No. 17-465

In The Supreme Court of the United States

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

Petitioner,

v.

U.S. FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

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

BRIEF OF WY-MT LAND STEWARDSHIP, LLC, WYOMING STOCK GROWERS ASSOCIATION, WYOMING ASSOCIATION OF CONSERVATION DISTRICTS, WYOMING FARM BUREAU FEDERATION, WYOMING WOOL GROWERS ASSOCIATION, AND UTAH FARM BUREAU FEDERATION, AS *AMICUS CURIAE* SUPPORTING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress has the authority under the Commerce Clause or the Necessary and Proper Clause to regulate intrastate noneconomic activity that does not have a substantial effect on interstate commerce and is not necessary to Congress' ability to regulate interstate commerce, by allowing the regulation of the "take" of an endangered species that is found only in one remote corner of one State and does not have any commercial use?

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Pursuant to Supreme Court Rule 37.2, Wyoming Stock Growers Association, Wyoming Association of Conservation Districts, Wyoming Farm Bureau Federation, Wyoming Wool Growers Association, the Utah Farm Bureau Federation, and WY-MT Land Stewardship, LLC respectfully submits this *amicus curiae* brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

WY-MT Land Stewardship, LLC is an entity formed by property owners in Wyoming and Montana with the continuing purpose of educating members and other interested public parties regarding

[1] Pursuant to Supreme Court Rule 37.6, *amicus* confirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties. *See* S.Ct.R. 37.3(a). Counsel of Record for all parties received notice at least 10 days prior to the due date of the intention to file this brief.

pipelines, condemnation, and landowners' rights, especially as it affects agricultural landowners. The LLC also desires to take whatever steps are necessary to protect local residents (including schools, farmsteads, and areas of concentrated populations), to address environmental damage, and to help protect and improve landowners' rights through legislation, public education, the courts, and any other forum that will further this purpose.

The Wyoming Wool Growers Association is one of the foremost agricultural organizations in the State of Wyoming. The mission of the organization is to assist and support its members in any appropriate activity that would benefit them in the business of sheep, lamb and wool, and goat or livestock production in the State of Wyoming and in the management and enhancement of Wyoming's natural resource base. In furtherance of this mission, the Wyoming Wool Growers Association promotes policies that are beneficial to members and their associated industries in areas of public lands, wildlife damage, import/export, water, animal care and husbandry, and other relevant issues. The Wyoming Wool Growers Association has also been an active partner with the State of Wyoming and its citizens in caring for, enhancing, and adding value to the renewable resources of the State. These continue to be the most important goals and objectives of the Association and its members and supporters.

The Utah Farm Bureau Federation is a non-profit corporation organized under the laws of the State of Utah. Formed in 1916 to promote, protect, and assert

the business, economic, social and educational interests of its members, the Utah Farm Bureau Federation is Utah's largest farming and ranching organization consisting of member families located in all twenty-nine counties. Many of the 28,000 member families are direct descendants and/or successors-in-interest of the pioneers who settled Utah. The organization provides a mechanism by which farmers and ranchers work together on a broad range of issues for the benefit of the industry, covering a range of topics for those who are directly or indirectly affected by agriculture.

The Wyoming Farm Bureau Federation is a general agriculture organization with more than 2,600 member families. Its members work together to develop agricultural resources, policy, programs, and services to enhance the rural lifestyle of Wyoming. The Wyoming Farm Bureau Federation is organized, controlled, and financed by members who pay annual dues. This organization provides a means by which farmers and ranchers work together for the benefit of the agriculture industry. Its policies cover a broad range of issues and include the interests of everyone in Wyoming who is directly or indirectly affected by agriculture.

The Wyoming Association of Conservation Districts provides leadership for the conservation of Wyoming's soil and water resources, promotes the control of soil erosion, promotes and protects the quality of Wyoming's waters, promotes wise use of Wyoming's water and all other natural resources, preserves and enhances wildlife habitat, protects the tax base, and promotes the health, safety and general welfare of the

citizens of the State of Wyoming through a responsible conservation ethic.

