper Clause authorize Congress to regulate intrastate, nonecomonic activity that does not have a substantial effect on interstate commerce and is not necessary to Congress's ability to regulate interstate commerce?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the States of Utah, Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, Ohio, South Carolina, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming. As sovereigns, *amici* have a compelling interest in safeguarding federalism principles – the Constitution's "healthy balance of power" between the state and federal governments. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

The Tenth Circuit's decision improperly tips that balance too far in the federal government's favor. The circuit court upheld a U.S. Fish and Wildlife Service (FWS) regulation that effectively erases Utah's solution to an entirely local problem: How to manage populations of the Utah prairie dog – a species that lives only in Utah – on non-federal land. If that FWS regulation is a valid exercise of Congress's Commerce Clause or Necessary and Proper Clause powers, then Congress has virtually limitless authority, and the Tenth Amendment is a dead letter. That is not and ought not to be the law – certainly not without this Court's saying so.

SUMMARY OF ARGUMENT

The Petition ably explains why the decision below requires review: It expands, and deepens confusion

[1] Counsel of record for all parties received notice at least 10 days before this brief was due of the States' intent to file it. The States may file this brief without leave of Court or consent of the parties. Sup. Ct. R. 37.4.

about the scope of, Congress's authority under the Commerce Clause. The States agree but focus on an additional reason the Court should grant review – the Tenth Circuit's judgment improperly invades state sovereignty over historic areas of state concern and seriously disrupts the proper balance of state and federal power.

The Constitution provides two structural safeguards against federal overreach. It divides the federal government's functions among three coordinate branches, each with express textual limits on its powers. And, just as important, it preserves the powers of the States – the sovereigns that created it. The Framers correctly concluded that both restraints – separation of powers and federalism – are necessary to preserve individual liberty and avoid tyranny. So powers not given to the federal government are reserved for the States and the people. But federalism serves its purposes only if the federal-state interplay remains properly balanced. That means courts must ensure that the federal government operates only within its enumerated powers so the States can function within their proper spheres.

The States retain their traditional authority to regulate and manage wildlife on non-federal lands within their borders. The Utah prairie dog lives only in Utah, primarily on non-federal land. Their numbers have grown over the past few decades to more than 40,000. Nonetheless, the federal government considers them "threatened" and protects them – even on State and private land – under the Endangered Species Act.

In particular, FWS regulations strictly regulate "takes" of Utah prairie dogs. In essence, no one can do anything deemed to harass, harm, or kill a Utah prairie dog or to impair its habitat unless authorized by FWS. This federal regulation on State and private land harms Utah communities and individuals. The animals build mounds and burrows that damage and make unsafe both private and public property, including parks, golf courses, airports, and cemeteries. The animals have also prevented citizens from building homes, selling lots, or starting businesses because the federal take regulation prevented cost-appropriate solutions.

The federal district court struck down FWS's take regulation on non-federal lands as beyond Congress's power under the Commerce Clause. Utah filled the regulatory void with its own comprehensive management plan, including take regulations that balance Utah prairie dog conservation with community, development, and landowner concerns. No one knows the animal, or the needs of Utah citizens, better than the State. And the State has the authority and experience to manage the Utah prairie dog within its own borders. Yet the Tenth Circuit's decision upholding FWS's regulations has effectively negated Utah's sovereign power in these traditional areas of state concern.

The effectively unlimited power the decision below gives to Congress poses a real threat to state sovereignty. The case, and its consequences, require this Court's review. The issue has percolated long enough in the lower courts, which have generated a range of

answers. This case squarely presents the question with no preservation or jurisdictional hurdles. The States need the Court to grant certiorari and restore the proper federal-state balance.

