No. ________

In The
Supreme Court of the United States

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Under the Endangered Species Act, the federal government issued a regulation prohibiting "take" of Utah prairie dogs, a species that is not involved in commerce and only found in Utah. "Take" is defined to include essentially any act that affects a single member of the species. Among other things, the regulation forbids state biologists from relocating Utah prairie dogs from neighborhoods, playgrounds, and airports to public conservation areas.

The district court declared the regulation unconstitutional because take of the Utah prairie dog is intrastate, noneconomic activity with no substantial effect on interstate commerce, and the regulation is unnecessary to Congress' ability to regulate the interstate market for any commodity. Without disagreeing with these conclusions, the Tenth Circuit reversed. It construed *Gonzales v. Raich*, in conflict with several other circuits, to authorize federal regulation of any activity for any purpose under a larger, comprehensive scheme, regardless of whether the regulation is necessary to Congress' ability to regulate commerce.

The question presented is:

Do the Commerce Clause and Necessary and Proper Clause authorize Congress 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?

Parties to the Proceeding

Petitioner, who was Plaintiff-Appellee below, is People for the Ethical Treatment of Property Owners, a nonprofit membership organization representing private property owners and others subject to overly burdensome regulations. It is not a publicly traded corporation, issues no stock, and has no parent corporation. No publicly held corporation holds more than a 10% ownership in the organization.

Respondents, who were Defendants-Appellants below, are: the United States Fish and Wildlife Service; the Director of the United States Fish and Wildlife Service;[1] Regional Director of the United States Fish and Wildlife Service's Mountain-Prairie Region, Noreen Walsh; the Department of Interior; and, Secretary of Interior, Ryan Zinke. Friends of Animals intervened as a defendant in the district court and was also an appellant in the Tenth Circuit.

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[1] The former Director of the Fish and Wildlife Service, who was named as a defendant in his official capacity, has since left that position and it has not yet been filled. The Principal Deputy Director, currently the highest official in the Service, is Greg Sheehan.

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PETITION FOR A WRIT OF CERTIORARI

This case presents vital and persistent constitutional questions about Congress' power to regulate intrastate, noneconomic activity under the Commerce Clause and Necessary and Proper Clause. The decision below extends Congress' power beyond the prior holdings of this Court and conflicts with how several other circuits have interpreted *Gonzales v. Raich*, 545 U.S. 1 (2005). The decision also recognizes no logical stopping point to federal power and undermines federalism by allowing untrammeled federal intrusion into areas of traditional state authority.

Under the Endangered Species Act, the United States Fish and Wildlife Service adopted a regulation prohibiting the "take" of Utah prairie dogs on private property. The district court struck down the regulation as exceeding the Commerce Clause because: it regulates intrastate, noneconomic activity with no substantial effect on interstate commerce; and the species resides in only one state and has no significant connection to interstate commerce. The district court also held that it exceeds the Necessary and Proper Clause because this power is not necessary to Congress' ability to regulate the market for any commodity. Without disagreeing with any of these conclusions, the Tenth Circuit reversed. It construed *Raich* to authorize federal regulation of any activity for any purpose, if included within a broader, comprehensive statute.

The Court should grant review to clarify what, if any, limits apply to Congress' power under *Raich*, and resolve the conflict among the circuits on how to interpret that decision. Because the Utah prairie dog

regulation is not necessary to Congress' ability to regulate the interstate market for any commodity, this case is an ideal vehicle to decide whether the Necessary and Proper Clause limits Congress' power to regulate intrastate, noneconomic activity.

This Court's review is urgent because, contrary to the repeated admonishments of this Court, the Tenth Circuit's decision recognizes no limit on Congress' power. The Tenth Circuit's broad interpretation of federal power also diminishes the role of the states by inviting federal intrusion into areas of traditional state authority. These federalism concerns are not merely theoretical; the Tenth Circuit's decision directly upended Utah's efforts to protect the species by moving prairie dogs from residential and developed areas to government-owned conservation lands.

This Court should grant certiorari to preserve the delicate balance between state and federal authority established by the Constitution and settle whether the Commerce Clause and Necessary and Proper Clause authorize Congress to regulate activity that is not interstate commerce, does not substantially affect interstate commerce, and is not necessary to Congress' ability to regulate interstate commerce.

OPINIONS BELOW

The Tenth Circuit's opinion is available at 852 F.3d 990 (Mar. 29, 2017) and is reproduced in the Appendix at A-1. The order denying rehearing *en banc* is reproduced in the Appendix at D-1.