The mission of the Wyoming Stock Growers Association is to serve the livestock business and families of Wyoming by protecting their economic, legislative, regulatory, judicial, environmental, custom, and cultural interests. The Wyoming Stock Growers Association pursues its mission of advocacy primarily through effective lobbying at both state and national levels by volunteer leadership and experienced staff. The Association maintains a legal fund to enable it to initiate, defend, or support litigation on critical issues with the potential to have a major impact on its members' ranching enterprises.

Whether Congress has the authority to regulate intrastate endangered species that do not impact interstate commerce greatly affects each of these parties because many species that are similar to the Utah prairie dog, in the sense that they are intrastate species with no impact on interstate commerce, could potentially reside on the lands of many members represented by each of these parties. One example of an intrastate species in Wyoming is the Wyoming Toad, which only resides in a remote area in the southern boundary of Wyoming. Further, there exists a cloud over every landowner's head that a new listing of an intrastate species would affect the property of one of these organizations' members. Thus, discovering who has the actual authority to regulate such species and what kinds of regulations must be in place greatly affects the parties whose private lands are often the ones

burdened with regulation due to endangered species.

SUMMARY OF ARGUMENT

Amicus Curiae urges the grant of Petitioner's petition for writ of certiorari, and the reversal of the decision of the Tenth Circuit Court of Appeals. Certiorari should be granted in this present case to resolve a conflict between several Circuit Courts of Appeals and this Court's own precedent as to the extent of Congress' power under the Commerce Clause and the Necessary and Proper Clause. The Utah prairie dog resides entirely within the boundaries of the State of Utah and has no discernible effect on interstate commerce. Consequently, the federal government has no constitutional authority to regulate the taking of Utah prairie dogs on non-federal land under the Endangered Species Act.

This Court's review is urgent because, not only does it resolve an obvious split in the Circuit Courts as to the extent of Congress' authority under the Commerce Clause and the Necessary and Proper Clause, but by granting certiorari, the Court can preserve the delicate balance of federalism by protecting the states' traditional policing power from federal impingement when the activity is not interstate commerce, does not substantially affect interstate commerce, and is not necessary to Congress' ability to regulate interstate commerce. Further, a reversal of the Tenth Circuit's

decision will fulfill the intent of the Endangered Species Act.

ARGUMENT

I. BACKGROUND

The Endangered Species Act was passed in 1973. The Act requires that the U.S. Fish and Wildlife Service and the National Marine Fisheries Service protect species at risk of extinction. This is achieved by requiring the listing of species in danger of extinction. 16 U.S.C. § 1533. There is a "take" prohibition for those listed species. 16 U.S.C. § 1538. "Take" is defined to include harassing, harming, or capturing a member of the species. 16 U.S.C. § 1532(19). However, "take" is not limited to intentionally causing an adverse effect on an endangered species, thus ordinarily lawful activity with an incidental effect could also violate the Endangered Species Act. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great. Or.*, 515 U.S. 687, 703 (1995). Take is a federal crime punishable by fines of up to $100,000 and a year in prison. 16 U.S.C. § 1540(b)(1); *see* 18 U.S.C. § 3571(b)(5). In addition, anyone can bring a lawsuit to enjoin a take, whether caused by the federal government, a state, or a private person acting on private property. 16 U.S.C. § 1540(g).

Conversely, Congress chose not to forbid the take of threatened species (those "likely to become an endangered species within the foreseeable future"). 16 U.S.C. §§ 1532(20), 1538 (limiting the take prohibition

to "endangered species"). Instead, it authorized the agency to forbid take, by regulation, if "necessary and advisable" for the conservation of a particular threatened species. 16 U.S.C. § 1533(d).

The Utah prairie dog is a species of rodent that is listed as threatened under the Endangered Species Act. Unlike many other species listed by the Secretary of the Interior, the Utah prairie dog is purely an intrastate species. Further, approximately 70% of the more than 40,000 Utah prairie dogs reside on private property. *See* 77 Fed. Reg. 46158, 46169 Table 3 (Aug. 2, 2012). The species is not involved in interstate commerce. There is no market for the Utah prairie dog. Further, the prairie dog is not used in any economic activity, or to create any commodity.

