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 FOR THE RESPONDENT-INTERVENOR FRIENDS OF ANIMALS IN OPPOSITION

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QUESTION PRESENTED

Whether the Constitution authorizes the federal government to regulate the "taking" of threatened Utah prairie dogs, pursuant to section 4 of the Endangered Species Act of 1973, 16 U.S.C. § 1533.

RULE 29.6 STATEMENT

Respondent-Intervenor Friends of Animals does not have parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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INTRODUCTION

Petitioner, People for the Ethical Treatment of Property Owners (PETPO), challenged the federal government's regulation of Utah prairie dogs, a species the U.S. Fish and Wildlife Service (FWS) has regulated under the Endangered Species Act (ESA) for over forty years. PETPO argued in both the district court and the court of appeals that FWS's regulation of Utah prairie dogs violates the Commerce Clause and/or the Necessary and Proper Clause of the U.S. Constitution because the Utah prairie dog resides only in Utah and is not sold as a "commodity." These arguments were rejected unanimously by a panel of this Court. *People for the Ethical Treatment of Property Owners (PETPO) v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1004 (10th Cir. 2017). In doing so, the Panel followed Supreme Court precedent and joined every Circuit Court of Appeals that has considered similar constitutional challenges and uniformly upheld ESA regulations of wholly intrastate species.[1]

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[1] *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv*., 827 F.3d 452, 476-78 (5th Cir. 2016) (dusky gopher frog), *reh'g denied*, 827 F.3d 452 (2017); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) (delta smelt), *cert. denied*, 132 S. Ct. 498 (2011); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007) (Alabama sturgeon), *cert. denied*, 552 U.S. 1097 (2008); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (six species of subterranean invertebrates), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (arroyo toad), *cert. denied*, 540 U.S. 1218 (2004); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders v.*

PETPO disagrees with the outcome of the case and petitioned for a writ of certiorari. In its Petition, PETPO fails to provide any legitimate reason for this Court to review the Tenth Circuit's decision. PETPO does not identify any Supreme Court decisions that conflict with the Panel's opinion, nor does it identify any questions of exceptional importance, such as conflicts with authoritative decisions of other United States Courts of Appeals.

As an initial matter, PETPO continues to claim that the principles in *Gonzales v. Raich*, 545 U.S. 1 (2005) do not apply to this case, and that its claim is similar to those presented in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). In PETPO's view, the regulation of Utah prairie dogs should be evaluated in isolation rather than in context of the ESA. In accordance with Supreme Court precedent, the Panel properly rejected PETPO's argument and held that Congress had a rational basis to believe that the challenged regulation constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce. *PETPO*, 852 F.3d at 1002-08.

Likewise, PETPO misreads the Panel's opinion to argue that it has "no logical limit" and unconstitutionally expands the reach of the Commerce Clause beyond the Supreme Court's holding in *Raich*. This too is not

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Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands Flower-Loving fly), *cert. denied*, 524 U.S. 937 (1998).

true. The Panel properly recognized several limits on the Commerce Clause power under *Raich*, namely that there must be a rational basis for a congressional finding: (1) that the ESA is a ***comprehensive scheme***; (2) that the challenged regulation is an ***essential part*** of the ESA; and (3) that the ESA ***substantially affects*** interstate commerce.

In short, the Tenth Circuit has merely joined all its sister circuits in a straightforward application of well-established Commerce Clause precedent in upholding ESA regulation of an intrastate species. Thus, Friends of Animals requests that the Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 852 F.3d 990 (Mar. 29, 2017) and is reproduced in Petitioner's Appendix at A-1. The order denying rehearing *en banc* is reproduced in Petitioner's Appendix at D-1. The district court's opinion is reported at 57 F. Supp. 3d 1337 (Nov. 5, 2014) and is reproduced in Petitioner's Appendix at B-1.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on March 29, 2017. A petition for rehearing *en banc* was denied on August 8, 2017. Pet.

App. D-1. The Petition for Writ of Certiorari was docketed on September 26, 2017. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Statutory Background: The Endangered Species Act.

A unanimous Congress passed the ESA to protect species in danger of extinction from commercial exploitation and to preserve them as a resource – both economic and otherwise – for future generations. Congress found a clear link between economic activity and the extinction of species, noting that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). It also recognized that "these species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id.* § 1531(a)(3). As the House Report from 1973 explained:

> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask . . . .

> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.

H.R. Rep. No. 93-412, at 5 (1973). This Court has already recognized that Congress enacted the ESA out of concern "about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178-79 (1978); *see also Preseault v. ICC*, 494 U.S. 1, 17-19 (1990) (protection of potential future value in interstate commerce is within Congress's Commerce Clause authority).

