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,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS DAVID AND PAMELA HERR IN OPPOSITION

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QUESTION PRESENTED

The United States Court of Appeals for the Sixth Circuit correctly held that the Forest Service's ban on using motorboats on Crooked Lake in the Sylvania Wilderness violated the "subject to valid existing rights" clause of Section 5 of the Michigan Wilderness Act. The Sixth Circuit found that landowners maintain littoral rights to "reasonable use" of the lake's surface under well-established principles of Michigan law. In addition to these legal authorities, the facts and history of Crooked Lake demonstrate that recreational boating constitutes reasonable use.

Despite the grandiose claims made by Petitioners, the Sixth Circuit's decision presents absolutely no conflict with this Court's prior decisions or other decisions from the Eighth, Ninth, or Eleventh Circuits. Petitioners fundamentally misunderstand the Sixth Circuit's opinion as a decision on the scope of the Property Clause power. In actuality, the court found that Congress limited the Forest Service's power to regulate under the Property Clause by including the saving clause in its delegation of authority. The question presented is:

Whether the Sixth Circuit correctly held that the Forest Service's motorboat restrictions, as applied to Respondents, violated the saving clause, "[s]ubject to valid existing rights," in Section 5 of the Michigan Wilderness Act.

PARTIES TO THE PROCEEDINGS

Respondents David A. Herr and Pamela F. Herr are littoral property owners on Crooked Lake in Michigan's Upper Peninsula. They were plaintiffs in the district court and were appellants in the court of appeals below.

Petitioners SWC, LLC d/b/a/ Sylvania Wilderness Cabins, Timothy A. Schmidt, Friends of Sylvania and Upper Peninsula Environmental Coalition were defendant-intervenors in the district court below in support of defendant United States Forest Service and were appellees in the court of appeals below.

United States Forest Service; Sonny Perdue, Secretary of Agriculture; Tom Tidwell, Chief of the United States Forest Service; Kathleen Atkinson, Regional Forester for the Eastern Region of the United States Forest Service; Linda Jackson, Forest Supervisor, Ottawa National Forest; and Tony Holland, District Ranger, Watersmeet-Iron River Ranger District were defendants in the district court and were appellees in the court of appeals below.

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INTRODUCTION

The Sixth Circuit properly reversed the district court's grant of summary judgment and denied Petitioners' request for rehearing en banc. The Sixth Circuit's decision was clear, correct, and

legally and factually unassailable. Contrary to the fallacious claims made by Petitioners, the Sixth Circuit's decision produces no threat to this Court's precedent, creates no inter-circuit conflict, nor misconstrues the federal government's power under the Property Clause.

Petitioners raise illusory constitutional issues and suggest conflicts with other circuit decisions that do not exist. At the heart of each defective argument presented in the Petition is the erroneous postulation that the Forest Service possesses the full scope of the Property Clause power. The Forest Service only possesses the power given to it by Congress. In this case, Congress did delegate *some* power to regulate under the Property Clause to the Forest Service, but it explicitly made that power subordinate to the existing, state-law-created property rights possessed by Respondents. Consequently, Petitioners present no possible rationale for this Court to grant certiorari.

The Sixth Circuit correctly held that Congress placed limitations on the Forest Service's delegated authority when it passed the Michigan Wilderness Act ("MWA") and created the Sylvania Wilderness. 101 Stat. 1274–78 (1987). Importantly, Section 5 of the MWA provides that the Forest Service's regulation of the Sylvania Wilderness pursuant to the Wilderness Act of 1964 is "[s]ubject to valid existing rights." Pet. App. 49.

In 2010, Respondents David and Pamela Herr ("Herrs") purchased two lots on Crooked Lake. The Herrs purchased the lots with the intent to use their gas-powered motorboat over the entire surface of

Crooked Lake, consistent with their state-law created littoral rights,[1] just as their predecessors had done.[2]

In *Herr v. U.S. Forest Service*, 865 F.3d 351 (6th Cir. 2017) ("*Herr IV*"), the Sixth Circuit correctly held that the Forest Service's ban on using any motorboats or any other boat that exceeded five miles per hour violated the saving clause of the MWA.[3] Pet. App. 3–23. Notably, though a 2-1 decision, the entire panel agreed that the Herrs' littoral rights were "valid existing rights" to which the Forest Service's authority to regulate Crooked Lake was "subject to."[4] The panel majority further held that the motorboat restrictions, which effectively prohibit the Herrs from using ninety-five percent of Crooked Lake, violated the MWA's saving clause because they

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[1] The rights in this case are "littoral" rights because the land abuts a lake, as opposed to a river. *See Thies v. Howland*, 380 N.W.2d 463, 466 n.2 (Mich. 1985). The term "riparian," however, is often used to refer to both types of rights. *See id.*

[2] Michigan law grants owners of land abutting a lake the right to use the entire surface of the lake for recreational activities, such as motorboating and fishing, so long as their use is in accordance with *state law* and does not unreasonably interfere with the reasonable use of the lake by other abutting landowners. *People v. Hulbert*, 91 N.W. 211, 211–12 (Mich. 1902). These rights are constitutionally protected property rights. *Peterman v. State Dep't of Natural Res.*, 521 N.W.2d 499, 508 (Mich. 1994).