The State of Utah adopted a management plan for the Utah prairie dog that continued to protect the prairie dog, but also reduced the burden on private property owners. The plan authorized Utah state biologists to remove prairie dogs from developed areas where the animal was a burden and relocate them onto government owned conservation areas. *See* Utah Admin. Code R657-70. The plan proved a success for two years, in that the two years of state management correspond with the two highest population counts for the species since the annual surveys began in 1976. Thus, despite the fact that the State of Utah successfully managed the Utah prairie dog and Congress' original intent in the Endangered Species Act that the states be the main mechanism for managing endangered species, the U.S. Fish and Wildlife Service insists on exclusively managing the Utah prairie dog.

In 2013, the People for the Ethical Treatment of Property Owners filed the present case in the U.S. District Court for the District of Utah. The district court granted summary judgment in favor of the Petitioner on two grounds. First, that the regulation prohibiting the taking of the Utah prairie dog exceeds Congress' power under the Commerce Clause. *People for the Ethical Treatment of Prop. Owners v. U.S. Fish and Wildlife Serv.*, 57 F.Supp.3d 1337, 1346 (D. Utah 2014). The court reasoned that the rule was noneconomic in nature because "the Service is regulating every activity, regardless of its nature, if it causes harm to a Utah prairie dog." *Id.* at 1344. The court further reasoned that the statute did not contain any jurisdictional limit that would explicitly connect it to interstate commerce. *Id.* Finally, the court reasoned that any link between the Utah prairie dog and a substantial effect on interstate commerce is too attenuated. *Id.* The district court acknowledged that the Utah prairie dog could possibly affect the environment; however, the district court held that affecting the environment is not the same as affecting commerce. *Id.* (stating "If Congress could use the Commerce Clause to regulate anything that *might* affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power under the Commerce Clause.").

The court also held that the regulation exceeded the Necessary and Proper Clause because the Utah prairie dog could be distinguished from the facts in *Gonzales v. Raich*, 545 U.S. 1 (2005). *Id.* at 1346. The court reasoned that *Raich* stood for the notion that the Necessary and Proper Clause allows for Congress to

regulate activities that substantially affect the national market for a commodity properly regulated by Congress. *Id.* The court put great emphasis on this point stating:

> The present case, on the other hand, differs significantly from *Raich* in one important way that makes any appeal to the Necessary and Proper Clause futile: takes of Utah prairie dogs on non-federal land – even to the point of extinction – would not substantially affect the national market for any commodity regulated by the ESA

Id.

The district court's decision was appealed to the Tenth Circuit Court of Appeals. The Tenth Circuit reversed the lower court's ruling. The court determined that although the species resided completely within the State of Utah and that it individually had no substantial connection to interstate commerce, the regulation within the Endangered Species Act was part of a comprehensive scheme that affects interstate commerce. *People for the Ethical Treatment of Prop. Owners v. U.S. Fish and Wildlife Serv.*, 852 F.3d 990, 1002 (10th Cir. 2017). The Tenth Circuit reasoned that *Raich* stood for the notion that Congress has the authority to regulate any activity under the Commerce Clause that it wishes to advance under that scheme. *Id.* Thus, since the prairie dog regulation fit within the comprehensive scheme it was within Congress' power to regulate the intrastate Utah prairie dog. *Id.*

II. CONGRESS DOES NOT HAVE THE AUTHORITY TO REGULATE ENDANGERED SPECIES THAT ARE ONLY FOUND IN A REMOTE CORNER OF A STATE AND DO NOT AFFECT INTERSTATE COMMERCE.

A. The scope of the Commerce Clause does not extend to intrastate species not involved in commerce.

The APA permits an aggrieved party to challenge and requires the Court to "hold unlawful and set aside" final agency actions that are "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(b); *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993). Traditionally, enforcement of the Endangered Species Act has been held to be within the power of Congress and delegable to the Departments of the Interior and Commerce through the Commerce Clause.

The Commerce Clause gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8. There are only three categories of activity Congress may regulate under its commerce power. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). First, Congress may regulate the use of the channels of interstate commerce. *Id.* Second, Congress may regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce, even though the threat may come only from intrastate activities. *Id.* Third, Congress may regulate those activities having a substantial relation to interstate commerce. *Id.* This Court has warned against

defining commerce in a way that "any activity can be looked upon as commercial," because such a definition would destroy any intended limits to federal power. *Id.* at 565. In *Morrison*, this Court further clarified that if Congress is not regulating the channels or instrumentalities of interstate commerce, or things moving in interstate commerce, its Commerce Clause power is limited to regulating economic activities that, in the aggregate, have a non-attenuated and substantial effect on interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 610 (2000).