In enacting the ESA, Congress properly recognized that the commercial impact of extinctions could not be addressed in piecemeal fashion because of the unquantifiable relationships among various species and the many commercial consequences of ecological collapse if species go extinct. *See*, *e.g.*, H.R. Conf. Rep. No. 97-835, 97th Cong., 2d Sess. at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2871 ("In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element.").

It is in the context of this comprehensive scheme that the Court must examine FWS's regulatory actions to help conserve the Utah prairie dog.

B. Factual Background: Utah Prairie Dogs.

Utah prairie dogs (*Cynomys parvidens*) are a keystone species critical to maintaining ecological balance. They serve as prey for many other species including golden eagles and endangered black-footed ferrets. They improve the quality of grasslands by aerating the soil, controlling noxious weeds or invasive plants, and mixing nutrients. Their colonies provide homes for a diverse array of animals and improve cycling of water and other nutrients.

Prairie dogs are also a highly social, intelligent species, organizing themselves into social groups called clans. As discussed in more detail below, they have sparked the interest of many scientists, journalists, and biologists and are featured extensively in the media and literature.

1. Regulations under the ESA designed to restrict commercial exploitation and preserve Utah prairie dogs.

Utah prairie dogs were listed under the ESA in 1974 after unbridled commercial interest and untempered eradication efforts drove them to the brink of extinction. *See* 38 Fed. Reg. 14678 (June 4, 1973). FWS identified habitat destruction for agricultural use and

unregulated shooting as some of the primary drivers of the species' decline. 49 Fed. Reg. 22330 (May 29, 1984); 77 Fed. Reg. 46158, 46161 (Aug. 2, 2012). By 1982, the species had started to recover, but the population was still only 10,000 adult animals, down from 95,000 in the 1920's. 49 Fed. Reg. 22330. In 1984, FWS downlisted the species to threatened in response to a petition from the Utah Division of Wildlife Resources to remove the Utah prairie dog from the ESA. 49 Fed. Reg. 22330. FWS continued to identify habitat destruction for agriculture use and residential development as threats to the species. 49 Fed. Reg. 22330.

Along with the reclassification of Utah prairie dogs in 1984, FWS issued a special rule under ESA Section 4(d) to allow take of prairie dogs on agricultural lands. This special rule was amended on June 14, 1991 (56 Fed. Reg. 27438) to increase the amount of regulated take throughout the species' range. On August 2, 2012, FWS again revised the established exemptions to prohibited take for the Utah prairie dog. 77 Fed. Reg. 46158.

Under ESA protection, the species slowly began to recover. In 2014 and 2015, the population was at the highest level since FWS listed the prairie dog with spring counts of 11,448 and 12,902 respectively.[2]

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[2] Utah Division of Wildlife Resources, Utah Prairie Dog Recovery Efforts 2016 Progress Report (Pub. No. 17-11), http://digitallibrary.utah.gov/awweb/main.jsp?flag=browse&smd=1&awdid=1 (last visited Nov. 26, 2017).

2. Utah prairie dog's direct connection to interstate commerce.

Petitioner and *Amici* repeatedly claim that Utah prairie dogs have no value or effect on interstate commerce. This claim is patently wrong. First, prairie dog related tourism generates revenue for airlines, railroads, hotels, campgrounds and restaurants both in and out of Utah. Friends of Animals members travel to the state to view Utah prairie dogs. *See*, *e.g.*, Decl. of James Jay Tutchton in Supp. of Friends of Animals' Mot. to Intervene at ¶ 9, *PETPO v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014) (ECF 34-2). Bryce Canyon National Park dedicates an entire day to Utah prairie dogs, attracting a variety of visitors to observe the species, participate in activities and games, and attend educational booths centered around Utah prairie dogs.[3]

Second, prairie dogs are also very important to the ecological health of western grasslands, an immense economic resource that provides for additional recreational and commercial opportunities.[4]

Third, Utah prairie dogs are the subject of substantial scientific research that contributes to interstate commerce. For example, one of Friends of

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[3] *See* https://www.nps.gov/brca/planyourvisit/updogday.htm, https://www.nps.gov/brca/planyourvisit/upload/UPDD_2015_001_c-2.pdf (last visited Nov. 25, 2017).

[4] *See* Conner, Seidl, VanTassell, and Wilkins, *United States Grasslands and Related Resources: An Economic and Biological Trends Assessment* (2001), http://twri.tamu.edu/media/256592/unitedstatesgrasslands.pdf (last visited Nov. 25, 2017).