[3] References to the Record are cited as "ROA" followed by the PageID number(s).

[4] Pet. App. 13–18, Pet. App. 19 (Donald, J., dissenting) ("I agree with the majority that the Herrs have valid existing rights to which any regulation by the Forest Service must be subservient.").

infringed on the Herrs' littoral rights under well-established Michigan law. *See* Pet. App. 13–19.

Nonetheless, Petitioners allege that the Sixth Circuit's opinion in this case conflicts with this Court's decisions in *Camfield v. United States*, 167 U.S. 518 (1897) and *Kleppe v. New Mexico*, 426 U.S. 529 (1976). Those decisions involved direct challenges to Congress's exercise of its Property Clause power. Unlike in *Kleppe* and *Camfield*, the Sixth Circuit's decision had nothing to do with the constitutionality of a statute. Rather, the crux of *Herr IV* was the MWA's saving clause and littoral rights under Michigan law. *See* Pet. App. 5–16. As explained by the Sixth Circuit:

> When the statute refers to "valid existing rights," it asks whether the property owners have such rights under state law, not federal law, and certainly not federal law as construed by a federal agency. The Herrs plainly have such rights under state law, as ample Michigan authorities confirm.

Pet. App. 15.

Moreover, this case does not involve a challenge to the scope of Congress's power under the Property Clause as Petitioners suggest. *See* U.S. CONST. art. IV, § 3, cl. 2; Pet. App. 45. Congress saw to that when it limited the Forest Service's authority to regulate motorboat use in the MWA by making that authority subservient to certain state-law property rights, which include motorboat use. Pet. App. 49.

It follows that this Court's previous pronouncements that the federal government's authority under the Property Clause is analogous to the state's police power are wholly irrelevant to the disposition of this case. *See* Petition at 3. Nor is it relevant that the Sixth Circuit acknowledged that the State of Michigan could have regulated motorboat use, or even possibly banned motorboats, at some point since the 1940s to affect the definition of reasonable use. *See* Petition at 17. As the majority correctly and clearly explained:

> The Forest Service tells us that it can regulate littoral and riparian rights under the Property Clause to the same extent that state regulators can regulate them. Maybe; maybe not. But we need not decide. For the Michigan Wilderness Act does not grant the Forest Service a power coextensive with Congress' plenary authority under the Property Clause. It instead delegates a power limited by existing rights—"subject to valid existing rights." For that reason, any "police power" the Forest Service may have must respect pre-existing property rights, not just the limits of state power. Unless or until the State permissibly says otherwise, littoral property rights include the right to reasonable use of the water's surface for recreational motorboating. No matter how reasonable the Forest Service may think this regulation is, it has no power to nullify the Herrs' pre-existing

> right under Michigan law to use the lake for recreational motorboating.

Pet. App. 17–18.

As such, the purportedly conflicting decisions in the Eighth, Ninth, Eleventh, and Sixth Circuits cited by Petitioners are all inapposite and present no basis for granting a Writ of Certiorari. In truth, Petitioners cannot point to any legitimate conflict with this Court's precedent or other circuit decisions and, therefore, the Petition should be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 3–23) is reported at 865 F.3d 351 (6th Cir. 2017). The opinion of the district court (Pet. App. 25–41) is reported at 212 F. Supp. 3d 720 (W.D. Mich. 2016).

STATEMENT OF THE CASE

A. Factual Background

David and Pamela Herr own lakefront property on Crooked Lake in the Upper Peninsula of Michigan. Pet. App. 5. Ninety-five percent of the land surrounding Crooked Lake is administered by the Forest Service as part of the federally-protected Sylvania Wilderness. Pet. App. 5–6. The other five percent is owned by private landowners, such as the

Herrs, who own the property under Michigan law. Pet. App. 6.

In 1931, President Hoover proclaimed certain lands in the western end of Michigan's Upper Peninsula as the Ottawa National Forest. *See* 46 Stat. 3044-45 (1931). Since then, the Ottawa National Forest has been expanded and now includes approximately one million acres of land.[5] In 1966, the United States purchased 14,000 acres of land surrounding the southern portion of Crooked Lake ("Sylvania area"), and added those acres to the Ottawa National Forest. Pet. App. 6. The Sylvania area encompasses over 18,000 acres and 36 lakes in the area, including Crooked Lake. Pet. App. 6.

