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.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY H. WOOD
Acting Assistant Attorney General
MARY HOLLINGSWORTH
ANNA T. KATSELAS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a regulation limiting the take of a threatened species under Section 4(d) of the Endangered Species Act of 1973, 16 U.S.C. 1533(d), is within Congress's power under the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 852 F.3d 990. The decision and order of the district court (Pet. App. B1-B18) is reported at 57 F. Supp. 3d 1337.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2017. A petition for rehearing was denied on August 8, 2017 (Pet. App. D1-D2). The petition for a writ of certiorari was filed on September 26, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the constitutionality of a federal regulation that restricts the take of the Utah prai-

rie dog, a species listed as "threatened" under the Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq*. Petitioner asserts that the ESA cannot constitutionally be applied to restrict the take of the Utah prairie dog on nonfederal land because the species is found only in Utah and is not currently the subject of a commercial market. The district court agreed and invalidated the challenged regulation. Pet. App. B1-B18. The court of appeals reversed. *Id.* at A1-A37.

1. Congress enacted the ESA based on its findings that many animal and plant species had been driven to extinction by "economic growth and development untempered by adequate concern and conservation" and that species threatened with extinction have substantial "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. 1531(a)(1) and (3). The ESA is "comprehensive legislation" that seeks "'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation of such . . . species.'" *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 180 (1978) (quoting 16 U.S.C. 1531(b)).

As relevant here, the ESA is administered by the Secretary of the Interior, acting through the Fish and Wildlife Service (FWS). 16 U.S.C. 1532(15); see 50 C.F.R. 17.11, 402.01(b). Section 4(a) of the ESA charges the FWS to determine by regulation "whether any species is an endangered species or a threatened species." 16 U.S.C. 1533(a)(1). An "endangered" species is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A "threatened" species is one that is likely to become endangered in the foreseeable future. 16 U.S.C. 1532(20).

Once a species is listed as endangered, the ESA imposes a variety of restrictions. Section 9 makes it unlawful to "import" or "export" an endangered species, or to "sell or offer for sale" or "deliver, receive, carry, transport, or ship" an endangered species in interstate or foreign commerce. 16 U.S.C. 1538(a)(1)(A), (E), and (F). Section 9 also generally makes it unlawful for any person to "take" an endangered species without authorization, or to "possess, sell, deliver, carry, transport, or ship" a species taken in violation of the Act. 16 U.S.C. 1538(a)(1)(B)-(D). To "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19); see 50 C.F.R. 17.3 (defining "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife"); see also *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Or.*, 515 U.S. 687, 696-708 (1995) (upholding that definition).

For species listed as threatened rather than endangered, Section 4(d) of the ESA directs the FWS to "issue such regulations as [it] deems necessary and advisable" to provide for the conservation of the species. 16 U.S.C. 1533(d). Those regulations "may * * * prohibit" any act that Section 9 prohibits with respect to endangered species. *Ibid.* The FWS has extended all of Section 9's prohibitions to threatened species via a general Section 4(d) rule, which applies unless the FWS issues a species-specific Section 4(d) rule modifying those default prohibitions. 50 C.F.R. 17.31.

2. The Utah prairie dog is a burrowing animal found only in southern Utah. 77 Fed. Reg. 46,158, 46,160-46,161 (Aug. 2, 2012). Beginning in the 1920s, Utah prairie dog populations "declined dramatically" because of efforts to "eradicate the species" through poisoning

and other means. *Id.* at 46,161. Drought, habitat alteration, and disease also contributed to the species' decline, and by the 1970s it had vanished from large portions of its original range. *Ibid.*

In 1973, the Utah prairie dog was listed as endangered under the ESA's predecessor statute. 77 Fed. Reg. at 46,159. In 1974, that listing was incorporated into the ESA's regulatory scheme. *Ibid.* In 1984, the FWS reclassified the species as threatened. *Ibid.*; see 49 Fed. Reg. 22,330 (May 29, 1984). At the same time, the FWS issued a special Section 4(d) Rule (the Rule) that allowed regulated take of Utah prairie dogs in certain areas. 77 Fed. Reg. at 46,159. In 1991, the FWS amended the Rule to increase the annual limit on takes and broaden the permissible take area to the species' entire range. *Ibid.*; see 56 Fed. Reg. 27,438 (June 14, 1991).