Animals' members, Dr. John Hoogland, has studied prairie dogs for over forty years. Declaration of Dr. John L. Hoogland in Support of Friends of Animals' Response to Plaintiff's Motion for Summary Judgment (hereinafter, "Hoogland Decl.") ¶¶ 2, 8. This includes an entire decade that was devoted solely to fieldwork in Utah working with Utah prairie dogs. Collectively, Dr. Hoogland and his assistants have devoted over 185,000 man-hours of research. *Id*. ¶ 8. The work of Dr. Hoogland, his assistants, and others[5] has contributed to the interstate economy in a multitude of ways. First and foremost is the financial support he has received in the form of research grants from foundations, non-profits, and government agencies. *Id*. ¶ 9. He received over sixty grants from organizations in various states, including the National Science Foundation, the Denver Zoological Foundation, the Ted Turner Foundation, and the states of Colorado and New Mexico, to name just a few. *Id*. These grants have supported assistants, students, and Dr. Hoogland in their research of prairie dogs. *Id*. ¶ 10.

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[5] Dr. Hoogland is not the only scientist who has researched and written about prairie dogs. *See* Elmore, R. D., and Messmer, T.A., *Public perceptions regarding the Utah Prairie Dog and its management: Implications for species recovery* (Berryman Institute Publication No. 23, Utah State University, Logan, 2006), http://extension.usu.edu/files/publications/publication/pub__8990805.pdf (last visited Nov. 25, 2017); and Curtis, R. and Frey, S., *Effects of vegetation differences in relocated Utah prairie dog release sites*, Natural Science, 5, 44-4 (2013), http://www.scirp.org/journal/PaperInformation.aspx?paperID=32012#.UwODTHkmVjY (last visited Nov. 25, 2017).

But the grants, which go to pay for interstate travel and salaries for Dr. Hoogland and his assistants, are just one aspect of how Utah prairie dog research contributes to the economy. Based upon his fieldwork, Dr. Hoogland has already published two books and edited another on prairie dogs. *Id*. ¶ 21. He has also authored over sixty scientific articles on prairie dogs. *Id*. ¶ 22. His work has contributed to a cascade of projects by others that further contribute to interstate commerce. For example, because competition, infanticide, and inbreeding are major issues in behavioral ecology and population biology that affect humans and other social animals, textbooks and journal articles by other scientists studying these subjects routinely cite Dr. Hoogland's work. *Id*. ¶ 27. Each of these scientists is also relying on grant money, and seeking to make a living from his or her work. The popular press also is curious about Dr. Hoogland's work. Publications such as *The New York Times, ABC News, Washington Post, Cleveland Plain Dealer, Chicago Sun Times, Detroit Free Press, Science*, *ScienceNow*, *National Geographic*, and *Le Generaliste*, to name a few, have highlighted his discoveries. *Id*. ¶ 28. Clearly these publications are all seeking a profit and are engaged in interstate commerce. *See*, *e.g.*, *Chen v. China Central Television*, 2007 WL 2298360 at *15 (S.D.N.Y. Aug. 9, 2007) ("The broadcast of television programs and the dissemination of news, however, are clearly activities by which private individuals and corporations engage in commerce.").

Dr. Hoogland's research has also been the subject of, or featured in, several movies and television

videos. Of these, five videos specifically document his research of Utah prairie dogs (*Population Biology of Prairie Dogs* (Japanese Television, 2003); *Prairie Dog Squad* (National Geographic Society, 2002); *Celebrity Crusaders* (Animal Planet Network, 1999); *Underdogs: Prairie Dogs Under Attack* (Turner Television, 1998); *Maryland's Prairie Dog Companion* (Maryland Public Television, 1997); *Catching the Last Prairie Dog* (Australian Wildlife, 1996); *Plague in Prairie Dog Colonies* (Utah Television Network, 1995)). For three of these television productions, film crews and producers spent three days filming Utah prairie dogs with Dr. Hoogland in the field. *Id*. ¶ 24. Clearly, the film industry is a major contributor to our nation's economy. *See FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984) (holding that it is well established that under the Commerce Clause, Congress can regulate broadcast communication).

Dr. Hoogland's research has helped protect western grassland, which as noted above is an immense economic resource. The prairie dog (all species) is a keystone species, and that means that it has a profound impact on its grassland ecosystem. *Id*. ¶ 14. Prairie dogs serve as prey for terrestrial predators such as American badgers, black-footed ferrets, bobcats, coyotes, and long-tailed weasels, and for avian predators such as ferruginous hawks, golden eagles, northern goshawks, prairie falcons, and Swainson's hawks. *Id*. Their burrows provide homes for a diverse array of animals, such as black-footed ferrets, burrowing owls, bullsnakes, tiger salamanders, and hundreds of species

of insects and spiders. The burrows also improve cycling of water and other nutrients. The subsoil exposed by excavations at colony-sites promotes the growth of certain plants that do not commonly grow elsewhere. *Id*. Prairie dog research can greatly assist other scientists and conservationists in preventing degradation to, and in some cases, help recovery of, grassland ecosystems. *See id*. ¶ 15.