The regulation of the Utah prairie dog by the United States Fish and Wildlife Service is not a valid exercise of power under the Commerce Clause because it neither satisfies the "substantial effect" standard articulated in *Morrison*, nor does it fall into any of the three categories articulated in *Lopez*. That is to say, the Utah prairie dog does not travel through channels of interstate commerce, it is not an instrumentality of interstate commerce, and it does not have a substantial relationship to interstate commerce.

The power of Congress to regulate intrastate activities is more limited than its power to regulate the instrumentalities and channels of interstate commerce. Whereas Congress may regulate any instrumentality or channel of interstate commerce, the Constitution permits Congress to regulate only those intrastate activities that have a substantial effect on interstate commerce. Further, federal regulation of intrastate activity must regulate activity that is economic in nature. *See Morrison*, 529 U.S. at 610. This

limitation recognizes that if the federal government is allowed to encroach upon noneconomic areas of state concern, federal regulations will be allowed to contravene all state legislation contrary to the Constitution's federalist dynamic. *See Lopez*, 514 U.S. at 595 (Thomas, J., concurring) (noting that the power to regulate "intrastate commerce" which substantially affects interstate commerce does not sanction federal regulation of intrastate "activities" unrelated to commerce).

In the present case, the taking of the Utah prairie dog is not economic in nature. The mere possibility of future substantial effects on interstate commerce is simply too hypothetical and attenuated from the regulation in question to meet the Constitutional requirements. Further, regulating wildlife on state and private lands is within an area of traditional state concern. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (stating that "protection of the wildlife of a state is peculiarly within the police power of the state, and the state has great latitude in determining what means are appropriate for its protection"). When there is a question as to whether Congress is trying to extend its commerce power beyond traditionally economic activities, the Court "at the least must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). Thus, the Court should accept the Petitioner's petition for certiorari to protect the states' right to exclusively regulate wildlife when it does not fall within the purview of the Commerce Clause.

B. There is a split in the courts of appeals as to how to apply *Raich*.

Raich dealt with California's "Compassionate Use Act," which authorized limited marijuana use for medicinal purposes. The Drug Enforcement Administration seized and destroyed the petitioner's cannabis plants under the authority of the Controlled Substances Act. The petitioner responded by bringing forth suit challenging the Controlled Substances Act to the extent that it regulated medical marijuana grown and used under the authority of the Compassionate Use Act. The petitioner's main argument was that Congress did not have the authority to regulate marijuana that was used purely in intrastate transactions and for personal use. The Court disagreed and held that the Commerce Clause granted Congress the authority to prohibit local cultivation and use of marijuana in compliance with California law. *Gonzales v. Raich*, 545 U.S. 1, 15 (2005). The Court reasoned that noncommercial possession of home-grown marijuana for personal medical use, as authorized by state law, could rationally be considered an inseparable part of the broader, and undeniably commercial, national market for marijuana. *Id.* at 26. Because it would be difficult to distinguish home-grown marijuana consumed for medical reasons from other marijuana, and the constant possibility that the medical marijuana could be sold into the illegal channels that Congress was trying to regulate, the Court concluded that Congress could rationally believe that medical marijuana, if exempted from the Act,

would significantly increase the supply of marijuana traveling in interstate commerce. *Id.* at 29-32.

The lower court's decision in the present case further perpetuated a split in the circuits on how to interpret and apply *Raich*. Many circuits have interpreted *Raich* as limited to regulations necessary to Congress' ability to regulate the market for a commodity. Other circuits have interpreted *Raich* broadly to allow any regulation related to any goal Congress pursues under a comprehensive scheme, essentially creating no limit to Congress' Commerce Clause power.

In the present case, the Tenth Circuit ruled against its own precedent in *Patton*. The court originally curtailed the scope of *Raich* to allow Congress only to "regulate possession [of a commodity] as a necessary and proper means of controlling its supply or demand." *United States v. Patton*, 451 F.3d 615, 626 (10th Cir. 2006). In *Patton*, the Tenth Circuit ruled that possessing body armor was not a commercial activity in nature, thus the only way that Congress would have the power to regulate the possession of body armor would be for it to show that possession of body armor would create "'substantial' and not 'attenuated' effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce." *Id*. at 625. Instead of looking to this precedent and analyzing whether the take of the prairie dog was commercial in nature and then determining whether the taking of the Utah prairie dog would create substantial effects on other states, the national economy, or Congress' ability to regulate interstate commerce, the Tenth Circuit

looked to whether prohibition of a take of an intrastate species broadly fits within the comprehensive scheme of the Endangered Species Act. *People for the Ethical Treatment of Prop. Owners*, 852 F.3d at 1005.

