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 Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Introduction

This case presents a significant constitutional question about Congress' power to regulate intrastate, noneconomic activity under the Commerce Clause and Necessary and Proper Clause. As evidenced by the twenty-three States and numerous other amici who urge this Court's review, this question is of undeniable national importance.[1]

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) (emphasis added). At the outer limits of this power, this Court has upheld Congress' regulation of the production of marijuana ("quintessentially economic" activity) where withholding this power would frustrate Congress' ability to comprehensively regulate the interstate market for that commodity. *Gonzales v. Raich*, 545 U.S. 1 (2005); *see* Pet. 25-26. This case

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[1] *See* 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; Brief of the Chamber of Commerce of the United States of America and the National Federation of Independent Business Small Business Legal Center; Brief of Property and Environment Research Center; Brief for the Cato Institute, Reason Foundation, and Individual Rights Foundation; Brief of the National Association of Home Builders; Brief of Center for Constitutional Jurisprudence; Brief of WY-MT Land Stewardship, LLC, Wyoming Stock Growers Association, Wyoming Association of Conservation Districts, Wyoming Farm Bureau Federation, Wyoming Wool Growers Association, and Utah Farm Bureau Federation.

involves neither economic activity nor power necessary to Congress' ability to regulate any interstate market. Despite this, the Tenth Circuit upheld the regulation at issue, holding that Congress can regulate any intrastate, noneconomic activity if it advances any purpose Congress might pursue under a comprehensive scheme, even if unnecessary to Congress' ability to regulate commerce. App. A-33. That interpretation defies any limit on federal power and upsets the "healthy balance of power between the States and Federal Government" by inviting federal intrusions into areas of traditional state authority. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). A decision with such far-reaching implications should not pass unreviewed.

Argument

I

The Petition Presents an Important Constitutional Question That Has Divided the Courts of Appeals

Respondents do not dispute the importance of the question presented.[2] Nor could they. It goes to the heart of our Constitution's system of limited and enumerated federal powers. *See Bond v. United States*, 564 U.S. 211 (2011); Pet. 25. On its own, the importance of that question makes the petition worthy of this Court's attention. But the case for this Court's review is stronger yet.

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[2] Respondents identify no vehicle problems that could prevent the Court from deciding the question presented in this case.

A. This Case Is an Ideal Vehicle To Resolve a Circuit Split on the Scope of Congress' Authority

This case implicates a conflict among the courts of appeals regarding the effect of this Court's decision in *National Federation of Independent Businesses v. Sebelius*. 567 U.S. 519 (2012). In that case, the Chief Justice interpreted *Raich* as limited by the Necessary and Proper Clause, a point on which Justices Scalia, Kennedy, Thomas, and Alito agreed. *See NFIB*, 567 U.S. at 561; *see also id.* at 653 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("[T]he 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."). However, because the case resulted in a fractured decision, the courts of appeals are divided on what weight to give the Chief Justice's opinion. *Compare* App. A-30 n.9 (rejecting the Chief Justice's reasoning) *with United States v. Anderson*, 771 F.3d 1064, 1068-70 (8th Cir. 2014) (following it). The Court should grant the petition to resolve that split and answer what, if any, limits on Congress' power follow from *NFIB*. *See* Pet. 18-21.

That is not the only conflict at issue. There is also a conflict among the courts of appeals on how to interpret *Raich*'s limits. The Tenth Circuit, as well as the Ninth and Eleventh Circuits, interprets *Raich* broadly to permit Congress to regulate any activity if it furthers some police power purpose under a comprehensive statute. *See* Pet. 17-18. The First, Second, Fourth, Sixth, and Eighth Circuits, in contrast, interpret *Raich* more narrowly, following the

interpretation applied by the district court in this case. *See* Pet. 15-16. The Tenth Circuit's decision is not only inconsistent with those decisions but also with this Court's decisions in *Lopez* and *Morrison*, both of which struck down provisions regulating intrastate, noneconomic activity contained in omnibus criminal statutes. *See* Pet. 25-28.

This case turns on the resolution of these conflicts. Take of the Utah prairie dog is intrastate, noneconomic activity with no substantial effect on interstate commerce.[3] Pet. 9-10. The district court declared the Utah prairie dog regulation unconstitutional because it is unnecessary to Congress' ability to regulate the market for any commodity. App. B-16; *see Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("Congress may regulate noneconomic intrastate activities *only* where the failure to do so 'could . . . undercut' its regulation of interstate commerce." (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995))). The Tenth Circuit, however, denied that "Congress may only reach intrastate activity which, if beyond [Congress'] grasp, would frustrate a comprehensive regulatory scheme's