3. Utah prairie dog decline under state management (2015-2016).

Utah prairie dogs, without ESA protection, are subject to exploitation and unsustainable takes. After the Utah District Court's decision, the Utah Division of Wildlife Resources implemented its own Utah Prairie Dog Management Plan. *See* Utah Admin. Code R657-70. The Utah management plan went into effect May 8, 2015, and it authorized far more people to kill Utah prairie dogs or translocate them to different areas – a process that may be traumatizing and detrimental to the animals. *Id.*

In 2014 and 2015, right before Utah implemented its own state management plan, the population was at its highest point in the last thirty years. However, from 2015 to 2016, the year Utah's management plan went into effect, the Utah prairie dog population declined

not only on private land, but also public and protected lands.[6]

REASONS FOR DENYING THE WRIT

The Tenth Circuit Court of Appeals decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

A. The Tenth Circuit interpreted *Raich* in accordance with Supreme Court precedent, and hearing this case would not resolve any disputes in the circuit courts.

Petitioner falsely claims that there is a division in the courts of appeals on how to interpret *Raich*. Pet. 15-18. Petitioner's argument is grounded on a misunderstanding of circuit court cases and an attempt to fit them into one of two categories, either: (1) cases that limit federal authority under the Necessary and Proper Clause to regulations necessary to Congress's ability to regulate the market for a commodity; or (2) cases that authorize "any regulations that advance any ends Congress might wish to pursue through a comprehensive scheme." Pet. 12. In doing so,

[6] Utah Division of Wildlife Resources, Utah Prairie Dog Recovery Efforts 2016 Progress Report (Pub. No. 17-11), http://digitallibrary.utah.gov/awweb/main.jsp?flag=browse&smd=1&awdid=1 (last visited Nov. 26, 2017).

Petitioner misstates the holdings in both categories of cases and creates a split where one does not exist.[7]

As an initial matter, Petitioner grossly misstates the holdings of cases upholding ESA regulations by claiming they authorize "any regulations that advance any ends Congress might wish to pursue through a comprehensive scheme." Pet. 12. This standard is not found in any of the cases that Petitioner cites. Rather, these cases emphasize three limiting factors on congressional authority. Namely, whether Congress had a rational basis to conclude that: (1) the ESA is a comprehensive scheme; (2) the challenged regulation is an essential part of the ESA; and (3) the ESA substantially affects interstate commerce. *See*, *e.g.*, *PETPO*, 852 F.3d at 1002-08; *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1273-77 (11th Cir. 2007); *San Luis & Delta-Mendota Water Auth.*, 638 F.3d 1163, 1174-77 (9th Cir. 2011).

Second, Petitioner claims that this case cannot be reconciled with other decisions from the First, Fourth, and Sixth Circuits that have upheld regulations necessary to Congress's ability to regulate the interstate market for a commodity. Pet. 15-16 (citing *United*

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[7] It is not clear from the Petition what issue splits the circuits. In some instances, Petitioner indicates it is whether *Raich* was decided as a Necessary and Proper Clause case – an issue not presented in the case – and in other instances it indicates it is whether the reasoning in *Raich* only applies to cases involving the regulation of a fungible commodity. Regardless of how one frames the issue, this case does not conflict with any other circuit court decisions.

States v. Rene E., 583 F.3d 8, 18 (1st Cir. 2009); *United States v. Hosford*, 843 F.3d 161, 171-72 (4th Cir. 2016); *United States v. Bowers*, 594 F.3d 522, 528 (6th Cir. 2010)).[8] However, Petitioner fails to point to any language in the Tenth Circuit's opinion that conflicts with or calls into question the holdings from these circuits. Instead, Petitioner makes the illogical leap that because these cases upheld the regulation of commodities, they necessarily restrict Congress's authority to regulate any other activities under the Commerce Clause.[9] This is not the case.

Although in *Raich*, this Court considered the regulation of intrastate marijuana production, the holding indicated that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, ***whatever its nature***, be reached by Congress if it exerts a substantial economic effect on interstate

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[8] Petitioner also cites the Second, Eighth, and District of Columbia Circuits to claim that *Raich* was decided under the Necessary and Proper Clause. Pet. 15-16. However, as discussed below, this case does not address that issue. *See infra* Argument Part D.

