No. 17-1398

In the Supreme Court of the United States

SWC, LLC; TIMOTHY A. SCHMIDT; FRIENDS OF SYLVANIA; AND THE UPPER PENINSULA ENVIRONMENTAL COALITION,
Petitioners,

v.

DAVID A. HERR AND PAMELA F. HERR, ET AL.,
Respondents.

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

REPLY BRIEF OF PETITIONERS

Howard A. Learner
Counsel of Record
Jeffrey T. Hammons
ENVIRONMENTAL LAW & POLICY CENTER
35 East Wacker Drive
Suite 1600
Chicago, IL 60601
(312) 673-6500
HLearner@elpc.org
JHammons@elpc.org

Robert L. Graham
JENNER & BLOCK, LLP
353 North Clark Street
Chicago, IL 60654
(312) 923-2785
RGraham@jenner.com

Counsel for Petitioners

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INTRODUCTION

Respondent "United States agrees with [P]etitioners that the [Sixth Circuit's] determination was erroneous." U.S. Opp. at 8. The United States further agrees with Petitioners that "[t]he court of appeals erred in concluding that the [Michigan Wilderness Act] does not allow application to respondents of motorboat limits for Crooked Lake, on the ground that such applications would violate respondents' 'valid existing rights' as riparian landowners." U.S. Opp. at 9. "Michigan law recognizes that restrictions like those at issue here do not deprive property owners of their riparian rights to make use of a lake's surface and subsurface." *Id.*

The United States explained in detail that: "under Michigan law, riparian rights do not include an absolute right to use gas motors or travel at high speeds." U.S. Opp. at 11. Accordingly, the United States concludes:

> Respondents' [Herrs'] use of gasoline-powered motorboats, in excess of no-wake speeds, on the portions of the lake that do not abut their property, is not a protected reasonable use under these circumstances, because of its deleterious impact on the correlative rights and interests of the United States in safeguarding Crooked Lake as a wilderness preserve for the public.

U.S. Opp. at 12.

In each of these respects, the United States agrees with Petitioners, agrees with Sixth Circuit Judge Donald's dissenting opinion, and agrees with

the District Court's decision. Likewise, in each of these respects, the United States disagrees with the Sixth Circuit's majority panel decision and disagrees with Respondents David and Pamela Herr. U.S. Opp. at 2, 8-12.

The United States, however, does not believe that this case presents a question of exceptional importance or presents a split among the Circuits. U.S. Opp. at 12-15. Petitioners respectfully disagree. This case does involve an issue of critical national interest and importance. The Sixth Circuit's decision unlawfully constricts the federal government's established powers under the Property Clause of the United States Constitution to impose reasonable limitations on private uses of designated national wilderness lands and waters that are necessary to protect the public's and *other* private riparian and littoral owners' uses and enjoyment.

Congress' enactment of the Michigan Wilderness Act designating, establishing and protecting the Sylvania Wilderness is not unique, but instead reflects the statutory approach adopted in many other federal statutes designating federal lands and waters for conservation and protection. This Court should grant the Petition for a Writ of Certiorari to avoid uncertainty and disruption of longstanding and traditional powers of Congress under the Property Clause—powers that have been recognized and affirmed by multiple other Circuits to regulate riparian activities on waters in and adjacent to federal lands that Congress has designated for preservation.

This Court should also grant the Petition for a Writ of Certiorari because this case presents a fundamental constitutional question worthy of this Court's review. This Court held in *Kleppe v. New*

Mexico, 426 U.S. 529, 540 (1976), and in *Camfield v. United States,* 167 U.S. 518, 525 (1897), that the federal government's authority under the Property Clause is "analogous" to a state's police power.

The Eighth, Ninth and Eleventh Circuits have each affirmed that the federal government's Property Clause power is "analogous" to a state's police power. *See, e.g., Minnesota v. Block*, 660 F.2d 1240, 1249-1251 (8th Cir. 1981) (finding Property Clause grants authority to regulate motorboats on *all* waters in the Boundary Waters Canoe Area Wilderness when the "United States owns close to ninety percent of the land surrounding the waters at issue. . ."); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (finding Property Clause grants authority "to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters."); *High Point v. Nat'l Park Service*, 850 F.3d 1185, 1199 (11th Cir. 2017) (finding Property Clause grants authority to "regulate activities on non-federal public waters in order to protect wildlife and visitors on [federal] lands.").

The conflicts with the foregoing decisions are apparent: the Sixth Circuit did not treat the Forest Service's authority to reasonably regulate gas-powered motorboats in a Congressionally-designated wilderness preserve as "analogous." The Sixth Circuit instead rendered the Forest Service's authority subservient to and dependent upon the State of Michigan taking prior actions to regulate gas-powered motorboating on Crooked Lake. *See Herr v. U.S. Forest Service*, 865 F.3d 351, 358 (6th Cir. 2017) ("Michigan could have regulated motorboat use on Crooked Lake during this time. . . But the key point is that it never did.").