ARGUMENT

This Court has "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *overruled on other grounds by Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976). And those limits must be respected and enforced no matter how important the subject of challenged federal conduct may be. *See, e.g.*, *Nat'l Fed. of Ind. Bus. v. Sebelius*, 567 U.S. 519, 561 (2012) (Roberts, C.J.) (concluding that Commerce Clause did not authorize the Affordable Care Act's individual mandate and noting agreement of Justices Scalia, Kennedy, Thomas, and Alito); *United States v. Morrison*, 529 U.S. 598, 609-16 (2000) (holding Commerce Clause did not authorize civil remedy provision of Violence Against Women Act); *Printz v. United States*, 521 U.S. 898, 933-35 (1997) (Congress cannot compel state officials to conduct background checks in attempting to regulate interstate firearm distribution); *United States v. Lopez*, 514 U.S. 549, 559-63 (1995) (Commerce Clause does not authorize prohibition of guns in school zones); *New York v. United States*, 505 U.S. 144, 174-77 (1992) (Congress cannot compel States to accept radioactive waste generated by several industries). "The lesson of these cases is that the

Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce." *NFIB*, 567 U.S. at 653 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

The Tenth Circuit's decision pays lip service to those limits but renders them illusory. No meaningful restrictions on Congress's power remain if, as the Tenth Circuit concluded, the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, enables federal regulation of a purely intrastate animal on State and private land when that animal is unrelated to any (inter- or intrastate) economic market.

Amici agree with Petitioner that the decision below conflicts with this Court's precedent and deepens confusion among the circuit courts about the Commerce Clause's reach. *See* Pet. 15-28; *see also*, *e.g.*, *Morrison*, 529 U.S. at 613 ("our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"). For that reason alone, the decision below warrants review.

But there is another reason to grant review. As explained below, the Tenth Circuit's decision uniquely harms Utah and the *amici* States by allowing improper federal intrusion on state sovereignty in areas of traditional state concern. By reading Congress's Commerce Clause power to be virtually limitless, the decision vitiates the proper federal-state balance

established in the Constitution's dual-sovereign, limited-government design.

I. The Tenth Circuit's Decision Allows Improper Federal Intrusion on State Sovereignty.

To avoid tyranny and preserve individual liberty, the Constitution diffuses government power in multiple ways – horizontally between coordinate branches and vertically between dual federal and state sovereigns. Both the separation of powers and federalism are vital bulwarks against abuses of government power. *Gregory*, 501 U.S. at 458; *see also Bond v. United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)) ("The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' "). As James Madison put it, this "double security" protects "the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323 (C. Rossiter ed., 1961).

Other important advantages also flow from our federal-state scheme: a decentralized government more attuned to the varying needs of a heterogeneous society; more chances for citizen participation in democratic processes; more creativity and experimentation in government (States as laboratories of democracy); and more responsive governments as States compete for a mobile citizenry. *Gregory*, 501 U.S. at 458 (citing McConnell, *Federalism: Evaluating the Founders'*

Design, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988)).

But merely creating separate governments doesn't guarantee better government. To achieve federalism's promises, "there must be a proper balance between the States and the Federal Government." *Gregory*, 501 U.S. at 459. Dual sovereigns "will act as mutual restraints only if both are credible." *Id.*

To be sure, the Supremacy Clause tips the balance of power in the federal government's favor. But the states weren't left powerless: Federal authority is – or at least, is supposed to be – limited. "The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.'" *NFIB*, 567 U.S. at 534-35 (Roberts, C.J.) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819)). The Bill of Rights makes express what the enumerated powers implied: Those "powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const. amend. X. The enumeration and limitation of federal power "thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." *NFIB*, 567 U.S. at 536 (Roberts, C.J.) (quoting The Federalist No. 45, at 293 (J. Madison) (C. Rossiter ed., 1961)).

To maintain a proper federal-state balance – to ensure the States remain "credible" sovereigns when regulating in local affairs – courts must police and enforce the Constitution's limits on federal power. For that reason, this Court assumes that Congress does not tread lightly into an area of traditional state concern. *Gregory*, 501 U.S. at 460; *id.* at 461 ("the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"). The Tenth Circuit's decision warrants plenary review because it fails to heed these first principles.