In 2012, the FWS amended the Rule to its current form. 77 Fed. Reg. at 46,158 (50 C.F.R. 17.40(g)). Subject to certain conditions, the Rule now authorizes take of the Utah prairie dog on agricultural lands, on private land within one-half mile of designated conservation areas, and in locations where prairie dogs create safety hazards or disturb cultural or burial sites. *Ibid.* The Rule also authorizes take that is incidental to "legal activities associated with standard agricultural practices." *Ibid.* The Rule preserves the application of the ESA's prohibitions on import, export, transportation, and sale of Utah prairie dogs. 50 C.F.R. 17.40(g)(1); see 50 C.F.R. 17.21, 17.31(a).

In addition to the takes allowed by the Rule itself, the FWS has worked with state and local officials to authorize incidental takes in a variety of circumstances

that are not covered by the Rule through Habitat Conservation Plans (HCPs) and other regulatory measures. See 16 U.S.C. 1539(a) (authorizing the incidental-take permits granted under HCPs). For example, the 1998 Iron County HCP allows county authorities to authorize incidental takes associated with residential and commercial development on non-federal land. Further, the Cedar City Golf Course and Paiute Tribal Lands HCP authorizes translocations and lethal trapping of prairie dogs to clear these areas for recreational and development purposes.[1]

3. Petitioner is an association of southwestern Utah property owners and others who assert that the Rule's restrictions have prevented them from building homes or otherwise developing their investment properties, or from protecting facilities such as an airport and a cemetery from Utah prairie dogs. Pet. App. A10. In 2013, petitioner filed a suit challenging the Rule in federal district court. Petitioner asserted that neither the Commerce Clause nor the Necessary and Proper Clause authorizes Congress to regulate the take of the Utah prairie dog on land not owned by the federal government because the species exists only in Utah and is

[1] The HCPs, and other documents related to the regulation of the Utah prairie dog, are available on the FWS's website. See FWS, *Species Profile for Utah prairie dog*, https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=A04A. In June 2017, the FWS initiated a review of the Rule to determine whether any new information warranted a change in the Rule. 14-4151 Docket entry, attach. A (10th Cir. June 22, 2017). The FWS has informed this Office that, after completing the review, it determined that a change to the Rule is not warranted at this time. Instead, FWS intends to work with the State and the affected county governments to develop greater regulatory and management flexibility through the mechanisms available under the current Rule.

not itself the subject of a commercial market. *Id.* at A11.

The district court granted summary judgment to petitioner. Pet. App. B1-B18. The court acknowledged that, under this Court's Commerce Clause precedents, Congress has authority to regulate "activities having a substantial relation to interstate commerce." *Id.* at B10 (quoting *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995)). In this case, the court believed that the dispositive question is "whether take of the Utah prairie dog has a substantial effect on interstate commerce." *Id.* at B13. The court held that it does not because there is no existing commercial market for Utah prairie dogs, and because the court deemed the evidence of the species' ecological, scientific, and commercial value insufficient to establish a substantial effect on interstate commerce. *Id.* at B12-B15.

4. The court of appeals reversed. Pet. App. A1-A37. After surveying this Court's decisions, including *Gonzales* v. *Raich*, 545 U.S. 1 (2005), the court explained that "the Commerce Clause authorizes regulation of noncommercial, purely intrastate activity that is an essential part of a broader regulatory scheme that, as a whole, substantially affects interstate commerce." Pet. App. A23. The court emphasized that the applicable standard of review is deferential, and that it "need not determine whether [the regulated activities], taken in the aggregate, substantially affect interstate commerce in fact." *Id.* at A21 (quoting *Raich*, 545 U.S. at 22). Instead, the court continued, the question is whether Congress had a "rational basis" for so concluding. *Ibid.* (quoting *Raich*, 545 U.S. at 22).