Similar conflicts have developed in the First Circuit, which held that *Raich* is limited to regulations necessary to Congress' ability to regulate the market for a commodity, then in a separate ruling states that *Raich* extends to all regulations that fit within a comprehensive scheme in which Congress has the authority to implement. *See United States v. Rene E.*, 583 F.3d 8, 18 (1st Cir. 2009) (stating "where a regulatory scheme is designed to 'control the supply and demand' of a commodity in the interstate market, a component regulation targeting intrastate conduct will be upheld if it is 'an essential part of the larger regulatory scheme'"); *but see also United States v. Nascimento*, 491 F.3d 25, 41 (1st Cir. 2007) (stating "This formulation is markedly different from the one offered by Justice Scalia, who argued unsuccessfully that Congress may regulate noneconomic intrastate activities 'only where the failure to do so could . . . undercut its regulation of interstate commerce.' While Justice Scalia attributes this view to the majority, we read the majority opinion – especially its disclaimer of 'scientific exactitude' – as declining to require so rigid a taxonomy") (citations omitted).

The Eleventh Circuit has similar conflicts. It interpreted *Raich* broadly to uphold the Endangered Species Act. *See Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007).

However, the Eleventh Circuit also described the test from *Raich* as "whether a rational basis did exist for Congress to conclude that intrastate conduct could substantially affect its ability to regulate interstate commerce." *United States v. Maxwell*, 446 F.3d 1210, 1216 (11th Cir. 2006).

If the Utah prairie dog was located in the Sixth Circuit, this litigation would have likely had a different outcome. In the Sixth Circuit the court has consistently looked at *Raich* as limited to those activities affecting interstate commerce. *See United States v. Bowers*, 594 F.3d 522, 528 (6th Cir. 2010); *see also United States v. Rose*, 522 F.3d 710, 717 (6th Cir. 2008) ("In *Raich* . . . the Court held that an activity involving a commodity for which there is an interstate market has a substantial relation to interstate commerce if Congress had a rational basis to conclude that 'failure to regulate that class of activity would undercut the regulation of the interstate market in the commodity.' ").

Thus, with the split in the circuits, that is further perpetuated by the inconsistencies within the circuits themselves, there is a strong showing of confusion surrounding the scope of *Raich*. The Court should accept the Petitioner's request for certiorari to clarify the scope of *Raich* and create consistency between the circuits and within the circuits.

C. *Raich* does not extend Congress' power through the Necessary and Proper Clause to regulate an intrastate species that does not affect commerce.

Members of this Court have earlier expressed that "[t]he Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 653 (2012) (Scalia, J., dissenting). The proper focus of the "substantial effect" test is measured by the activity being regulated. *See Gonzales v. Raich*, 545 U.S. 1, 23 (2005). Thus, in the present case, the question presented is whether the taking of the Utah prairie dog itself has a substantial effect on interstate commerce; not whether the regulation preventing the take has such an effect.

The lower court's ruling is based on the decision that a regulation may be upheld when it is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Raich*, 545 U.S. at 24-25. However, the Tenth Circuit erred in its ruling because it aggregated the connection too liberally and essentially converted the Commerce Clause into an unlimited federal power. *See Lopez*, 514 U.S. at 595 (Thomas, J., concurring).