A. States retain authority to regulate their own wildlife and lands.

States have historic authority to regulate, manage, and control the wildlife and non-federal lands within their borders. *See Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979) (regulating state wildlife is an area of state concern); *Solid Waste Agency of Northern Cook Cty. v. U.S. Corps of Engineers*, 531 U.S. 159, 161 (2001) (noting the "States' traditional and primary power over land and water use"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (stating that "regulation of land use [is] traditionally performed by local governments").

In particular, this Court has long recognized that "the power" to control and regulate wildlife "which the colonies thus possessed passed to the states with the

separation from the mother county, and remains in them at the present day, in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." *Geer*, 161 U.S. at 528.[2]

Congress also recognizes the States' sovereign authority over wildlife and continues to leave the authority to manage and conserve wildlife, even on federal lands, in state hands. For example, the Federal Land Policy and Management Act (FLPMA) provides that the federal authority under this Act should not be construed as "diminishing the responsibility and authority of the States for management of fish and resident wildlife." 43 U.S.C. § 1732(b) (2012). "Congress in [FLPMA] . . . for both wilderness and non-wilderness lands explicitly recognized and reaffirmed the primary authority and responsibility of the States for management of fish and resident wildlife on such lands." 43 C.F.R. § 24.4(c) (2006).[3] Courts have interpreted this

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[2] *Hughes v. Oklahoma*, 441 U.S. 322 (1979), does not undermine the States' traditional interest in regulating their wildlife. *Hughes* merely affirmed that "challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulation of other natural resources" and noted that this approach still "*makes ample allowance for preserving*, in ways not inconsistent with the Commerce Clause, *the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership*." *Id.* at 335-36 (emphasis added).

[3] Similar language recognizing the States' authority to manage and conserve their wildlife appears in other federal land management acts. *See, e.g.*, National Forest Organic Act, 16 U.S.C. § 528 (2012) ("Nothing herein shall be construed as affecting the

language as "self-evidently plac[ing] the 'responsibility and authority' for state wildlife management precisely where Congress has traditionally placed it[,] *in the hands of the states*." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1249-50 (D.C. Cir. 1980) (emphasis added).

B. FWS's rule regulates Utah prairie dogs, which live only in Utah and play no role in any economic market.

The facts here bring those undisputed principles of state sovereignty into sharp focus. As their name suggests, Utah prairie dogs exist only in Utah. Pet. App. E-14 to E-15. They live together in colonies creating mounds and burrow systems. Pet. App. E-10 to E-11. Initially listed as endangered under the Endangered Species Act, the Utah prairie dogs' status was upgraded to threatened in 1984 when their population had grown to around 24,000. Pet. App. E-5; 77 Fed. Reg. 46,158, 46,169 Table 3. A few decades later, their numbers had climbed to more than 40,000. 77 Fed. Reg. at 46,169 Table 3. The growing Utah prairie dog populations increasingly find themselves in new environs including suburban areas and agricultural lands. Pet. App. E-12 to E-14. Roughly 70 percent of the animals now live on non-federal land. Pet. App. E-42.

Despite the increasing Utah prairie dog populations, the federal government still considers them

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jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests.").

threatened. In 2012, FWS revised a rule to further restrict the number and locations of "takes" of Utah prairie dogs on non-federal land. 50 C.F.R. § 17.40(g). In essence, no one can take – that is, harass, harm, or capture (among other things) – a Utah prairie dog unless FWS authorizes it under a relative few and very narrow circumstances. *Id.*; Pet. App. E-96 to E-102. What's more, an unauthorized take is a federal crime punishable by substantial fines and prison time. 16 U.S.C. § 1540(b)(1); 18 U.S.C. § 3571(b)(5). And even if the federal government chooses not to press criminal charges, anyone can sue to enjoin the alleged take of Utah prairie dogs. 16 U.S.C. § 1540(g).