[9] Petitioner chops up quoted portions of these cases to suggest that *Raich* is only relevant if there is a fungible commodity. *See* Pet. 16 (describing "'[t]he question under *Raich*' as 'whether Congress had a rational basis for concluding that leaving [some activity] outside federal control would affect price and market conditions of the larger interstate market that Congress was authorized to regulate.'" (quoting *United States v. Bowers*, 594 F.3d 522, 528 (6th Cir. 2010)). However, the actual quote from that case states that "[t]he question under *Raich*, then, ***as relevant to this case***, is whether . . . ." *Bowers*, 594 F.3d at 528 (emphasis added). Thus, the Circuit was applying the facts of the case before it to a standard this Court articulated in *Raich*, but it was not restricting *Raich* to those facts as indicated by Petitioner.

commerce." *Raich*, 545 U.S. 1, 1 (2005) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)) (emphasis added). Moreover, this Court did not limit this test to statutes regulating commodities in an interstate market, but decided it could not "excise individual applications of a concededly valid statutory scheme." *Raich*, 545 U.S. at 72 (internal quotation marks omitted). Finally, Petitioner's argument that *Raich* was intended to limit a doctrine to commodities is unsupportable as this Court had already applied it to discriminatory accommodations, *see Katzenbach v. McClung*, 379 U.S. 294, 302 (1964); fair labor standards, *see United States v. Darby*, 312 U.S. 100, 115 (1941); extortionate credit transactions, *see Perez v. U.S.*, 402 U.S. 146, 154 (1971); and mining safety standards, *see Hodel v. Ind.*, 452 U.S. 314, 329 (1981). *Raich* did not purport to overrule these lines of cases as Petitioner would like to believe.

Contrary to Petitioner's arguments, the circuits have had no trouble interpreting *Raich* beyond the regulation of the market for interstate commodities. Even the circuits that Petitioner cites in support of its preferred interpretation have applied *Raich* beyond regulations of interstate commodities. In *United States v. Nascimento*, for example, the First Circuit recognized that the case before it was distinguishable from *Raich* because it did not deal with a fungible commodity, but held that was not decisive in *Raich* and "[a]ll that is necessary to deflect a Commerce Clause challenge to a general regulatory statute is a showing that the statute itself deals rationally with a class of activity that has a substantial relationship to interstate or foreign

commerce." 491 F.3d 25, 39 (1st Cir. 2007); *see also United States v. Anderson*, 771 F.3d 1064, 1070 (8th Cir. 2014) (applying *Raich* to uphold sex offender registration requirements, and quoting *Raich* in holding that "we refuse to excise individual components of a larger scheme"); *United States v. Umaña*, 750 F.3d 320, 337-38 (4th Cir. 2014) (applying *Raich* standard to intrastate acts of violence related to racketeering enterprise); *United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010) (applying *Raich* to reinstate indictments of Appellees for failing to register and update their sex offender registrations as required by the Sex Offender Registration and Notification Act); *United States v. Cundiff*, 555 F.3d 200, 213 n.6 (6th Cir. 2009) (citing *Raich* to note that a Commerce Clause challenge to Clean Water Act permitting requirements "would be rather tenuous anyway").

More importantly, two of the circuits Petitioner cites in support of its interpretation have considered the same issue presented here and upheld ESA regulations of purely intrastate species. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003). Notably, these cases do not purport to conflict with the decisions Petitioner cites. Thus, circuit courts have consistently held that the Commerce Clause grants Congress both the authority to regulate a commodity for which there is an interstate market and grants Congress the

authority to regulate intrastate species as part of the ESA.[10] Petitioner's alleged "circuit split" is illusory.

B. All circuit courts of appeals that have considered the issue presented in this case have uniformly upheld federal authority to regulate wholly intrastate species under the Endangered Species Act.

Petitioner acknowledges that the six circuits to have considered the issue presented in this case have uniformly upheld ESA regulations of intrastate species, but claims this Court should weigh in because the circuits have adopted conflicting rationales for their decisions. Pet. 22-24. To the extent there may be slightly diverging analyses in the circuits, Petitioner grossly overstates the so-called disagreements among the circuits and overlooks the fact that the issue generating disagreement is not presented in this case.

First, Petitioner exaggerates the allegedly "conflicting" rationales that courts have employed to uphold federal authority to regulate listed species under the ESA. Pet. 22-23. Petitioner points to three factors that courts have considered in upholding ESA regulations: (1) the economic nature of plaintiffs' activities;

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[10] *See* Pet. 17 (conceding that the Tenth and Eleventh Circuits have cases on both sides of the alleged dispute); *see also PETPO*, 852 F.3d 990; *Markle Interests*, 827 F.3d 452; *San Luis & Delta-Mendota Water Auth.*, 638 F.3d 1163; *Ala.-Tombigbee Rivers Coal.*, 477 F.3d 1250; *GDF Realty*, 326 F.3d 622; *Rancho Viejo*, 323 F.3d 1062; *Gibbs*, 214 F.3d 483; *Nat'l Ass'n of Home Builders*, 130 F.3d 1041.