In *Raich*, the issue was whether Congress was authorized to regulate the purely local growth and consumption of marijuana. Because it was clear that a

national market for marijuana already existed, the Court found that Congress had the power to regulate activities that have a substantial effect on that market. *See Raich*, 545 U.S. at 17-22. Such activities obviously include growing marijuana, which leads to a greater national supply of the product, as well as consuming it, which affects the national demand for the product. Congress was consequently authorized to regulate any growth or consumption of marijuana in the United States, including any such activity that occurs exclusively within one state. *See id.*

This case differs markedly from *Raich* because the Utah prairie dog, unlike marijuana, is not an essential part of a larger regulation of economic activity. The district court acknowledged this, stating: "takes of Utah prairie dogs on non-federal land – even to the point of extinction – would not substantially affect the national market for any commodity regulated by the ESA." *People for the Ethical Treatment of Prop. Owners v. U.S. Fish and Wildlife Serv.*, 57 F.Supp.3d 1337, 1346 (D. Utah 2014). Therefore, unlike in *Raich* where a national market was affected by the local consumption and use of marijuana, there is no national market that is affected by any taking of the Utah prairie dog. Thus, it follows that congressional protection of the Utah prairie dog is not necessary to the ESA's economic scheme.

III. THE TENTH CIRCUIT'S RULING HARMS THE PURPOSE OF THE ENDANGERED SPECIES ACT.

A. The Tenth Circuit's ruling endangers listed species rather than protects them.

According to the Fish and Wildlife Service, approximately half of all listed species have at least eighty percent of their habitat on private lands. U.S. Fish & Wildlife Service, *Our Endangered Species Program and How it Works with Landowners* (July 2009) https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf. Because these species are so prevalent on private lands, "landowners' actions will ultimately determine the fate of many species." *See* Michael Bean, *Endangered Species, Endangered Act?*, ENVIRONMENT, vol.41, no.1 (Jan. 1999). All agree that the cooperation and good will of private landowners is essential to the recovery of threatened and endangered species. As expressed by renowned conservationist Aldo Leopold, "[c]onservation will ultimately boil down to rewarding the private landowner who conserves the public interest." Aldo Leopold, *Conservation Economics*, J. OF FORESTRY (May 1, 1934). Despite the critical importance of private landowners to achieving the ESA's goal of species preservation, landowners are not rewarded. Quite to the contrary, landowners are frequently left to foot the bill for conserving the public interest. Moreover, the heavy-handed regulatory approach of the government results in numerous unintended negative consequences and fosters an anti-conservation sentiment among many landowners.

Instances are not wanting of private landowners engaging in preemptive habitat destruction, forest clearing, and the aptly named "shoot, shovel and shut-up" in an effort to avoid the oppressive strictures of the ESA. The Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior summarized the problem well:

> There is increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems. The problems they're trying to avoid are the problems stemming from the Act's prohibition against people taking endangered species by adverse modification of habitat. And they're trying to avoid those problems by avoiding having endangered species on their property. Now it's important to recognize that all of these actions that landowners are either taking or threatening to take are not the result of malice toward the environment. Rather, they're fairly rational decisions motivated by a desire to avoid potentially significant economic constraints.

Michael Bean, *Ecosystem Approaches to Fish and Wildlife Conservation: Rediscovering the Land Ethic*, U.S. Fish and Wildlife Service Office of Training and Education Seminar Series (Nov. 3, 1994). Stated otherwise, "[e]ndangered species are perceived by many landowners as a financial liability, resulting in anti-conservation incentives because maintaining high-quality habitats that harbor or attract endangered species

would represent a gamble against loss of future economic opportunities." Martin B. Main, Fritz M. Roka, and Reed F. Noss, *Evaluating Costs of Conservation*, CONSERVATION BIOLOGY, vol.13, no.6 (1999), pp. 1263,1265.

Federal regulators have long been aware of the unjust burden the ESA consigns to landowners whose properties house endangered or threatened species. Twenty years ago, then-Secretary of the Interior Bruce Babbitt noted the "train wreck" between property interests and the ESA. *See* Bruce Babbitt, Secretary of the Interior, Address at the National Press Club Luncheon (July 18, 1997). This "train wreck" is the result of "landowners fearing a decline in the value of their properties because the ESA restricts future land use options where threatened or endangered species are found but makes no provision for compensation." Martin B. Main, Fritz M. Roka, and Reed F. Noss, *Evaluating Costs of Conservation*, CONSERVATION BIOLOGY, vol.13, No.6 (1999), p. 1265. Despite these well-known defects in the ESA, federal regulators have done nothing to improve the plight of landowners burdened by the presence of listed species on their properties. Commonly, these innocent landowners, whose assistance is essential to meeting the ESA's objectives, are treated as criminals: "[a] forest landowner harvesting timber, a farmer plowing new ground, or a developer clearing land for a shopping center stand in the same position as a poacher taking aim at a whooping crane." Michael Bean, *Endangered*

Species, Endangered Act?, ENVIRONMENT, vol.41, no.1 (Jan. 1999).