Federal regulation, combined with the expanding number of Utah prairie dogs in residential and agricultural areas, has created serious problems for Utah citizens and communities. In one city, the Utah prairie dogs have damaged local sports fields, the golf course, the airport, and the cemetery. Pet. App. H-2 to H-5. The take regulations either prevent the city from adequately addressing the problem or create significant costs and delays. *Id.* The rule likewise hamstrings private citizens. Landowners can't build planned homes on their private property in residential areas because Utah prairie dogs burrowed tunnels before the landowners could pour foundations. Pet. App. I-2. And the presence of Utah prairie dogs has stopped other citizens from starting small businesses. Pet. App. G-1 to G-3. Even the court of appeals agreed that PETPO members were injured by the Utah prairie dogs and that those injuries were traceable to FWS's

regulations. Pet. App. A-12 to A-13 n.1; *see also* Pet. App. E-57 (FWS stating take not allowed on "public rangelands or properties being developed for residential, commercial, or transportation uses").

Everyone agrees that there is no economic market for Utah prairie dogs (or their by-products), and that Utah prairie dogs do not implicate the channels of intra- or interstate commerce. Pet. App. A-20 (noting parties' agreement on these facts). They live only in Utah and are not used as a commodity in any sense. Indeed, neither the district court nor the Tenth Circuit found the Utah prairie dog to be involved in any economic market. *Id.* A-31 (Tenth Circuit concluding proper question was whether the Endangered Species Act, rather than the Utah prairie dog, "has a substantial relation to interstate commerce"); *id.* B-12 to B-17 (district court rejecting FWS's arguments that the Utah prairie dog affects interstate commerce).

C. FWS's rule thwarts Utah's own management plan addressing Utah prairie dog conservation and landowner rights.

Because FWS regulates intrastate wildlife and land use with no nexus to any economic market – areas historically subject only to state control – the district court struck down FWS's 2012 rule (and prohibited federal regulation of the Utah prairie dog on State and private land generally). *See* Pet. App. B. Soon thereafter, the Utah Division of Wildlife Resources (DWR) exercised the State's authority and implemented a Utah

Prairie Dog Management Plan on non-federal lands, along with accompanying regulations. Utah Admin. Code r. 657-70, "Taking Utah Prairie Dogs" (the Utah Plan). Importantly, this was not Utah's first effort managing Utah prairie dogs. The management plan built on decades of State experience monitoring and regulating the animals. As the then-Utah DWR Director (and current FWS Deputy Director) explained at the time, DWR has "been in the prairie dog business for decades [and has] as much expertise as anybody on the planet. We are not wondering how to best manage them; we have been doing it for decades." Brett Prettyman, *State management plan for Utah prairie dog would allow up to 6,000 to be killed*, The Salt Lake Tribune (March 7, 2015, 2:39 pm), http://archive.sltrib.com/article.php?id=2259055&itype=CMSID.

In general, the Management Plan appropriately balanced Utah prairie dog conservation with legitimate government and private landowner concerns (including public health, safety, and welfare). The Plan restored pre-2012 caps on take (6,000 animals per year) and created rules to establish or supplement self-sustaining Utah prairie dog populations on federal and state lands by taking or capturing problem animals on private lands and relocating them to preserve areas. The goal was to gradually remove Utah prairie dogs from human conflict areas – where their long-term survival is doubtful – and onto preserve areas where they are unconditionally protected from take and can flourish without human interference.

The accompanying regulations specifically prohibited take of Utah prairie dogs on *all* federal land, where takes are regulated by the Endangered Species Act and the FWS. Utah Admin. Code r. 657-70-4. Takes of Utah prairie dogs are also prohibited on State and private lands, except in specific situations authorized by DWR. For instance, takes may occur without prior notification to DWR (1) in areas outside mapped habitat documented as actively hosting a Utah prairie dog colony, or (2) inside occupied or inhabited homes and businesses. The number and location of all such takes must be reported to the DWR at the end of each month. *See, e.g.*, *id.* r. 657-70-5 and r. 657-70-6.