The Forest Service thereafter constructed a public boat landing on Forest Service administered land that abutted the north bay of Crooked Lake. The landing facilitated motorboat use on the entire surface of Crooked Lake by the littoral landowners and the general public.[6]

The National Forest Management Act, 16 U.S.C. § 1600 *et seq*., requires the Forest Service to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). These plans, commonly referred to as "forest plans," guide future activities in a forest. 16 U.S.C. § 1604(e)(1). In 1986, the Forest Service issued the first forest plan for the Ottawa National Forest ("1986 Forest Plan").

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[5] ROA 688, 691.
[6] ROA 3956; ROA 3961.

In the 1986 Forest Plan, the Forest Service recommended the Sylvania area for wilderness study,[7] notwithstanding the longstanding motorboat use on Crooked Lake by the littoral landowners.[8] In response to concerns that designating the Sylvania area for wilderness study may eliminate motorboat use on Crooked Lake, the Forest Service responded:

> Motorboat usage on Crooked [Lake] ... would continue unless Congress specifically prohibits such use in legislation designating the Sylvania as wilderness. *The Forest Service can not [sic] regulate use of motors on [Crooked Lake]*; it can only regulate transportation of motors over National Forest System land. If there is private land on the lakeshore, motor boats can continue to access the lake through that land.[9]

In 1987, Congress passed the MWA. 101 Stat. 1274. Section (3)(b) of the MWA designated the lands in the Sylvania area as the Sylvania Wilderness, which placed those lands in the National Wilderness Preservation System. 101 Stat. at 1274; Pet. App. 48. Approximately ninety-five percent of Crooked Lake is within the boundaries of the Sylvania Wilderness. Pet. App. 6. The majority of the north bay of Crooked Lake is located outside of the Sylvania Wilderness. Pet. App. 6. There are approximately ten to twelve private littoral lots

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[7] ROA 8004.
[8] ROA 7364; ROA 7411.
[9] ROA 4113.

along the north shore of this bay, including the lots owned by the Herrs. Pet. App. 6.

Section 5 of the MWA provides: "[s]ubject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act …." 101 Stat. at 1275–76; Pet. App. 49. The saving clause, "subject to valid existing rights," is frequently used by Congress and the Executive Branch to protect existing rights and legitimate expectations from subsequent changes in the law.[10]

In 1992, the Forest Service issued Amendment No. 1 to the 1986 Forest Plan, which prohibited the use of sailboats and houseboats on those portions of Crooked Lake within the Sylvania Wilderness.[11] In 1993, littoral landowners on Crooked Lake challenged Amendment No. 1 on the grounds that the restrictions infringed upon their littoral rights in violation of the saving clause, "[s]ubject to valid existing rights," in Section 5 of the MWA.[12] The district court agreed that the plaintiffs' littoral rights were "valid existing rights" within the meaning of

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[10] *See*, *e.g.*, James N. Barkeley & Lawrence V. Albert, *A Survey Of Case Law Interpreting 'Valid Existing Rights'—Implications For Unpatented Mining Claims*, 34 RMMLF-INST 9, § 9.02 at 9-5 to 9-6 (1988); *id.* at 9-6 n.7 ("valid existing rights" is used as a term of art in more than 100 statutory provisions).

[11] ROA 5233; ROA 5235.

[12] *Stupak-Thrall v. United States*, 843 F. Supp. 327, 328–29 (W.D. Mich. 1994), *aff'd*, 70 F.3d 881 (6th Cir. 1995), *vacated*, 81 F.3d 651 (6th Cir. 1996), *aff'd by an equally divided en banc court*, 89 F.3d 1269 (6th Cir. 1996) ("*Stupak-Thrall I*").

the saving clause, but nonetheless upheld Amendment No. 1. *Stupak-Thrall*, 843 F. Supp. at 330–34. Specifically, the district court, through a faulty application of Michigan's "reasonable use" doctrine, *id.* at 332–34, ruled that the Forest Service's "proposed use," as reflected by its restrictions on sailboats and houseboats, "[was] not unreasonable." *Id.* at 333–34.[13] Based upon this ruling, the district court granted summary judgment in favor of the Forest Service.[14] That judgment was ultimately affirmed by an equally divided en banc court. *Stupak-Thrall I*, 89 F.3d at 1269.[15]

In May 1995, while *Stupak-Thrall I* was pending, the Forest Service issued Amendment No. 5 to the 1986 Forest Plan, which prohibited the use of gas-powered motorboats on those portions of Crooked Lake within the wilderness.[16] *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055, 1058 n.2 (W.D. Mich.

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[13] This ruling was premised on the lack of evidence that sailboats or houseboats had ever been used on Crooked Lake. *Stupak-Thrall,* 843 F. Supp. at 334. This is not the case vis-à-vis gas-powered motorboats. *See* ROA 7364 (Forest Service noting "traditional[]" motorboat use by owners of private land abutting Crooked Lake).