The court of appeals rejected petitioner's contention that it should consider the effects of the "take of the

Utah prairie dog alone" rather than the effects of "the ESA generally." Pet. App. A23. The court explained that where, as here and in *Raich*, the challenged regulation is part of a "comprehensive regulatory scheme," the question is whether the scheme as a whole substantially affects interstate commerce. *Id.* at A24-A25. The court also noted that "every federal appellate court" that has addressed the question has "aggregated [the ESA's] effects on all threatened and endangered species" rather than considering each species in isolation. *Id.* at A27.

The court of appeals then concluded that "the substantial relationship between the ESA and interstate commerce is patent," observing that petitioner had not "even attempt[ed] to dispute [it]." Pet. App. A31. For example, the court pointed to Congres's finding that unrestrained economic activity had caused past extinctions of "'various species of fish, wildlife, and plants in the United States,'" and explained that "regulation of take of endangered and threatened species is directly related to * * * economic development and commercial activity" because it "acts as a brake on economic activity." *Id.* at A31-A32 (citation omitted). The court also noted that the ESA "promote[s] commercial activity in the long run" by conserving endangered and threatened species for possible future exploitation. *Id.* at A33. And the court explained that the ESA affects "an illegal wildlife trade that generates $5-8 billion annually." *Ibid.*

Finally, the court of appeals held that "Congress had a rational basis to believe that providing for the regulation of take of purely intrastate species like the Utah prairie dog is essential to the ESA's comprehensive regulatory scheme." Pet. App. A33. The court explained

that roughly "sixty-eight percent of species that the ESA protects exist purely intrastate" and that excising those species would "severely undercut" the Act's purpose and "'leave a gaping hole'" in the statutory scheme. *Id.* at A33-A34 (quoting *Raich*, 545 U.S. at 22). Again, the court noted that "[e]very one of [its] sister circuits that ha[d] addressed th[e] issue" had likewise held that "regulation of purely intrastate species is an essential part of the ESA's regulatory scheme." *Id.* at A34.

5. The court of appeals denied rehearing en banc, with no judge requesting a vote. Pet. App. D1-D2.

ARGUMENT

Petitioner renews its contention (Pet. 12-34) that Congress lacks authority to regulate the take of a species that exists in only one State and for which there is no present commercial market. The court of appeals faithfully followed this Court's precedents in rejecting that argument, and its decision does not conflict with any decision of another court of appeals. No further review is warranted.

1. Five other courts of appeals have considered the question whether Congress had constitutional authority to apply the ESA's restrictions to intrastate species for which there is no existing commercial market. All five have held that it does. See *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 638 F.3d 1163, 1174-1177 (9th Cir.) (*San Luis*), cert. denied, 565 U.S. 1009 (2011); *Alabama-Tombigbee Rivers Coal.* v. *Kempthorne*, 477 F.3d 1250, 1271-1277 (11th Cir. 2007) (*Tombigbee*), cert. denied, 552 U.S. 1097 (2008); *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 627-641 (5th Cir. 2003) (*GDF Realty*), cert. denied, 545 U.S. 1114 (2005); *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062, 1066-1080 (D.C. Cir.

2003), cert. denied, 540 U.S. 1218 (2004); *Gibbs* v. *Babbitt*, 214 F.3d 483, 492-506 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1045-1047 (D.C. Cir. 1997) (*NAHB*) (opinion of Wald, J.), cert. denied, 524 U.S. 937 (1998); *NAHB*, 130 F.3d at 1057-1060 (Henderson, J., concurring).[2] This Court declined to review each of those decisions, and the same result is warranted here.