Simply put, the Sixth Circuit impermissibly inverted the allocation of powers under the Constitution. The federal government's powers under the Property Clause are not subservient to a state's *non*-action. Judge Donald correctly recognized in her dissent below that state regulation is not "a prerequisite to the Forest Service's ability to regulate." *Herr*, 865 F.3d at 360 (Donald, J., dissenting).

The Herrs argue that the Forest Service's reasonable limits on loud, noisy, fast and disruptive gas-powered motorboats in the Sylvania Wilderness violate their "valid existing rights," based on supposed Michigan "state-law-created property rights." Herr Opp. at 2. As the United States recognized, and Petitioners have demonstrated, there is no riparian right to use gas-powered motorboats under Michigan law. *See* U.S. Opp. at 9-12; *infra* § III. The Herrs do not have a "valid existing right" to run gas-powered motorboats in the 95 percent of Crooked Lake that is in the national wilderness preserve. The Herrs' reliance on the statutory savings clause of the Michigan Wilderness Act is misplaced and incorrect. Judge Donald's dissenting opinion below correctly concluded that the Forest Service's sensible limits on large gas-powered motorboat use on the 95 percent of Crooked Lake located in the Sylvania Wilderness preserve is legally permissible and valid.

Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari and reverse the Sixth Circuit's decision below.

ARGUMENT

I. Critical National Interests Are At Stake.

Congress has acted through the Wilderness Act of 1964, the Michigan Wilderness Act of 1987 and many other statutes to designate, establish and protect federal property as national parks and national wilderness preserves, recreational and conservation areas, and forests. These wonderful, natural and special places are used and enjoyed by many Americans, and they are a vital and critical part of our national heritage. The Sixth Circuit's 2-1 panel decision would potentially disrupt and impair common sense protections of these preserves by impermissibly precluding the federal government's ability to reasonably regulate activities on waters in and adjacent to these federal properties.

The Sixth Circuit's decision allows a state's inaction to preclude the federal government from adopting reasonable regulations to limit large, loud, wake-creating gas-powered motorboat use in the calm and stillness of a national wilderness area where people who are fishing, canoeing, hiking and camping, and the resident wildlife as well, enjoy the quiet of the great outdoors. The Sixth Circuit's decision impermissibly restricts the Forest Service's powers delegated by Congress under the Property Clause to administer the Sylvania Wilderness and other wilderness areas "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness." 16 U.S.C. § 1131(a).

The Sixth Circuit's erroneous 2-1 panel decision is of critical national importance because many federally protected wilderness areas and other

special places are preserved through Congress' exercise of its Property Clause powers as in this case. The Michigan Wilderness Act's delegation of Property Clause power is not unique. Congress included similar language in legislation creating many other preserves within the Sixth Circuit. *See, e.g.,* Omnibus Public Lan Management Act of 2009, 111 P.L. 11, 123 Stat. 991, § 1001(c); Sleeping Bear Dunes National Lakeshore Conservation and Recreation Act, 113 P.L. 87, 128 Stat. 1017, § 4(a); Kentucky Wilderness Act of 1985, 98 P.L. 197, 99 Stat. 1351, § 3; Tennessee Wilderness Act of 1984, 98 P.L. 578, 98 Stat. 3088, § 4; Tennessee Wilderness Act of 1986, 99 P.L. 490, 100 Stat. 1235, § 4(a).

Congress also included similarly worded delegations of Property Clause power in legislation creating many preserves outside of the Sixth Circuit. *See, e.g.,* Wisconsin Wilderness Act of 1984, 98 P.L. 321, 98 Stat. 250, § 4; Consolidated Appropriations Act of 2005, 108 P.L. 447, 118 Stat. 2809, § 140(d)(1) (Apostle Islands National Lakeshore); *Id*., § 145(e) (Cumberland Island Wilderness); An Act to establish the Charles C. Deam Wilderness in the Hoosier National Forest, Indiana, 97 P.L. 384, 96 Stat. 1942, § 2.

The United States contends that this case solely concerns "the riparian rights of about ten owners of littoral property on Crooked Lake" and, therefore, it does not "present a question of exceptional importance warranting this Court's review. . ." U.S. Opp. at 15. That is the context, however, in which many public land and water protection and property cases are presented to this Court. *See e.g., Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (involving a single owner of two parcels of land); *Camfield*, 167 U.S. 518 (involving only two individuals).