[14] *Stupak-Thrall*, 843 F. Supp. at 334.

[15] No judge on the panel or the en banc court agreed with Judge Quist's application of Michigan's "reasonable use" doctrine. *Stupak-Thrall*, 70 F.3d at 889 ("We do not agree that the 'reasonable use' doctrine governs the federal government's actions in this case."); *Stupak-Thrall I*, 89 F.3d at 1272 (Boggs, J., dissenting) ("Our unsatisfactory resolution ensures that this struggle will go on, now with less guidance than ever, governed by a district court theory that not one member of this court has indicated agreement with.").

[16] *Stupak-Thrall II*, 988 F. Supp. at 1058 n.2.

1997) ("*Stupak-Thrall II*"). In *Stupak-Thrall II*, the plaintiffs challenged the motorboat restrictions on the ground that the restrictions infringed on their littoral rights in violation of the saving clause in Section 5 of the MWA. *Id.* at 1059.

The district court recognized that, under Michigan law, littoral landowners "share in common the right to use the entire surface of the lake for boating and fishing, so long as they do not interfere with the reasonable use of the waters by the other riparian owners[,]" and that this right includes the right to use gas-powered motorboats. *Id.* at 1062–64. In contrast to the lack of evidence regarding sailboat or houseboat use in *Stupak-Thrall I*, the district court also recognized that littoral landowners had used gas-powered motorboats on Crooked Lake since the 1940s. *Stupak-Thrall II*, 988 F. Supp. at 1059, 1065. More importantly, because the Forest Service's authority to manage the wilderness is "subject to valid existing rights," the court ruled that the Forest Service lacked the authority to restrict the plaintiffs' littoral rights to use gas-powered motorboats on that portion of Crooked Lake within the wilderness.[17] Accordingly, the court declared the Forest Service's motorboat restrictions invalid as applied to the plaintiffs and permanently enjoined the Forest Service from enforcing its restrictions against the plaintiffs and their guests. *Id.* at 1064, 1065–66.

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[17] *Id.* at 1064 ("To the extent that Amendment No. 5 limits Plaintiffs' valid existing right to use gas powered motor boats on the surface of Crooked Lake, it exceeds the Forest Service's authority ....").

The Forest Service filed an appeal in *Stupak-Thrall II*, and while that appeal was pending began the process for revising its 1986 Forest Plan.[18] In September 2003, the Forest Service published notice of its intent to revise the 1986 Forest Plan.[19] Concurrently, the Forest Service released a document entitled *Need for Change: Description of Proposal for Revising the Forest Plan of the Ottawa National Forest* ("*Need for Change*") for public scrutiny.[20] Although the Forest Service acknowledged that motorboat use on Crooked Lake was raised as a concern during the development of *Need for Change* and it was obviously aware of the adverse decision in *Stupak-Thrall II*, the Forest Service inexplicably decided not to consider motorboat use on Crooked Lake during the forest plan revision process.[21]

In March 2005, the Forest Service released the proposed forest plan for public comment. *See* 70 Fed. Reg. 15,315 (Mar. 23, 2005). The Forest Service

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[18] In 2005, the Forest Service voluntarily dismissed its appeal in *Stupak-Thrall II* after it facilitated the sale of the littoral land owned by one of the plaintiffs to a conservation organization. ROA 8337. The Forest Service then paid the conservation organization to burden that land with a servitude, which prohibits the owners of that land from using gas-powered motorboats on Crooked Lake. *Id*. Because that land accounted for most of the gas-powered motorboat use on Crooked Lake, the Forest Service's actions were intended to "substantially and permanently" reduce the amount of gas-powered motorboat use in the wilderness. *Id*.

[19] ROA 613–621.

[20] ROA 622–73.

[21] ROA 648–49; ROA 1221–24.

received comments explaining that the Forest Service lacked the authority to restrict the littoral owners' use of gas-powered motorboats on Crooked Lake.[22] However, the Forest Service ostensibly ignored those comments—based upon its inexplicable decision in *Need for Change* that motorboat use on Crooked Lake would not be considered during the revision process.[23]

In March 2006, the Forest Service issued the 2006 Forest Plan.[24] Concurrently, the Forest Service issued a Record of Decision approving the 2006 Forest Plan.[25] The 2006 Forest Plan includes the same motorboat restrictions that were in Amendment No. 5, and which Judge Bell had ruled were unlawful as applied to littoral landowners on Crooked Lake:

> Only electric motors with a maximum size of 24 volts or 48 pounds of thrust (4 horsepower equivalent) or less will be permitted on Big Bateau, Crooked, and Devil's Head Lakes within the Sylvania Wilderness. All watercraft on these lakes are restricted to a slow no-wake speed.[26]

In August 2007, after administrative appeals regarding the motorboat restrictions in the 2006

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[22] *E.g.*, ROA 8319–22.
[23] *See* ROA 1221–24; 1874; ROA 1380.
[24] ROA 1409–1666.
[25] ROA 1360–1408.
[26] ROA 1517; *see also* ROA 3945 (Forest Service quantifying no-wake speed as "1 to 5 mph[.]").