2. a. This Court has "identified three broad categories of activity that Congress may regulate under its commerce power." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995). "First, Congress may regulate the use of the channels of interstate commerce." *Ibid.* "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559 (citation omitted). The court of appeals held that the ESA falls within the third category because the Act's comprehensive scheme regulates activities that substantially affect interstate commerce. Pet. App. A31. Indeed, as this Court and other courts of appeals have recognized as well, there are a number of ways in which the activities regulated by the ESA substantially affect interstate commerce.

First, there is a significant worldwide market in illegally-taken animals. The estimated value of ESA-

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[2] The Fifth Circuit recently applied *GDF Realty* in *Markle Interests, L.L.C.* v. *FWS*, 827 F.3d 452, 475-479 (2016), petitions for cert. pending, Nos. 17-71 and 17-74 (filed July 11 and 12, 2017).

prohibited trade in protected species is between $5 billion and $8 billion annually worldwide, with Americans spending an estimated $200 million annually on illegally-taken animals. Pet. App. A33; see *Tombigbee*, 477 F.3d at 1273; cf. *Gonzales* v. *Raich*, 545 U.S. 1, 26 (2005) (relying on the "established, and lucrative, [illegal] interstate market" in marijuana). And even with respect to species that are not presently traded commercially, the ESA's protections may "permit the regeneration of [covered] species to a level where controlled exploitation of that species can be resumed," leading to "profit from the trading and marketing of that species * * * where otherwise it would have been completely eliminated from commercial channels." S. Rep. No. 526, 91st Cong., 1st Sess. 3 (1969); see *Gibbs*, 214 F.3d at 495 (discussing the recovery of the alligator as an example).

Second, the ESA reflects Congress's determination that the "genetic variations" of protected species "are potential resources" with a value that is, "quite literally, incalculable." *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 178 (1978) (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 4-5 (1973) (House Report)) (emphasis omitted); see, *e.g.*, *Tombigbee*, 477 F.3d at 1274 (citing the example of a plant that was driven nearly to extinction before scientists discovered that it contained substances now used to treat cancer). Relatedly, preserving genetic biodiversity is of great value to agriculture and aquaculture, because the introduction of genetic material from wild species can enhance the productivity and commercial value of their domesticated counterparts. *NAHB*, 130 F.3d at 1052-1053 (opinion of Wald, J.). Extinctions thus "diminish[] a natural resource that

could otherwise be used for present and future commercial purposes." *Id.* at 1053. The reasons for protecting that resource are not limited to those species that have recognized commercial uses today, or did when the ESA was enacted in 1973. They encompass future uses of a species as well. This Court has held, in a similar vein, that the Commerce Clause authorized the regulation of decommissioned railroad rights of way because Congress could determine that "every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable." *Preseault* v. *ICC*, 494 U.S. 1, 19 (1990).

Third, the ESA reflects the understanding that "many" threatened and endangered animals "perform vital biological services to maintain a 'balance of nature' within their environments." S. Rep. No. 307, 93d Cong., 1st Sess. 2 (1973); see House Report 6 (discussing "the critical nature of the interrelationships of plants and animals between themselves and with their environment").[3] Moreover, "[a] species' simple presence in its natural habitat may stimulate commerce by encouraging fishing, hunting, and tourism." *Tombigbee*, 477 F.3d at 1274.[4]

Finally, even apart from the trade in endangered species and the commercial effect of extinctions, the conduct regulated by the ESA's take restriction is itself

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[3] The Utah prairie dog, for example, is a keystone species of the western grassland ecosystem, meaning it has a disproportionately large effect relative to its abundance. C.A. App. 65, 128. Other species rely on the habitat conditions that prairie dog colonies create, and frequently use their burrows for shelter. *Ibid.*

[4] Utah prairie dogs are studied by scientific researchers and are of interest to wildlife viewers and photographers. C.A. App. 101-134.