Regulated takes were also authorized for the following:

Developed lands. After notice to DWR, Utah prairie dogs could be removed by a landowner or an authorized law enforcement officer for "human health [or] safety" reasons when they inhabit or occupy areas in and immediately around human development, such as homes, businesses, parks, playgrounds, airports, schools, churches, cemeteries, archeological and historical sites, areas of cultural or religious significance, and similar areas of public concern. *Id.* r. 657-70-7 and r. 657-70-2(2)(c) (defining "developed land"). Utah prairie dogs will never thrive in these areas, which makes relocation the best conservation approach.

Developable lands. Occupied and unoccupied Utah prairie dog habitat may be developed, after DWR has surveyed the property for Utah prairie dogs and issued

authorization to proceed. DWR will attempt to capture any Utah prairie dogs on the property and relocate them before the land is developed. Take is constrained by an annual, range-wide limitation on cumulative Utah prairie dog take across all developable lands, agricultural lands, and rangelands. *Id.* r. 657-70-10.

Agricultural lands and rangelands. Utah prairie dogs damaging cultivated crops or pastures may be removed by the landowner under the terms of a certificate of registration (COR) issued by DWR. Landowners cannot take Utah prairie dogs damaging agricultural lands or rangelands without a COR. The COR limits the number of animals that may be removed from the property based on the number of Utah prairie dogs counted on the property and the overall Utah prairie dog population on the broader management unit. DWR will work with landowners to implement capture and relocation tactics in lieu of or before employing lethal removal techniques. *Id.* r. 657-70-11 and r. 657-70-12.

The State was committed to its plan. At the outset, the Utah Legislature appropriated $400,000 to DWR to fund the Utah Prairie Dog Management Plan. 2015 Utah Laws 2026. The State takes seriously its sovereign responsibilities to both conserve the Utah prairie dog and manage the animals' impacts on private property and non-federal public lands.

But with a few keystrokes, the Tenth Circuit's opinion rendered those comprehensive State efforts a nullity. The court of appeals allowed the FWS

regulation to displace Utah's plan for regulating its wildlife and land use – two areas of traditional state concern. Worse still, anyone trying to implement Utah's plan now likely would be committing a federal crime.

II. This Case Imposes Real Harm on Individuals and the State and Presents Issues that Should Be Resolved Now.

This case thus cries out for this Court's review. This is no mere academic theorizing about the proper limits of federal power. The Tenth Circuit's decision permits ongoing, concrete harm to Utah and its citizens. No one knows the Utah prairie dog or the needs of its own citizens better than the State. Yet FWS's regulation restrains Utah from using its experience to manage and conserve an entirely intrastate animal on non-federal land for the benefit of the Utah prairie dogs, the State's citizens, and private property owners. In the meantime, the animals are damaging property and hindering development because the federal government deems its preferred course the better one to follow in these traditional areas of state concern.

As the Petition describes, the Tenth Circuit's sweeping decision allows for further encroachment on state power in many other ways: national land use regulations, a comprehensive criminal code, or virtually any human activity made part of a broad regulatory scheme. Pet. 32-33. It's hard to envision a potential

federal regulation that wouldn't pass constitutional muster under the Tenth Circuit's analysis.

In short, this case is an excellent vehicle to address the Commerce Clause, Necessary and Proper Clause, and federalism questions presented. No jurisdictional issues hinder the Court's review. And all of the issues were squarely presented and preserved below.

These issues have percolated in the circuit courts long enough. They have provoked conflicting opinions among judges. Further delay will not shed more light on the problem or help crystalize the issues. The battle and the battle lines are already well known. The time is now, and the need acute, for the Court to clarify that the Commerce Clause does not authorize federal regulation of non-economic, purely intrastate activity that does not substantially affect interstate commerce and is not necessary to Congress's ability to regulate interstate commerce.

CONCLUSION

This Court should grant the Petition and reverse the Tenth Circuit's decision.

Respectfully submitted.

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