Forest Plan were denied,[27] the Forest Service issued a Forest Order ("2007 Forest Order"), which made violations of the motorboat restrictions criminal offenses.[28]

In 2010, the Herrs purchased two littoral lots on Crooked Lake with the specific intent to use gas-powered motorboats over the entire surface of Crooked Lake, Pet. App. 9, consistent with their littoral rights and just as their predecessors had done.[29] In 2010-2012, the Herrs purchased a pass from the Forest Service allowing them to use the Forest Service-managed boat landing on Crooked Lake.[30] Use of the Forest Service-managed boat landing facilitated the Herrs' ability to use their gas-powered motorboat over the entire surface of Crooked Lake.[31]

In 2013, the Forest Service modified the boat landing to make it a carry down only facility,[32] thereby eliminating all gas-powered motorboat use on Crooked Lake by the general public. Notwithstanding this fact, the Herrs received a letter from the District Ranger, in which he stated that he was "instructing Forest Service personnel to fully enforce existing Forest Orders regarding use of motorboats within the wilderness portion of Crooked Lake except as limited by the court's ruling [in

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[27] *See* ROA 1867–84.
[28] ROA 2025–27.
[29] ROA 9792-96.
[30] ROA 9795; Pet. App. 9.
[31] ROA 9795.
[32] *Id.*

Stupak-Thrall II.]"[33] Prior to the June 2013 Letter, the Forest Service never sought to enforce the 2007 Forest Order against the littoral landowners.[34]

B. Procedural History

Because the June 2013 Letter placed the Herrs at risk of criminal penalties for exercising their littoral rights, the Herrs filed suit against the Forest Service under the Administrative Procedure Act. Pet. App. 10. Specifically, the Herrs sought judicial review of whether the motorboat restrictions were unlawful *as applied to them* as littoral landowners. Pet. App. 10.

The Forest Service moved to dismiss the Herrs' claims, arguing that the Herrs' claims were barred by the six-year limitations period on APA challenges to the 2007 Forest Order. Pet. App. 10. The district court granted the Forest Service's motion to dismiss. Pet. App. 10. The Herrs appealed and the Sixth Circuit reversed. *Herr v. U.S. Forest Service*, 803 F.3d 809 (6th Cir. 2015) ("*Herr II*"). Specifically, the Sixth Circuit ruled that the limitation period in 28 U.S.C. § 2401(a) was not jurisdictional and that it did not begin to run until the Herrs acquired their littoral land in 2010. *Herr II*, 803 F.3d at 813–22. Because the Herrs' claims were timely filed in 2014, the Sixth Circuit remanded for further proceedings. *Id.* at 823.

On remand, the district court denied the Herrs' motion for summary judgment and granted

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[33] ROA 9795–96.
[34] ROA 9793–96; ROA 9720–21.

summary judgment in favor the Forest Service and Intervenors. *Herr v. U.S. Forest Service*, 212 F. Supp. 3d 720 (W.D. Mich. 2016) ("*Herr III*"). Although the district court recognized that the Herrs' littoral rights grant them the right to use their gas-powered motorboat over the entire surface of Crooked Lake, Pet. App. 37–39, it ruled that they were not saved by the saving clause, "[s]ubject to valid existing rights," in Section 5 of the MWA because the Herrs did not own those rights in 1987 when the MWA was enacted. Pet. App. 39.

Once again, the Herrs appealed the district court's decision to the Sixth Circuit, and, once again, the Sixth Circuit ruled in favor of the Herrs. Pet. App. 18–19. The Sixth Circuit denied the Petitioners' request for rehearing en banc on January 4, 2018. Pet. App. 43–44. On April 4, 2018, Petitioners filed a Petition for Writ of Certiorari with this Court.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD DENY THE PETITION BECAUSE PETITIONERS FUNDAMENTALLY MISUNDERSTAND CONGRESS'S PROPERTY CLAUSE POWER AND THERE IS NO CONFLICT WITH THIS COURT'S PRIOR DECISIONS.