(2) the impact of takes on the environment and interstate commerce; and (3) a broad theory based on the ESA's substantial effect on interstate commerce. Pet. 22-23. Contrary to Petitioner's argument, the diverse reasons for upholding ESA regulations are largely complementary and not divisive. For example, several circuits have used all the allegedly "conflicting" rationales cited by Petitioner for upholding ESA regulations. These cases consider the economic nature of activities that were regulated by the ESA;[11] that protecting species prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it;[12] and other "broad theories" including the direct economic value of species,[13] and species' ability to stimulate interstate commerce through recreation, tourism, and scientific study.[14]

The only variance Petitioner identifies among the circuits is how the Fifth Circuit evaluated regulated

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[11] *See*, *e.g.*, *San Luis & Delta-Mendota Water Auth.*, 638 F.3d 1163, 1176; *Ala.-Tombigbee Rivers Coal.*, 477 F.3d 1250, 1273 (considering ESA's regulations of economic activities); *Rancho Viejo*, 323 F.3d 1062, 1078; *Gibbs*, 214 F.3d 483, 495; *Nat'l Ass'n of Home Builders*, 130 F.3d 1041, 1056.

[12] *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1176; *Gibbs*, 214 F.3d at 495-96; *Nat'l Ass'n of Home Builders*, 130 F.3d 1041, 1052-53; *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1273-75.

[13] *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1176; *Gibbs*, 214 F.3d at 495; *Nat'l Ass'n of Home Builders*, 130 F.3d at 1051-52; *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1273.

[14] *San Luis & Delta-Mendota Water Auth.*, 638 F.3d 1163, 1176 (9th Cir. 2011); *Gibbs*, 214 F.3d at 492-94; *Nat'l Ass'n of Home Builders*, 130 F.3d at 248 n.11; *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1274 (11th Cir. 2007).

activity under the ESA in *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003). The Fifth Circuit would not consider the economic conduct of a party that seeks to take a listed species. Under this interpretation, if a regulation prevented a party from building a Walmart, the Fifth Circuit would not consider the economic nature of building a Walmart and instead would consider the taking of the species in isolation of the regulated party's economic motivations. However, this distinction is not significant. The Fifth Circuit expressly acknowledged that despite its divergent view on how to categorize the activities of regulated parties, its analysis was otherwise "consistent" with the other circuits. *GDF Realty*, 326 F.3d at 633-36. It also recognized that the decisions of the other circuits were not based solely on their analyses of the plaintiffs' activities. *Id.* As such, the Fifth Circuit came to the same conclusion as every circuit that has considered the issue, and correctly found that regulating the take of intrastate species under the ESA is a constitutional exercise of commerce power. *Id.* at 640-41.

More importantly, this case would not shed light on the differing approaches of upholding the ESA because the Tenth Circuit did not uphold the ESA regulations based on the economic nature of the Petitioner's activities. *PETPO*, 852 F.3d 990, 1001 n.6. Instead, the Tenth Circuit found that Congress had a rational basis to believe that the challenged regulation constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce. 852 F.3d at 1002-08. There

is no circuit split on this issue. The Tenth Circuit opinion cited all its sister circuits in support of its finding. 852 F.3d at 1007-08. Thus, hearing this case would not resolve any alleged disagreement among the circuits.

C. The Tenth Circuit's opinion is consistent with precedent of this Court and contains limits on congressional power under the Commerce Clause.

Petitioner further misstates the holding of the Tenth Circuit in several respects in an attempt to discredit the decision below. First, Petitioner erroneously claims that the Tenth Circuit suggests that *Lopez* and *Morrision* were wrongly decided. Pet. 28. To the contrary, the Tenth Circuit cites both *Lopez* and *Morrison* as good law to support its decision. *See*, *e.g.*, *PETPO*, 852 F.3d at 1000-01 (citing *Lopez* for standard of review); *id.* at 1002-03 (reviewing holding and facts of *Lopez, Morrison*, and *Raich* to support analysis of this case). Three circuits upheld ESA regulations of intrastate species based on *Lopez* and *Morrison* before this Court even decided *Raich*. *See Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003). Consistent with these decisions, the Tenth Circuit considered the standard of review in both *Lopez* and *Morrison* to uphold the regulation of Utah prairie dogs.

Second, Petitioner repeatedly argues that the Tenth Circuit's unanimous opinion admits to no logical limit on federal power. Pet. 2, 14, 28-30. This argument is also wrong. As stated above, the Tenth Circuit's opinion identified three limiting factors and thoroughly analyzed whether Congress had a rational basis to conclude that: (1) the ESA is a ***comprehensive scheme***; (2) the challenged regulation is an ***essential part*** of the ESA; and (3) the ESA ***substantially affects*** interstate commerce. 852 F.3d at 1002-08.