The Sixth Circuit's erroneous decision will foster uncertainty and potentially disrupt reasonable regulations to protect not only the Sylvania Wilderness, but also other national preserves protected through similar Congressional delegations of Property Clause power.

II. The Sixth Circuit's Decision Creates a Constitutional Conflict with This Court's Decisions and Other Circuits' Decisions.

Respondent Herrs argue that the Sixth Circuit's decision does not conflict with *Kleppe* and *Camfield* because those cases involved statutes and not regulations, and, therefore, are somehow not relevant to the Forest Service's common sense limitations on large and noisy gas-powered motorboat use in a national wilderness preserve. Herrs' Opp. at 19.

This Respondent Herrs' argument fails because *Kleppe* and *Camfield* focus on the broad scope of the Property Clause and not just on the particular statutes at issue in those cases. The Respondent Herrs concede, as they must, that Congress delegated its Property Clause power to the Forest Service in the present case. Herrs Opp. at 2 ("Congress did delegate some power to regulate under the Property Clause to the Forest Service"). *Kleppe* and *Camfield* are equally applicable to the scope of the Property Clause power delegated to the Forest Service to enact reasonable restrictions on gas-powered motorboat use in the Sylvania Wilderness preserve.

The Herrs argue that the lack of a savings clause issue in *Kleppe* and *Camfield* renders those cases distinguishable. Herrs' Opp. at 19. However, because

the Herrs do not have a "valid existing right" protected by the savings clause in the Michigan Wilderness Act, see U.S. Opp. at 9-12, the Sixth Circuit majority should have treated the Forest Service's Property Clause powers as "analogous" to Michigan's police powers. The lack of a savings clause issue in *Kleppe* and *Camfield* does not save the Sixth Circuit's decision from conflicting with this Court's decisions.

There is also no merit to the Herrs' argument that Michigan's police power to regulate riparian rights "confers no authority on the Forest Service to apply its motorboat restrictions against the Herrs." Herrs Opp. at 23. This argument directly conflicts with *Kleppe* and *Camfield*, both of which recognize that the federal government's Property Clause power is "analogous" to the state's police power. *Kleppe*, 426 U.S. at 540; *Camfield,* 167 U.S. at 525.

The United States contends that the Sixth Circuit's decision was limited to the statutory question involving the Michigan Wilderness Act's savings clause and, for that reason, "declined to address" the full extent of Congress' power under the Property Clause. On that basis, the United States argues that the Sixth Circuit's decision does not conflict with *Kleppe* and *Canfield*. U.S. Opp. at 12-13. This contention disregards both the scope of the Property Clause and this Court's precedent.

First, the Property Clause is the source of Congressional power for the Michigan Wilderness Act of 1987 and the Wilderness Act of 1964, which, in turn, authorize the Forest Service to enact reasonable regulations to protect the 95 percent of Crooked Lake that is in the Sylvania Wilderness preserve. The Sixth Circuit's decision thus necessarily involves the Property Clause.

Second, the Sixth Circuit failed to follow *Kleppe*'s and *Camfield*'s holdings recognizing the Property Clause power as "analogous" to a state's police power. The Sixth Circuit erroneously made the federal government's Property Clause power dependent on whether Michigan had first acted to regulate gas-powered motorboats on Crooked Lake. *See Herr*, 865 F.3d at 358 ("Michigan could have regulated motorboat use on Crooked Lake during this time. . . But the key point is that it never did.").

Judge Donald highlighted this conflict in her dissent: "Recognizing that the state may impose such regulations, the majority nevertheless concludes that the Forest Service may not regulate Crooked Lake in this manner because Michigan has not imposed such restrictions itself. But Forest Service's powers, while restricted, do not depend on state action." *Herr*, 865 F.3d at 360 (Donald, J., dissenting).

The Sixth Circuit's decision that Michigan's inaction precludes the Forest Service from adopting sensible restrictions on large and loud gas-powered motorboat use in a national wilderness preserve fails to treat the Forest Service's power as "analogous" to the State's power. As Judge Donald's dissent correctly concludes:

> [S]tate regulation is not a prerequisite to the Forest Service's ability to regulate. The determining factor, rather, is whether the regulation is a proper exercise of the state's police power. And, as previously mentioned, Michigan state law confirms that restrictions on kinds of vessels and speed of motorboats are permissible.

Herr, 865 F.3d at 360 (Donald, J., dissenting).

The United States strains in arguing that the Sixth Circuit's decision below does not conflict with decisions of the Eighth, Ninth and Eleventh Circuits. U.S. Opp. at 13-14. But it does.