The Sixth Circuit's decision in no way conflicts with prior decisions of this Court, and, therefore,

offers no basis for this Court to grant review under S. Ct. R. 10(c). All four of Petitioners' arguments for granting the Petition under S. Ct. R. 10(c) are premised on their erroneous belief that the Forest Service possesses the full scope of the Property Clause power and that power allows the agency to apply its motorboat restrictions against the Herrs. *See* Petition at 16–21. The gist of the Petition is that the Sixth Circuit's decision "unreasonably constrain[s] the federal government's authority [under the Property Clause] to reasonably regulate activities affecting its property" pursuant to this Court's prior decisions in *Camfield v. U.S.*, 167 U.S. 518 (1897) and *Kleppe v. New Mexico*, 426 U.S. 529 (1976). Petition at 16. However, Petitioners fail to grasp that Congress itself constrained the Forest Service's authority to regulate under the Property Clause when it enacted the saving clause, "[s]ubject to valid existing rights," within the MWA. The Herrs maintain a right to "reasonable use" of the lake's surface under Michigan law—including motorboat use—because Congress specifically protected their existing property rights in the MWA. The flaws with Petitioners' belief are patent and permeate throughout the entire Petition.

First, the Property Clause grants power only to Congress—not the Forest Service. U.S. CONST. art. IV., § 3, cl. 2. Second, "an agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("an administrative agency's power ... is limited to the authority delegated by Congress").

Granted, Congress has delegated *some* of its Property Clause power to the Forest Service through the MWA and the Wilderness Act. *See* Pet. App. 12. But Congress has not delegated the full scope of its Property Clause power. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (Before a court may conclude that Congress delegated the full scope of one of its enumerated powers, there must be "a clear indication that Congress intended that result."). In fact, the saving clause "[s]ubject to valid existing rights" proves that Congress did not delegate the full scope of its Property Clause power because that clause is an express limitation on the Forest Service's delegated authority. Pet. App. 17 ("[T]he [MWA] does not grant the Forest Service a power coextensive with Congress' plenary authority under the Property Clause. It instead delegates a power limited by existing rights ...."); *see also Stupak-Thrall II*, 988 F. Supp. at 1062.

Therefore, this case does not involve a constitutional question. Instead, as correctly recognized by the Sixth Circuit, this case involves a straightforward question of statutory interpretation regarding the five-word saving clause, "[s]ubject to valid existing rights[.]" Pet. App. 13–15; *see also Stupak-Thrall I*, 843 F. Supp. at 330 ("[T]he MWA should be read to make administration of the Sylvania Wilderness subject to plaintiffs' valid riparian rights, as established under state law."). Because Petitioners have not shown that the Sixth Circuit's reading of the saving clause is erroneous or conflicts with any decision, their Petition should be denied.

Based upon their erroneous belief that the Forest Service possesses the full scope of the Congress's Property Clause power, Petitioners argue that the Sixth Circuit's opinion conflicts with this Court's decisions in *Camfield* and *Kleppe*. Petition at 16–21. Because those cases are inapposite, this Court should not grant the Petition.

First, *Camfield* and *Kleppe* involved the constitutionality of federal statutes and, thus, were direct challenges to Congress's exercise of its Property Clause power. *Camfield*, 167 U.S. at 521–26; *Kleppe*, 426 U.S. at 535–41. Because those cases involved Congress's exercise of its Property Clause power, the Sixth Circuit's opinion does not conflict with those decisions, as the issue in this case is whether the Forest Service exceeded its limited, delegated authority under the MWA.

Second, neither *Camfield* nor *Kleppe* involved a saving clause. Therefore, it is impossible for the panel majority's reading of the saving clause in the instant case to conflict with those decisions.

Third, Petitioners claim that the Sixth Circuit's decision "renders the federal government's power to protect its property subservient to specific predicate action by the State of Michigan." Petition at 17. In a hollow attempt to spin straw into gold, they misconstrue dicta in the Sixth Circuit's straightforward discussion of littoral rights. As the Sixth Circuit pointed out, the "nub" of the dispute is whether the Herrs possess "valid rights" under Michigan law to use motorboats on Crooked Lake. Pet. App. 14–15.

The court acknowledged that state law can impose reasonable limits on littoral rights. Pet. App. 15. However, the Sixth Circuit found that "Michigan courts have repeatedly indicated" that recreational boating "amounts to a reasonable use." Pet. App. 15. Another indicator of what is "reasonable use" for littoral owners under Michigan law is "longstanding prior use." *See* Pet. App. 15. (citing *Dumont v. Kellogg*, 29 Mich. 420, 425 (1874)). Thus, the Sixth Circuit found it relevant and noteworthy that the State of Michigan could have regulated motorboats on Crooked Lake since use began in the 1940s, yet never did.[35] Pet. App. 16 (noting that regulation would still be "at the risk of imposing a regulatory taking under the State or Federal Constitutions."). As such, "[t]he long history of pre-existing use confirms that it is not unreasonable to use a gas-powered motorboat at speeds above five miles per hour on Crooked Lake." Pet. App. 17.