The district court's opinion is reported at 57 F. Supp. 3d 1337 (Nov. 5, 2014) and is reproduced in the Appendix at B-1.

JURISDICTION

On November 5, 2014, the district court granted summary judgment to People for the Ethical Treatment of Property Owners, ruling that the Commerce Clause and Necessary and Proper Clause do not authorize the federal regulation. App. B-1, C-1. Federal defendants and defendant-intervenor appealed the decision to the Tenth Circuit. On March 29, 2017, the Tenth Circuit reversed the district court's decision. App. A-1. People for the Ethical Treatment of Property Owners filed a petition for rehearing *en banc*, which was denied on August 8, 2017. App. D-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Article I, Section 8, clause 3, of the United States Constitution provides:

> [The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article I, Section 8, clause 18, of the United States Constitution provides:

> [The Congress shall have Power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Endangered Species Act, 16 U.S.C. § 1532(19), provides:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

The Utah prairie dog regulation is reproduced in the Appendix at E-96 to E-102.

STATEMENT OF THE CASE

Statutory Background

The Endangered Species Act

The Endangered Species Act charges the U.S. Fish and Wildlife Service with protecting species at risk of extinction. It requires the listing of species "in danger of extinction" as endangered and forbids their take. 16 U.S.C. §§ 1532(6), 1533(a), (b), 1538. "Take" is defined to include, among many other things, harassing, harming, or capturing a member of the species. 16 U.S.C. § 1532(19).

The Service interprets "take" beyond its ordinary meaning. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great. Or.*, 515 U.S. 687 (1995). Take is not limited to intentionally causing an adverse effect on an endangered species; any ordinary, lawful activity with an incidental effect on the species is also forbidden. *See Sweet Home*, 515 U.S. at 703. Thus, modifying land used by a protected species or accidentally getting too close to one can violate the prohibition. *Sweet Home*, 515 U.S. at 703; *see, e.g.,* National Marine Fisheries Serv., *North Atlantic Right Whale Protection*, 62 Fed. Reg. 6729 (Feb. 13, 1997) (interpreting "harassing" to include getting within

500 yards of a right whale). 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 take, whether caused by the federal government, a state, or a private person acting on private property. 16 U.S.C. § 1540(g).

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); S. Rep. No. 93-307, at 8 (1973) (The Secretary "may make any or all of the acts and conduct defined as 'prohibited acts' . . . as to 'endangered species' also prohibited acts as to the particular threatened species.").[1]

Factual Background

The Utah prairie dog

The Utah prairie dog is a species of rodent and one of five types of prairie dogs. *See* App. E-8. Utah prairie dogs live in colonies, which construct tunnel and burrow systems for shelter and for hibernation during 4 to 6 months of the year. App. E-8 to E-9, E-12. Native to semiarid shrub-steppe and grassland habitats, they are adapting to life in suburban, residential areas and agricultural lands, which provide abundant food and

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[1] *Reprinted in* Cong. Research Serv., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980*, at 307 (1982).

protection from predators. *See* App. E-12 to E-14. Approximately 70% of the more than 40,000 Utah prairie dogs reside on private property. *See* 77 Fed. Reg. 46,158, 46,169 Table 3 (Aug. 2, 2012); App. E-42.

Utah prairie dogs are not involved in commerce. There is no market for them. App. B-12 to B-17. And they are not used in any economic activity or to create any commodity. *Id.* The only connections between the species and interstate commerce defendants identify are that the federal government promotes the species' presence on federal lands to tourists[2] and a scientist has crossed state lines to study the species. App. B-13 to B-14.

The Utah prairie dog has been listed under the Endangered Species Act since 1973. App. B-2. In 1984, the species' status was changed from endangered to threatened, when the population consisted of approximately 24,000 animals. *See* 77 Fed. Reg. at 46,169 Table 3. Over the next thirty years, that population nearly doubled, to more than 40,000 in 2010. *Id.*

Despite the rebounding population, the Service adopted a regulation in 2012 to further restrict take. 50 C.F.R. § 17.40(g); App. E-96. The regulation forbids the take of any Utah prairie dog without a federal permit, with few, narrow exceptions. App. E-96 to E-102. Compared to earlier regulations, the current regulation reduces the number of takes that can be

[2] Congress has broad authority to regulate federal lands under the Property Clause. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). People for the Ethical Treatment of Property Owners have not challenged Congress' ability to regulate take on federal land.

permitted and restricts permits to only certain types of property, whereas all private property had previously been eligible for permits. 77 Fed. Reg. at 46,158 Table 1.