principally commercial or economic in character. Pet. App. A32. Indeed, as the court of appeals noted, *id.* at A31-A32, the ESA includes an express congressional finding 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). The ESA's take prohibition was a response to that finding, and "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities," including land development and agriculture. *Rancho Viejo*, 323 F.3d at 1078 (citation omitted); see *GDF Realty*, 326 F.3d at 639 ("[I]t is obvious that the majority of takes [prohibited by the ESA] would result from economic activity.").

b. As the court of appeals noted, petitioner "does not even attempt to dispute * * * the substantial relationship between the ESA and interstate commerce." Pet. App. A31. Nor does petitioner argue that the ESA, or any of its provisions, is facially unconstitutional. Instead, petitioner asserts only that the ESA's take restriction is unconstitutional as applied to the Utah prairie dog because (in petitioner's view) the take of that species—when considered in isolation—does not substantially affect interstate commerce. This Court's decisions foreclose that line of argument:

> [Petitioner] asks [the Court] to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and [*United States* v. *Morrison*, 529 U.S. 598 (2000)], the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for [this Court has] often reiterated that

> where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.

Raich, 545 U.S. at 23 (brackets, citations, and internal quotation marks omitted). The Court in *Raich* thus found it sufficient that Congress had a rational basis for believing that, when viewed in the aggregate, excluding intrastate activity from regulation would substantially affect interstate commerce. *Id.* at 22; see *id.* at 17, 19.

Congress's decision to apply the ESA to all species that meet the strict criteria for threatened or endangered status—and thus the soundness of focusing on the aggregate commercial significance of all listed species in assessing the Act's constitutionality—follows directly from three central (and related) premises of the Act: (1) that individual species are part of an interdependent web; (2) that the significance of a particular species cannot reliably be determined in advance; and (3) that extinction of a species eliminates for all time the possibility of future commercial uses. This Court has therefore recognized the ESA's 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." *Hill*, 437 U.S. at 178-179. The Court has also highlighted the Act's legislative history, which emphasized the value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting House Report 5). "Because Congress could not anticipate which species might have undiscovered scientific and economic value, it made sense to protect all those species that are endangered." *Tombigbee*, 477 F.3d at 1275.

c. Petitioner errs in asserting (Pet. 25-30) that the court of appeals' analysis was inconsistent with *Lopez*, *Morrison*, and *Raich*. Those decisions recognize that "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Applying that principle in *Raich*, the Court upheld the application of the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, to the intrastate cultivation and possession of home-grown medical marijuana, finding "that Congress had a rational basis for believing that, when viewed in the aggregate, * * * leaving home-consumed marijuana outside federal control would * * * affect price and market conditions." 545 U.S. at 19. *Raich* thus reaffirmed Congress's broad power to enact a comprehensive regulation of activities affecting interstate commerce, even if that statute reaches some intrastate noncommercial activities. Consistent with that understanding, every court of appeals that has considered a challenge like petitioner's—both before and after *Raich*—has held that the substantial-effects test must be applied to the activities regulated by the ESA in the aggregate, not species-by-species. Pet. App. A27-A28 (collecting cases).

Petitioner, in contrast, would interpret *Raich* as limiting that broad authority to "regulations necessary to Congress' ability to regulate the market for a commodity." Pet. 15. It is true that, as *Raich* illustrates, one permissible exercise of Congress's authority to regulate activities substantially affecting interstate commerce is the regulation of the intrastate production or possession of a "fungible commodity" like marijuana or wheat. *Raich*, 545 U.S. at 18; see *Wickard* v. *Filburn*, 317 U.S.

111, 115 (1942). But *Raich* itself made clear that the "class of activities" principle has a long lineage and is not limited to the regulation of fungible commodities. The Court explained that its "case law firmly establishe[d] Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17.