[3] Congress' finding that economic growth and development was a primary driver of many species' decline, emphasized by Respondents, does not address whether take of the Utah prairie dog is economic activity, nor would it bind this Court if it did. *See United States v. Morrison*, 529 U.S. 598, 614 (2000). The district court held that take of this species is intrastate, noneconomic activity with no substantial effect on interstate commerce. App. B-9 to B-18. It also rejected, as too attenuated to withstand scrutiny under *Lopez* and *Morrison*, Friends of Animals' argument that the Utah prairie dog has a substantial connection to commerce because a scientist has studied it. App. B-13. The Tenth Circuit's decision cast no doubt on either determination.

ability to function *as a regulation of commerce*" and upheld the regulation because it furthers Congress' "conservation purposes." App. A-30, A-33. The sole disagreement between the Tenth Circuit and the district court was on whether this regulation must be necessary to Congress' ability to regulate interstate commerce to withstand constitutional scrutiny. *See* Pet. 9-10. Thus, this is an ideal vehicle for the Court to answer that question. *See* Pet. 18-21.

Respondents dispute that this case turns on the resolution of that question, relying on the Tenth Circuit's statement that it would have reached the same result under either the Commerce Clause or Necessary and Proper Clause. *See* App. A-30 n.8. However, this dicta merely explains that the Tenth Circuit placed no weight in the label, not that the regulation would be constitutional if Congress is limited to regulating intrastate, economic activities where necessary to its ability to regulate commerce. The dicta casts no doubt on the circuit split nor on whether this case turns on its resolution.

Respondents also ask the Court to ignore this circuit split because the courts interpreting Congress' power more narrowly have not yet confronted a regulation that exceeds that limit. But this merely shows how exceedingly rare it is for Congress to regulate activity where, as here, "neither the actors nor their conduct has a commercial character[.]" *Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)). This Court, too, has only rarely confronted such cases but has "upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature[.]" *Morrison*, 529 U.S. at 613 (emphasis added). The take

of a Utah prairie dog is not economic activity nor is it necessary to Congress' ability to regulate any interstate commerce. Pet. 9-11. Thus, under the First, Second, Fourth, Sixth, and Eighth Circuits' interpretation of *Raich*, the regulation is unconstitutional. *See* Pet. 15-17.

B. That Some of Petitioner's Members Wish To Engage in Economic Activity Presents No Obstacle To Deciding the Question Presented

Respondents argue that the Court should ignore the constitutional infirmity of this regulation because some of People for the Ethical Treatment of Property Owners' members wish to engage in economic activity. Respondents' implication that the organization is exclusively motivated by economic impacts is mistaken. The organization's primary interest is for the state to recover the species, sensitive to the impacts on the community. App. L-3. The organization also contains members whose interests are not economic, including a local government that is forbidden from protecting community parks and other public facilities. App. H-2 to H-4; *cf. Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1158-59 (D.C. Cir. 2003) (Sentelle, J., dissenting) (criticizing the government's overly broad understanding of "economic activity" as any use of land).

Even if Respondents' characterization of the organization's interest were correct, its argument would implicate an additional circuit split that merits this Court's consideration. As the Chief Justice explained, when on the D.C. Circuit, Respondents' argument is contrary to Supreme Court precedent and is the subject of a circuit split. *See Rancho Viejo, LLC*,

334 F.3d at 1160 (Roberts, J., dissenting); *see also Lopez*, 514 U.S. at 529 (declaring unconstitutional a ban on possessing a gun in a school zone even though the defendant was paid to bring a gun to school); *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993) ("Lopez was to receive $40 for his services."). This conflict is an example of the larger web of conflicting and inconsistent opinions the courts of appeals have issued to uphold Endangered Species Act regulations. Pet. 22-24. The Court should grant the petition to clear up this doctrinal confusion. *Cf. Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (federal government's inability to articulate a single, clear constitutional theory "raise[s] significant constitutional questions").

C. Respondents' Merits Arguments Admit No Limit to Congress' Power

In opposing the petition, Respondents principally argue the merits. A full response is impossible in such a short reply but all of these arguments suffer one fatal flaw: they would justify unlimited federal power.

For instance, Respondents assert that the only limit on Congress' power is that the comprehensive scheme must itself have some effect on interstate commerce. This is no limit at all but would, paradoxically, encourage Congress to regulate as broadly as possible to insulate its actions from constitutional scrutiny. *See* Pet. 28-30, 32-34. As the Chief Justice explained as a judge on the D.C. Circuit, this theory is also inconsistent with Supreme Court precedent. *See Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting).

Respondents' argument that Congress can regulate any activity affecting any species so long as some of the species listed under the Endangered Species Act have some connection to interstate commerce "would render meaningless any 'economic nature' prerequisite to aggregation." *GDF Realty Inv. Ltd. v. Norton*, 326 F.3d 622, 638 (5th Cir. 2003); *see* App. B-17. Tellingly, much of Respondents' briefs address species that are unrelated to the Utah prairie dog. *Cf.* App. B-16 ("The present case . . . differs significantly from *Raich* in one important way that makes any appeal to the Necessary and Proper Clause futile: takes of Utah prairie dogs on non-federal land . . . would not substantially affect the national market for any commodity regulated by the ESA."). There is no logical stopping point to Respondents' theory because Congress could always cast a wider net. *See Morrison*, 529 U.S. at 615 (explaining that this sort of bootstrapping would permit Congress to regulate anything).