In analyzing these limiting factors, the Tenth Circuit distinguished this case from *Lopez* and *Morrison*, where the regulations at issue were part of larger pieces of legislation that did not constitute comprehensive regulatory schemes because they dealt with diverse subjects. 852 F.3d at 1002-04. In contrast, the ESA, like the Controlled Substances Act at issue in *Raich*, is a comprehensive regulatory scheme connected with a uniform goal. 852 F.3d at 1002-06. Similarly, other circuits that have considered post-*Raich* Commerce Clause challenges to the ESA have "had little difficulty concluding that 'the Endangered Species Act is a general regulatory statute bearing a substantial relation to commerce.'" *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1176 (quoting *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1273). Thus, it was proper for the Panel to aggregate the effects of the regulated activity – the take of intrastate species. *Id.*

Likewise, the Tenth Circuit explained that there must be a rational basis for Congress to believe that regulating intrastate species, such as Utah prairie

dogs, is "***essential***" to the ESA's comprehensive regulatory scheme. 852 F.3d at 1006-08. In this case, removing intrastate species, such as the Utah prairie dog, from the ESA "would 'leave a gaping hole in the' ESA." 852 F.3d at 1007 (quoting *Raich*, 545 U.S. at 22). Over sixty-eight percent of the species that the ESA protects are intrastate, and preserving the scientific and commercial value of these species is essential to the ESA. 852 F.3d at 1007. Thus, contrary to Petitioner's argument, Congress could not just add any regulations to a larger statute to expand its power under the Commerce Clause.

Finally, and probably most important, Petitioner overlooks the heart of the Panel's analysis – the ESA's substantial effect on interstate commerce. The opinion explains in detail how the ESA is "***directly related to – indeed, arguably inversely correlated with – economic development and commercial activity***." 852 F.3d at 1006 (emphasis added). The opinion quotes findings in the text of the ESA as well as legislative history to demonstrate the substantial relationship between the ESA and interstate commerce. *Id.* at 1006-07. The opinion further explains that Congress enacted the ESA to regulate untempered economic growth, to promote long-term commerce by conserving species, and to regulate the illegal wildlife trade – a multibillion dollar industry. *Id*. Friends of Animals' declarations also demonstrate the value of intrastate species and their connection to interstate commerce. Prairie dogs have garnered national attention, inspired books and articles, and served as the subject of extensive

research that organizations across the country choose to fund. *See generally* Hoogland Decl. Utah prairie dogs also stimulate interstate commerce by attracting out-of-state travelers who want to observe Utah prairie dogs. Decl. of James Jay Tutchton in Supp. of Friends of Animals' Mot. to Intervene ¶ 9, *PETPO v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (ECF 34-2); *see also supra* Factual Background Part B.2: Utah prairie dog's direct connection to interstate commerce.

The connection between the ESA and interstate commerce distinguishes the ESA from the statutes at issue in *Morrison* and *Lopez*, which regulated intrastate criminal activity, and the hypothetical cases created by Petitioner. Unlike here, in *Lopez* this Court found that the statute at issue "by its terms [had] nothing to do with 'commerce' or any sort of economic enterprise" and that it would have to "pile inference upon inference" to support the government's contentions that it substantially affected interstate commerce. *Lopez*, 514 U.S. at 561, 567. Similarly, in *Morrison* the statute involved intrastate criminal activity, and this Court rejected the government's argument that relied on the "but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615. This Court found that authorizing the regulation of criminal activity at issue in *Lopez* and *Morrison* would allow Congress to regulate any other type of violence, and may be applied equally to family law and other areas of traditional state

regulation. *Id.* at 615-17; *Lopez*, 514 U.S. at 567. As explained in the Tenth Circuit's opinion, the ESA is not based on an attenuated but-for causal chain, nor does one need to pile inference upon inference to reach the conclusion that the ESA substantially affects interstate commerce. 852 F.3d at 1003-06. Rather, the ESA is "***directly related***" to commercial activity and substantially affects interstate commerce. *Id.* at 1006.

In short, Petitioner is flatly wrong in claiming that the Tenth Circuit's decision in this case places no limit on federal authority under the Commerce Clause. The Tenth Circuit has consistently applied Supreme Court precedent to find that ESA regulations are within Commerce Clause authority and other regulations, such as 18 U.S.C. § 931 prohibiting felon possession of body armor, could not be justified as a regulation of intrastate activity that substantially affects interstate commerce. *United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006); *see also PETPO*, 852 F.3d at 1002-03 (distinguishing this case from *Patton*). Thus, Petitioner's argument that this case leads to unlimited federal authority is unfounded.