For example, the Court in *Raich* cited *Perez* v. *United States*, 402 U.S. 146 (1971), which held that Congress had a rational basis to conclude that intrastate loansharking could substantially affect interstate commerce, including by allowing organized crime interests to gain control of legitimate businesses. *Id.* at 155-156; see *Raich*, 545 U.S. at 17. The Court also cited *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), which rejected a Commerce Clause challenge to a statute requiring the protection and remediation of lands used for coal mining. *Id.* at 268-269. See *Raich*, 545 U.S. at 22. In *Hodel*, the Court found that Congress had a rational basis for concluding that the environmental harms of coal mining, taken in the aggregate, substantially affected interstate commerce because mining could hinder the affected land's future utility in a variety of ways. 452 U.S. at 276-280. And the Court rejected the argument—analogous to the one advanced by petitioner here—that the inquiry into substantial effects must be undertaken from the perspective of "whether land *as such* is subject to regulation under the Commerce Clause, *i.e.* whether land can be regarded as 'in commerce.'" *Id.* at 275 (citation omitted).

d. Petitioner also errs in asserting (Pet. 28-34) that the decision below upsets the balance between federal

and state authority. The decision below in fact maintains that balance, because the ESA has been on the books for nearly half a century, and courts of appeals have uniformly rejected claims that it exceeds Congress's constitutional authority. The Act protects only endangered and threatened species. "[T]he conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation." *Gibbs*, 214 F.3d at 500. And the enactment of a comprehensive federal scheme protecting endangered and threatened species is far removed from any assertion of a general, police-power responsibility for all wildlife within a State's borders. This Court has observed, moreover, that establishing a federal floor of regulation can serve to prevent "destructive interstate competition," which in this context could causes extinctions of national significance. *Hodel*, 452 U.S. at 282; see *Gibbs*, 214 F.3d at 501-503.

3. Petitioner's challenge to the application of the ESA fails for an additional reason that is tied to the specific circumstances of this case. Petitioner challenges the ESA's restrictions on the take of Utah prairie dogs because those restrictions allegedly prevent its members from developing their property or otherwise engaging in commercial or economic activities. The district court found that petitioner had standing on that basis. Pet. App. B8-B8 & n.2. The ESA would be valid as applied to that conduct even if petitioner were correct that it cannot be applied to prohibit takes resulting from purely noneconomic activities. The commercial nature of the conduct at issue here readily distinguishes this case from *Lopez* and *Morrison*, where "neither the actors nor their conduct ha[d] a commercial character." *Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 580) (Kennedy, J., concurring)).

Petitioner cannot avoid the conclusion that the ESA is valid as applied to its members' commercial activities by arguing that restrictions on the take of Utah prairie dogs would be unconstitutional as applied to hypothetical noncommercial activities. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973).

Consideration of the nature of the conduct at issue here is especially appropriate because petitioner has not sought facial invalidation of any provision of the ESA, but has instead limited its challenge to the application of the ESA's restriction on takes to a single species. Pet. App. A11, B16-B17. It would make little sense to disregard the commercial nature of the conduct to which the statutory regime is being applied.[5]

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[5] Petitioner asserts (Pet. 22 n.11) that consideration of its members' activities is inconsistent with *Lopez*, which petitioner characterizes as invalidating "a federal ban on gun possession in a school zone * * * on its face, notwithstanding that the individual defendant was paid to deliver the gun." But that fact is not reflected in this Court's opinion, and there was no reason to suppose that violations of the statute at issue in *Lopez* would typically be committed for economic reasons or by commercial actors. The same was true in *Morrison*. Here, in contrast, the takes prohibited by the ESA *characteristically* result from economic activity. See pp. 11-12, *supra*. In addition, *Lopez* and *Morrison* were facial challenges. Here, in contrast, petitioner does not argue that the ESA is facially invalid, and instead seeks to strike down the statute only as applied to the Utah prairie dog. In arguing that the Court must nonetheless disregard the commercial character of its members' activities, peti-

4. Petitioner acknowledges (Pet. 22) that every court of appeals to consider the question has held that the ESA may be applied to a species like the Utah prairie dog. Petitioner nonetheless contends (Pet. 15-18, 22-24) that this Court should grant review to resolve asserted differences in the reasoning of the decisions upholding the ESA and applying *Raich* in other contexts. But "[t]his Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Accordingly, even if they existed, such disagreements in reasoning would not warrant this Court's review. And petitioner exaggerates those disagreements in any event.