After the district court struck down the regulation, Utah adopted a management plan to provide for the long-term protection of the species and reduce burdens on private property owners. Under the management plan, state biologists moved prairie dogs from developed areas, where they are causing problems, and relocated them to government-owned conservation areas. *See* Utah Admin. Code R657-70 (Utah prairie dog management plan); *see also* Utah S.B. 230, Gen. Sess. (2003) (appropriating $400,000 to fund Utah prairie dog conservation under the plan). The two years of state management corresponded with the two highest population counts for the species since annual surveys began in 1976. *See* Utah Division of Wildlife Resources, *Utah prairie dogs prosper under state management*.[3] The Tenth Circuit's decision, restoring the federal regulation, forbids further implementation of the management plan because a state biologist would be guilty of "take" if she caught a prairie dog to move it, even for conservation purposes. 50 C.F.R. § 17.40(g); *see* 16 U.S.C. § 1532(19).

People for the Ethical Treatment of Property Owners

People for the Ethical Treatment of Property Owners is a nonprofit organization consisting of more than 200 residents of southwestern Utah. App. L-2. The organization advocates state protections for

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[3] https://goo.gl/hF9yUq (last visited Sept. 19, 2017).

prairie dogs that are more sensitive to the burdens imposed on local communities and private property owners, like the management plan Utah implemented from 2015 to 2017. App. L-3.

The federal regulation prevents the organization's members from engaging in activities that are taken for granted in other communities. Some own lots in residential subdivisions where they planned to build homes, but prairie dogs moved in first and the regulation forbids permits for their property. App. I-2. Others purchased land as an investment to provide retirement income, only to have the regulation forbid any use that could provide a return on that investment. App. J-2. The regulation has frustrated the local government of Cedar City's efforts to protect public facilities from the disruptive, tunneling rodent. App. H-2. For safety reasons, the city has had to fence off overrun, pockmarked parks from local children. *Id.* The city operates a municipal airport, where Utah prairie dogs tunneling near the runway and taxiway presented a substantial hazard. App. H-3. Prairie dogs have also occupied the local cemetery operated by Cedar City, where they interrupted funerals, ate flowers and other remembrances left by mourners, and disturbed the grounds. App. H-3 to H-4.[4]

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[4] After this lawsuit was filed, the federal government authorized the city to construct a fence around the property, at great expense to the city and state. App. F-2.

Proceedings Below

The district court strikes down the regulation as exceeding the Commerce Clause and Necessary and Proper Clause

In 2013, People for the Ethical Treatment of Property Owners filed this lawsuit challenging the constitutionality of the Utah prairie dog regulation. App. B-4. The district court granted summary judgment to the organization, holding that the regulation exceeds the Commerce Clause power because take is intrastate, noneconomic activity, the Utah prairie dog is found in only one state, and the species has no significant connection to interstate commerce. App. B-9 to B-18.[5] Acknowledging that the Utah prairie dog may affect the environment, the district court held that is not the same as affecting commerce: "If Congress could use the Commerce Clause to regulate anything that *might* affect the ecosystem . . . there would be no logical stopping point to congressional power under the Commerce Clause." App. B-13.

The district court also held that the regulation exceeds the Necessary and Proper Clause because "the rule in question is not necessary to the statute's economic scheme." App. B-15.

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[5] In the district court, Federal Defendants challenged People for the Ethical Treatment of Property Owners' standing, citing state regulations as an obstacle to redressability. Intervenor also challenged standing, citing a federal regulation as an obstacle to redressability. The district court rejected both arguments. App. B-7 to B-9. Federal Defendants abandoned their standing objection on appeal, but intervenor persisted. The Tenth Circuit rejected intervenor's standing objection too. App. A-12 to A-17.

> "The present case . . . 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."

App. B-16.