Respondents also speculate that most species listed under the Endangered Species Act have no connection to interstate commerce, asserting that this should discourage the Court from scrutinizing the regulation at issue here. But this admission cuts against the government's claim to constitutional authority. To hold otherwise would mean that the more Congress regulates, the less constitutional scrutiny it receives. *See* Pet. 21. This would turn the Founders' design of limited and enumerated powers on its head by incentivizing Congress to broadly regulate beyond its powers. *See* App. B-13. Thus, Respondents' theory would "work a substantial expansion of federal authority." *See NFIB*, 567 U.S. at 560.

Respondents also argue that Congress can regulate any activity affecting any species because (1) any species could conceivably become the subject of interstate commerce at some point in the future and (2) all life is part of an "interdependent web." The former argument is "simply too hypothetical and attenuated . . . to pass constitutional muster." *GDF Realty*, 326 F.3d at 638; *see Morrison*, 529 U.S. at 618-19. And, under either theory, "there would be no logical stopping point to congressional power[.]" App. B-13; *see* Pet. 25-30. Notably, the government does not dispute that its theory would permit Congress to exercise a police power, but relies instead on the fact that this statute does not go quite so far. FWS Br. at 16. The same was true in *Lopez* and *Morrison*, of course, yet this Court declared those provisions unconstitutional because the theory necessary to support them, as here, would admit no limit. *See* Pet. 32-34. It should do the same here. *Cf. Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

Finally, Respondents mischaracterize this case as asking the Court to "excise individual applications of a concededly valid statutory scheme." *See Raich*, 545 U.S. at 23. Not so. Courts cannot "'excise, as trivial, individual instances'" of a class of economic activities to avoid finding a substantial effect on interstate commerce. *Id.* (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971), and *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). But that does not describe this case for several reasons. First, *every case* that Respondents cite concerns explicit regulation of commercial actors

or activity, whereas this case does not. *See id.* at 22 (marijuana production); *Preseault v. ICC*, 494 U.S. 1, 19 (1990) (railroad companies); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (mining companies); *Perez*, 402 U.S. 146 (loan sharks). Second, People for the Ethical Treatment of Property Owners asks the Court to do precisely what it did in *Raich*: assess whether the provision regulates quintessentially economic activities necessary to the regulation of an interstate market for a commodity. *Raich*, 545 U.S. at 22-23. In *Raich*, that test was applied to the production of marijuana (and not all drugs regulated under the Controlled Substances Act). *Id.* Here, the question is whether the regulation of the take of Utah prairie dogs meets this test, not whether any particular type of activity causing take does so. App. B-16.

II

The Tenth Circuit's Decision Invites Federal Intrusion into Areas of Traditional State Authority

The Tenth Circuit's decision upsets the balance between state and federal authority by inviting federal intrusion into areas of traditional state authority. *See* Pet. 30-34. Twenty-three States urge the Court to review this case for precisely that reason. As the States explain, "[b]y 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." Br. of Utah, et al., 5-6. This federal intrusion into the States' traditional authority to manage wildlife and land-use "forecloses the States from experimenting and exercising their

own judgment in an area to which [they] lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

Respondents argue that the Court should ignore these federalism concerns because the Supremacy Clause requires the States to accede to federal law. But this argument is mere question-begging. Federal intrusion into an area of traditional state authority is a critical factor in determining whether Congress has exceeded its power. *See Morrison*, 529 U.S. at 611; *see also United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring). The Tenth Circuit's decision countenances a wide variety of federal intrusions into areas of traditional state authority and thus merits this Court's review. Pet. 32-34. These concerns are not merely theoretical; the regulation is currently forbidding state biologists from implementing Utah's plan to recover the species, on pain of criminal punishment. Pet. 7, 31.

Taking a more extreme view than the federal government, Friends of Animals asserts that *Hughes v. Oklahoma* terminated the State's traditional authority to manage wildlife. That both misconstrues *Hughes* and ignores subsequent cases confirming that the management of wildlife remains an area of traditional state authority. *See Hughes*, 441 U.S. 322, 335-36 (1979) ("preserving . . . the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership"); *see also Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2431 (2015); *Kleppe v. New Mexico*, 426 U.S. 529, 545-46 (1976)

("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions.").

Finally, the government's vague suggestion that it will try to be more flexible with the State of Utah in the future is no cure to the federal intrusion into states' traditional authority. The "proper balance between the States and the Federal Government" is not preserved if the States enjoy their authority at the discretion of a federal agency. States and the federal government "will act as mutual restraints only if both are credible." *Gregory*, 501 U.S. at 459.

Conclusion

The petition for certiorari should be granted and the Tenth Circuit's decision overturned.

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Respectfully submitted,

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