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[35] *See also* ROA 7364 (1986 Forest Plan noting traditional motorboat use on Crooked Lake). Neither the State of Michigan nor the relevant local government has banned gas-powered motorboats on Crooked Lake nor limited all motorboats to a no-wake speed. *See* Mich. Admin. Code R. 281.727.2 (indicating that motorboats are not prohibited on Crooked Lake). Thus, under Michigan law, as determined by the elected representatives of the State of Michigan and the relevant local government, the Herrs have the right to use their gas-powered motorboat in a reasonable manner and at reasonable speeds over the entire surface of Crooked Lake. *See* M.C.L. § 324.80145 ("A person operating … a vessel upon the waters of this state shall operate it in a careful and prudent manner and at such a rate of speed so as not to endanger unreasonably the life or property of any person.").

Attempting to invoke the parade of horribles, Petitioners claim that the Sixth Circuit's decision "elevates state power over federal power in violation of the Supremacy Clause," Petition at 19, and "'places the public domain of the United States completely at the mercy of state legislation.'" Petition at 18 (quoting *Camfield*, 167 U.S. at 526). These hyperbolic and erroneous claims once again fail to recognize that it was Congress who elevated those state-law rights over the authority of the Forest Service by virtue of the saving clause in Section 5 of the MWA.

To be sure, under our federal system, state law may "be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ...." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Yet, a federal agency may only displace state law when "it is acting within the scope of its congressionally delegated authority." *Id.* To "determin[e] whether Congress intended the regulations of an administrative agency to displace state law" requires an examination of "the nature and scope of the authority granted by Congress to the agency." *Id.* This examination begins with the presumption that Congress does not intend for an agency to intrude on the traditional powers of the states, unless there is a "clear" congressional statement to that effect. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (When Congress legislates in areas which the states have traditionally occupied, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

It is axiomatic that the exercise of police powers and the regulation of littoral rights and other state-law created property rights are traditional functions of the states. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (noting the "States' traditional and primary power over land and water use"). There is nothing in the language of either the MWA or the Wilderness Act that suggests a "clear and manifest purpose" of Congress to allow the Forest Service to preempt state law or override the judgment of the Herrs' elected representatives regarding the exercise of littoral rights on Crooked Lake. *See Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) (rejecting interpretation of a federal law that would "preclude[] the execution of state laws by [a] state authority in a matter normally within state power"). Nor have Petitioners suggested how such a delegation of authority could be found in those Acts in light of the saving clause, which is an express limitation on the Forest Service's authority and evidences Congress's respect for both private property rights and state law.[36] *See Stupak-Thrall I*, 89 F.3d at 1288 (Boggs, J. dissenting) (The saving clause in "Section 5 of the MWA protects from invasion or disparagement (1) property rights (2) *officially sanctioned by state law* (3) in existence on

[36] Further congressional respect for state law is found in Section 8 of the MWA, 101 Stat. at 1277, and Sections 4(d)(7) and 5(a) of the Wilderness Act, 16 U.S.C. §§ 1133(d)(7) and 1134(a). Such respect is also found in 16 U.S.C. § 480, which is derived from both the Forest Service Organic Administration Act of 1897 ("Organic Act"), 16 U.S.C. § 473 *et seq*., and the 1911 Weeks Act, 16 U.S.C. § 511 *et seq*.

the date the MWA was enacted." (emphasis added)). Therefore, that Michigan and the relevant local government may be able to regulate the Herrs' littoral rights confers no authority on the Forest Service to apply its motorboat restrictions against the Herrs.

Finally, it is worth emphasizing that the littoral rights possessed by the Herrs are protected property rights. Although the State of Michigan and the relevant local government may regulate the exercise of littoral rights, that authority must still be lawfully exercised and is limited by the Takings Clause. *See Miller v. Fabius Twp. Bd., St. Joseph Cnty.*, 114 N.W.2d 205, 209 (Mich. 1962) (upholding local ordinance because it was within delegated authority); *Difronzo v. Vill. of Port Sanilac*, 419 N.W.2d 756, 758 (Mich. App. 1988) ("The law in Michigan is clear that government interference with littoral rights ... may be so egregious as to constitute a taking ...."); *see also Yates v. Milwaukee*, 77 U.S. 497, 503–04 (1870) (noting that littoral rights are "valuable" property rights that "cannot be arbitrarily or capriciously destroyed or impaired" and may only be taken "upon due compensation"); *see also* Pet. App. 16 (noting Michigan's regulation of littoral rights triggers risk of regulatory takings liability).

II. THIS COURT SHOULD DENY REVIEW BECAUSE THERE IS NO INTER-CIRCUIT CONFLICT.

The panel majority opinion does not conflict with any decisions from other circuits for substantially the same reasons as stated above. Petitioners' arguments under S. Ct. R. 10(a) are

futile because Petitioners fail to appreciate that this case involves a Congressionally-enacted saving clause and a protected state-law property right. Thus, Petitioners cannot demonstrate a legitimate inter-circuit conflict.