First, petitioner asserts (Pet. 15-18) that the decision below conflicts with decisions that purportedly interpret *Raich* as limiting the "class of activity" principle to laws that are necessary to the regulation of an interstate market in a "commodity." Petitioner is mistaken. The decisions it cites applied *Raich* to regulations of specific commodities (certain firearms and child pornography).[6] But all of those decisions upheld the challenged regulations, and none of them held that the principle applied in *Raich* is limited to regulations of commodities.

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tioner improperly seeks "to have its cake and eat it too" by combining the most favorable features of both facial and as-applied review. *Rancho Viejo*, 323 F.3d at 1077.

[6] See *United States* v. *Hosford*, 843 F.3d 161, 171-172 (4th Cir. 2016); *United States* v. *Bowers*, 594 F.3d 522, 528-529 (6th Cir.), cert. denied, 526 U.S. 936 (2010); *United States* v. *Rene E.*, 583 F.3d 8, 18 (1st Cir. 2009), cert. denied, 558 U.S. 1133 (2010); *United States* v. *Rose*, 522 F.3d 710, 717 (6th Cir.), cert. denied, 555 U.S. 890 (2008); *United States* v. *Maxwell*, 446 F.3d 1210, 1215-1216 (11th Cir.), cert. denied, 549 U.S. 1070 (2006).

Second, petitioner states (Pet. 16-17) that courts of appeals have sometimes characterized *Raich* as resting on the Commerce Clause alone, and sometimes as resting on the Necessary and Proper Clause as well. But petitioner does not identify any case in which that distinction affected the outcome. Here, for example, the court of appeals stated that although it "perform[ed] [its] *Raich* analysis under the Commerce Clause," its holding would have "remain[ed] unchanged" even if it had "proceed[ed] instead under the assumption that *Raich* was decided under the Necessary and Proper Clause." Pet. App. A30 n.8.

Third, petitioner asserts (Pet. 17) that the Ninth Circuit "interprets *Raich* to authorize any federal regulation within a comprehensive scheme that furthers any congressional purpose," and that the Third Circuit has criticized the Ninth Circuit's approach. That is wrong. The Ninth Circuit has rejected the argument that Congress's Commerce Clause authority is limited to "*purely* economic or commercial statute[s]." *San Luis*, 638 F.3d at 1177 (emphasis added). But the court upheld the ESA only because it is a "comprehensive regulatory scheme" that has a "'substantial relation to commerce.'" *Ibid.* (citation omitted). In so doing, the court applied this Court's repeated admonitions that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). And the Third Circuit decision petitioner cites did not criticize—or even cite—the relevant Ninth Circuit decision. Instead, it addressed an entirely unrelated Ninth Circuit precedent interpreting the *Foreign* Commerce

Clause. See *United States* v. *Pendleton*, 658 F.3d 299, 307 n.5 (3d Cir. 2011), cert. denied, 567 U.S. 918 (2012).

Finally, petitioner argues (Pet. 22-24) that the courts of appeals that have upheld the ESA have at times relied on somewhat different rationales. But all of those courts rejected constitutional challenges to the ESA; any difference in their reasons for reaching that uniform result would not warrant this Court's review. And that is particularly true in this case, where the court of appeals did not disagree with any aspect of another court of appeals' reasoning. To the contrary, the court emphasized that the critical steps in its analysis were in accord with the approach followed by "[e]very one of [its] sister circuits that ha[d] addressed" the relevant issues. Pet. App. A34; see *id.* at A27.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
MARY HOLLINGSWORTH
ANNA T. KATSELAS
Attorneys

DECEMBER 2017