D. To the extent that there may be divergent interpretations of whether *Raich* is a Necessary and Proper Clause case, those interpretations are not at issue in this case.

Petitioner also indicates that there may be disagreement in the circuits on whether *Raich* was decided under the Necessary and Proper Clause. Pet. 18.

However, as the Tenth Circuit made clear, this argument had no bearing on its decision in this case: "***were we to proceed instead under the assumption that Raich was decided under the Necessary and Proper Clause, our ultimate conclusion . . . would remain unchanged***." *PETPO*, 852 F.3d at 1005 n.8 (emphasis added). Similarly, the district court's decision did not hinge on whether the case was analyzed under the Necessary and Proper Clause. *PETPO v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d at 1346 (finding was the same under both the Commerce Clause and Necessary and Proper Clause). Thus, to the extent there may be uncertainty as to whether *Raich* was decided under the Necessary and Proper Clause, this issue is not relevant to this case. In fact, at least seven circuit court cases have held that Congress has authority to regulate purely intrastate species whether through a particular application of the ESA or through an agency regulation, and none of the cases have hinged on whether or not *Raich* was decided under the Necessary and Proper Clause.[15]

E. The Panel's opinion does not raise concerns about federalism.

In a final attempt to get the outcome it desires, Petitioner argues that the Panel's decision raises

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[15] *See PETPO*, 852 F.3d at 1007; *Markle Interests*, 827 F.3d at 476-78 (5th Cir. 2016); *San Luis & Delta-Mendota Water Auth.*, 638 F.3d 1163; *Ala.-Tombigbee Rivers Coal.*, 477 F.3d 1250; *GDF Realty*, 326 F.3d 622; *Rancho Viejo*, 323 F.3d 1062; *Gibbs*, 214 F.3d 483; *Nat'l Ass'n of Home Builders*, 130 F.3d 1041.

significant federalism concerns. Pet. 30-33. Petitioner argues that the challenged regulation interferes with the state's regulation of Utah prairie dogs, and that such regulation is an area of traditional state authority. Petitioner cites *Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896) in support of its argument. Pet. 30-31. However, this Court expressly overruled *Geer*, finding that "[t]he *Geer* analysis has also been eroded to the point of virtual extinction in cases involving regulation of wild animals." *Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979).

This Court has repeatedly affirmed federal jurisdiction over endangered, threatened, and migratory wildlife. *See*, *e.g.*, *Missouri v. Holland*, 252 U.S. 416, 431-35 (1920) (upholding the Migratory Bird Treaty Act against a Tenth Amendment challenge); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995) (upholding regulation under the ESA broadly defining the term "harm" and allowing the federal government to regulate "significant habitat modification" of threatened and endangered species). After reviewing federal conservation statutes and cases over the past century, the Fourth Circuit concluded that "it is clear from our laws and precedent that federal regulation of endangered wildlife does not trench impermissibly upon state powers. Rather, the federal government possesses a historic interest in such regulation – an interest that has repeatedly been recognized by the federal courts." *Gibbs v. Babbitt*, 214 F.3d 483, 501 (4th Cir. 2000); *see also* M. Nie *et al.*, *Fish and*

Wildlife Management on Federal Lands: Debunking State Supremacy, 47 Environmental Law (2017).

Furthermore, the ESA does not purport to protect all wildlife, but only threatened and endangered species that the states themselves have proven unable adequately to protect and restore. In this regard, the ESA explicitly provides for state cooperative agreements, 16 U.S.C. § 1535, and relies in substantial part on the adequacy of state regulatory mechanisms in listing species for federal protection. 16 U.S.C. § 1533. At its heart, the ESA is a cooperative federalism statute that protects the economic values of wildlife and regulates the negative impacts of economic activities on wildlife. Accordingly, the ESA's regulation of wildlife is bounded by the type of limiting principles that Justice Scalia discussed in his *Raich* concurrence and is consistent with our federalist system. A ruling to the contrary would truly "turn federalism on its head." *Gibbs*, 214 F.3d at 505.

Finally, the fact that Utah adopted its own plan for managing Utah prairie dogs cannot restrict congressional authority to regulate under the ESA. As explained above, the challenged regulation is a valid exercise of the federal government's authority under the Commerce Clause, and this Court has repeatedly held that "no form of state activity can constitutionally thwart the regulatory power granted by the Commerce Clause to Congress." *See Raich*, 545 U.S. at 29 (quoting *Wickard*, 317 U.S. at 124).

CONCLUSION

Petitioner has repeatedly misstated the law and facts and has offered no legitimate reason why this Court should hear this case after the Tenth Circuit issued a reasoned opinion that is consistent with established Supreme Court precedent and every other Circuit that has considered Commerce Clause challenges to the ESA. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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