The public interest does not lie in saddling private landowners with the entire expense of species preservation. The rational resentment many landowners feel toward the Endangered Species Act is warranted. Their sacrifices for species preservation are both immeasurable and unrewarded.

Conversely, state control of the Utah prairie dog has proven a success to both protect and increase the population of the Utah prairie dog, and also help lessen the burden of private landowners affected by the Utah prairie dog. After the district court gave management authority to the state, the Utah Division of Wildlife Resources managed the Utah prairie dog for two years. Under the management plan, state biologists moved prairie dogs from developed areas, where they caused problems, and relocated them to government-owned conservation areas. *See* Utah Admin. Code R657-70 (Utah prairie dog management plan). The Utah Division of Wildlife Resources moved an average of 2,300 prairie dogs to public land to provide relief to property owners along with relief to local governments who also were overburdened by the rodent. Utah Division of Wildlife Resources, *DWR Press Release: Utah Prairie Dogs Prosper Under State Management*, ETV NEWS (April 4, 2017) http://etv10news.com/utah-prairie-dogs-prosper-under-state-management/. The two years the state managed the Utah prairie dog population without federal interference also saw the largest amount of

prairie dogs since the population began being recorded in 1976. *See id.*

This Court should accept certiorari because the Utah prairie dog take prohibition, promulgated by regulators some 2,000 miles from its place of impact, and who are wholly unconcerned with and unscathed by its deleterious effects on landowners, is bad public policy and will not further the mission of the Endangered Species Act. This becomes especially clear when viewing the great success the State of Utah had in managing the Utah prairie dog for two years. Moreover, the Tenth Circuit's decision allowing virtually unfettered federal control of local and State land use decisions will only serve to exacerbate the problem. Thus, this issue is of the scope for this Court to accept certiorari because it implicates the entire scheme of the Endangered Species Act, as well as federalism for the Nation and merits the Court's careful consideration.

B. The Endangered Species Act is intended to encourage state management.

The Act originally contemplated state management of endangered and threatened species within each state with federal oversight. *Endangered Species: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93rd Cong. 211 (1973) [hereinafter 1973 House ESA Hearing] (statement of Nathaniel Reed, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior) (stating

that the intent is that "each of the States will pass a program which will be acceptable to us, and our job will be looking over their shoulder. It will be a very friendly look over the shoulder."). Despite the fact of budget shortcomings, ESA statutory deadlines, and citizen-suit litigation, which clearly shows that the federal government is ill-equipped to provide suitable resources to ensure the protection and recovery of wholly intrastate endangered species, the Endangered Species Act has become a tool to take away state police power over its resources and put that power under the control of the federal government. *See* Western Governors' Association, Policy Resolution 2016-08, *Species Conservation and the Endangered Species Act* 1-2 (2016) https://westgov.org/images/2016-08_Species_Conservation_and_ESA.pdf. By allowing further control to be given to Congress under the Commerce Clause, the intent of the Endangered Species Act to encourage state participation is further frustrated.

CONCLUSION

The Court should accept the Petitioner's writ of certiorari because in doing so the Court will be able to resolve a conflict not only between the Circuits as to how to interpret *Raich*, but it will also resolve confusion within the individual circuits themselves who have inconsistently applied *Raich*. Further, in accepting the Petitioner's petition, the Court will be able to answer as to how great the scope of the Commerce Clause is. The decision presented by the Tenth Circuit

puts forth the notion that Congress has unlimited regulatory power under the Commerce Clause. This decision comes despite this Court's repeated warnings that the Commerce Clause must have limits to preserve federalism. By accepting the Petitioner's petition and overturning the decision by the Tenth Circuit, this Court can finally set forth the limits of Congress' power under the Commerce Clause. Finally, by accepting the Petitioner's petition for writ of certiorari, the Court can finally bring back the original intent of the Endangered Species Act, which is to protect listed animals through state and landowner cooperation. *Amicus Curiae* urges the Supreme Court to grant Petitioner's petition for writ of certiorari, and to reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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