First, *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), is totally inapposite because it involved a direct challenge to Congress's exercise of its Property Clause power. *Id.* at 1244 (challenging constitutionality of the Boundary Water Canoe Area Wilderness Act of 1978). There is absolutely no dispute in this case over the scope of Congress's Property Clause power.

There is also no conflict with the other Eighth Circuit decisions cited by Petitioners. *United States v. Brown*, 552 F.2d 817, 819–23 (8th Cir. 1977), involved neither existing property rights nor a saving clause. *Free Enterprise Canoe Renters Ass'n of Missouri v. Watt*, 711 F.2d 852 (8th Cir. 1983), is completely irrelevant for the same reason. *Id.* at 856–57 (challenging regulation based on ambiguity, estoppel, and lack of public notice).

Second, Petitioners' reliance on *High Point, LLLP v. Nat'l Park Service*, 850 F.3d 1185 (11th Cir. 2017) is misplaced. *High Point* is easily distinguishable because there was no "valid existing right" in that case to trigger the saving clause. *Id.* at 1193–98; *see also* Pet. App. 13–14. That the Eleventh Circuit said the Forest Service may regulate activities on non-federal waters in order to protect wildlife and visitors, Petition at 25, is completely immaterial to the Sixth Circuit's decision in light of Michigan law and Section 5 of the MWA.

Thus, there can be no conflict with the Sixth Circuit's decision.

United States. v. Lindsey, 595 F.2d 5 (9th Cir. 1979) (per curiam), involved Forest Service regulation of conduct on non-federal land when necessary to protect adjacent federal property or navigable water, but there is no conflict because, once again, no property right was implicated and there was no saving clause. *Id.* at 6–7. Moreover, *Lindsey* was also a direct challenge to the scope of Congress's Property Clause power. *See id.*

Similarly, *United States v. Hells Canyon Guide Serv., Inc.*, 660 F.2d 735 (9th Cir. 1981), is completely inapplicable because it involved whether the Secretary of Agriculture properly exercised his power under the Property Clause when he instituted a permit system for commercial activities. *Id.* at 737. Once again, there was no saving clause or protected property right at issue. *See id.*

Third, the Sixth Circuit's opinion does not conflict with the Sixth Circuit's prior decision in *Burlison v. United States*, 533 F.3d 419 (6th Cir. 2008). In that case, the court suggested that the Property Clause gives Congress a police power, that this police power was implicitly delegated to the U.S. Fish & Wildlife Service ("FWS"), and that this implicitly delegated police power allowed the FWS to reasonably regulate a private easement. *Id.* at 432–33, 438–39; *but see Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (the states—not the federal government—possess a police power); *United States v. Morrison*, 529 U.S. 598, 618–19 (2000) ("the Founders denied the National Government" a "police

power"). Even if the Property Clause confers upon Congress a police power, and assuming such a power was implicitly delegated to the FWS, the authority delegated to the FWS in that case was not limited by the saving clause "[s]ubject to valid existing rights[.]" *See* 16 U.S.C. § 668dd; *see also Stupak-Thrall I*, 89 F.3d at 1291–94 (Boggs, J., dissenting) (the existence of the saving clause proves that the Forest Service lacks a police power). *Burlison* is further distinguishable because the FWS was seeking to regulate activities occurring *on federal lands*, i.e., the United States owned both the servient estate and the possessory interest in the easement. *Burlison*, 533 F.3d at 438–40. Here, the Forest Service's right to use the surface of Crooked Lake is shared with the other littoral owners. Pet. App. 13. *Burlison* is also distinguishable because the panel provided no indication of what may be a reasonable regulation because the FWS had not yet attempted to regulate the easement. 553 F.3d at 440. Any authority to reasonably regulate, however, would not allow the FWS to limit the use of the private easement by ninety-five percent, as the motorboat restrictions limit the Herrs' littoral rights.

For these reasons, there is no inter-circuit conflict for this Court to adjudicate and the Petition should be denied.

CONCLUSION

Petitioners desperately want to transform this case into something it is not. Congress explicitly made the Forest Service's power to regulate

motorboat use on Crooked Lake "subject to valid existing rights" when it enacted the MWA. Because the Herrs possess the protected littoral right to reasonably use motorboats on Crooked Lake under Michigan law, it was Congress itself that made the Forest Service's delegated power under the Property Clause subservient to Michigan law. In the end, the Sixth Circuit's decision presents no conflict with this Court's precedents, decisions from the Eighth, Ninth, or Eleventh Circuits, or the federal government's constitutional powers under the Property Clause.

Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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