First, the Sixth Circuit's decision invalidating the Forest Service's reasonable restrictions on gas-powered motorboat use on the 95 percent of Crooked Lake that lies within the Sylvania Wilderness directly conflicts with the Eighth Circuit's decision upholding motorboat restrictions over *all* waters in the Boundary Waters Canoe Area Wilderness where the "United States owns close to ninety percent of the land surrounding the waters at issue." *Minnesota v. Block,* 660 F.2d at 1251; *see also United States v. Brown,* 552 F.2d 817, 821 (8th Cir. 1977) (Property Clause power permits the federal government to prohibit duck hunting on waters even if a state does not cede jurisdiction over those waters in a national park).

Second, the Sixth Circuit's decision directly conflicts with the Ninth Circuit's decision holding that the Property Clause empowers the United States Department of Agriculture to adopt a regulation prohibiting campfires near a federally-protected Wild and Scenic River in the Hells Canyon National Recreation Area. "It is well-established that [the Property] Clause grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." *United States v. Lindsey*, 595 F.2d at 6.

Third, the Sixth Circuit's decision—invalidating the Forest Service's reasonable restrictions on gas-powered motorboat use on the 95 percent of Crooked Lake that lies within the Sylvania Wilderness because a small portion of Crooked Lake lies outside

the national wilderness boundary—directly conflicts with the Eleventh Circuit's determination that the Property Clause grants authority for the National Park Service to "regulate activities on non-federal public waters in order to protect wildlife and visitors on [federal] lands." *High Point v. Nat'l Park Service*, 850 F.3d at 1199. In *High Point*, the plaintiff owned a life estate within a federal wilderness area located on the Cumberland Island National Seashore. The Eleventh Circuit upheld the National Park Service's denial of permission for the plaintiff to expand or relocate a dock within the wilderness preserve.

III. Michigan's Police Power to Regulate Motorboat Use of Riparian Owners Provides the Forest Service with an "Analogous" Power under *Kleppe* and *Camfield*.

The United States and the dissent explain that the State of Michigan routinely exercises its police power to regulate riparian and littoral rights. U.S. Opp. at 9-12; *Herr*, 865 F.3d at 360 (Donald, J., dissenting). Therefore, following *Kleppe* and *Camfield*, Michigan's police power to regulate motorboat use of riparian owners provides the Forest Service with an "analogous" power over the Sylvania Wilderness preserve and Crooked Lake. *Herr*, 865 F.3d at 360 (Donald, J., dissenting).

Petitioners agree with the United States that the Sixth Circuit's decision misconstrues Michigan riparian rights law. "Those [Michigan] statutes and ordinances strongly indicate that the Michigan riparian right to use surface waters does not include an absolute right to travel on those waters using

gas-powered motorboats or at speeds in excess of no-wake speed." U.S. Opp. at 11.

Under well-established Michigan law, there is no riparian right to use gas-powered motorboats on a lake. *See Herr*, 865 F.3d at 360 (Donald, J., dissenting); *Square Lake Hills Condo. Ass'n v. Bloomfield Twp.*, 471 N.W.2d 321, 327 (Mich. 1991) (holding that township's motorboat regulation did not violate riparian rights); *Opal Lake Ass'n v. Michaywe Ltd. P'Ship*, 234 N.W.2d 437 (Mich. Ct. App. 1975) (upholding an injunction prohibiting gas-powered motorboat use by a riparian owner); *see also* U.S. Opp. at 9-12.

Michigan law even provides for outright bans on a riparian or littoral owner's use of gas-powered motorboats on more than 40 lakes. *See e.g.*, MICH. ADMIN. CODE R. 281.727.2; *see also* Petition for a Writ of Certiorari at 12. "Michigan state law confirms that restrictions on kinds of vessels and speed of motorboats are permissible." *Herr*, 865 F.3d at 360 (Donald, J., dissenting).

In the present case, the Forest Service's reasonable restrictions on gas-powered motorboat use in a national wilderness preserve are "analogous" to established Michigan law. The Herrs and other people are free to use and enjoy the entire surface of Crooked Lake for swimming, fishing and boating with kayaks, canoes and rowboats, and boating with small, quiet electric motors of 4 horsepower or smaller – just not large, noisy, fast, wake-creating gas-powered motorboats in the Sylvania Wilderness preserve.

CONCLUSION

Petitioners respectfully request that the Court grant their Petition for a Writ of Certiorari.

July 20, 2018 Respectfully submitted,

Howard A. Learner
Counsel of Record
Jeffrey Hammons
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, Illinois 60601
(312) 673-6500
HLearner@elpc.org
JHammons@elpc.org

Robert L. Graham
Jenner & Block, LLP
353 North Clark Street
Chicago, Illinois 60654
(312) 923-2785
RGraham@jenner.com