The court also rejected the government's argument that all species must be lumped together to perform the Commerce Clause analysis. App. B-17 ("Defendants essentially ask the court to find that takes of Utah prairie dogs substantially affect interstate commerce solely because the prairie dog has been grouped with a number of other species[.]"). Such bootstrapping would allow Congress to expand its power without limit, allowing analysis "far too attenuated to suggest that regulating takes of Utah prairie dogs is a necessary part of the ESA's economic scheme." *Id.*

The Tenth Circuit reverses

Without disagreeing with the district court's conclusions that (1) take is intrastate, noneconomic activity, (2) the species is found in only one state and has no substantial connection to interstate commerce, and (3) the regulation is unnecessary to Congress' ability to regulate interstate commerce, the Tenth Circuit reversed. It determined that the Endangered Species Act is a comprehensive scheme that affects interstate commerce, citing other regulations that have created "an illegal wildlife trade that generates

$5-8 billion annually[,]" and "'the potential for unknown commercial uses'" for some species. App. A-32 to A-33 (quoting H.R. Rep. No. 93-412).[6]

Relying on *Gonzales v. Raich*, 545 U.S. 1, the court upheld the regulation as part of that comprehensive scheme, reasoning that, if Congress could not regulate every activity affecting any species, that limit on its authority would "severely undercut the ESA's conservation purposes." App. A-33. The court expressly rejected the argument that, under *Raich*, "Congress may only reach intrastate activity which, if beyond [Congress's] grasp, would frustrate a comprehensive regulatory scheme's ability to function *as a regulation of commerce*." App. A-30, *see* App. A-33 n.11. Instead, it held that a regulation contained within a comprehensive scheme is constitutional if it advances any end Congress wishes to advance under that scheme. App. A-33 (upholding the regulation because it furthers Congress' "conservation purposes").

In rejecting the district court's focus on the specific regulation of Utah prairie dog take, the Tenth Circuit stressed that "[a]pproximately sixty-eight percent of species that the ESA protects exist purely intrastate[.]" App. A-33. Because any constitutional limitation on Congress' ability to regulate intrastate, noneconomic activity affecting any one species might call into question its ability to regulate noneconomic activity for others, the court reasoned, it should not scrutinize the ties to commerce for any of them. App. A-33 to A-34.

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[6] *Reprinted in* Cong. Research Serv., *supra* n.2, at 144-45.

People for the Ethical Treatment of Property Owners sought rehearing *en banc*, which was denied on August 8, 2017. App. D-1.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision authorizes a dramatic expansion of federal authority that destroys the "healthy balance of power between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). This Court should grant certiorari to restore that balance and resolve whether the Commerce Clause and Necessary and Proper Clause authorize federal regulation of activity that is not interstate commerce, does not substantially affect interstate commerce, and is unnecessary to Congress' ability to regulate interstate commerce.

The case presents an important federal question, which has divided the circuit courts and that has not been, but should be, settled by this Court. Since *Raich* upheld federal regulation of local marijuana production within a comprehensive scheme to regulate the market for that commodity, the circuit courts are split on how to interpret that decision. *Compare United States v. Anderson*, 771 F.3d 1064, 1068-70 (8th Cir. 2014), *with* App. A-33 to A-34. Several circuits interpret *Raich*, consistent with the Necessary and Proper Clause, as limited to those regulations necessary to Congress' ability to regulate the interstate market for a commodity. *See, e.g., Anderson*, 771 F.3d at 1068-70.

Others, like the decision below, interpret *Raich* to authorize any regulations that advance any ends Congress might wish to pursue through a comprehensive scheme. *See, e.g., See San Luis &*

Delta-Mendota Water Auth., 638 F.3d 1163, 1177 (9th Cir. 2011). Several members of this Court have suggested that *Raich* cannot be stretched so far. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561 (2012); *id.* at 653 (Scalia, J., dissenting). But the question has never been settled by the Court. Without clarification, the uncertain limits of *Raich* will continue to pose difficulties for the circuit courts and make possible decisions like the one below, embracing exceedingly broad theories of federal power, far beyond any this Court has ever accepted.

This is an opportune case to decide this question because it involves regulation of intrastate, noneconomic activity affecting a species that is not the subject of commerce, and withholding this power would not frustrate Congress' ability to regulate the market for any commodity. *See* App. B-16. Such regulations are so far removed from commerce that even the circuits that have upheld them have adopted conflicting rationales to do so. *Compare Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003), *with GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003); *see also Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting) (acknowledging the circuit split).

The question presented is not merely academic; it has immediate and significant implications for federalism. Regulating wildlife is an area of traditional state concern. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896). Yet the Utah prairie dog regulation forbids Utah from managing the species. Under the regulation, state biologists would commit a federal crime if they continued implementing the state's plan

to move prairie dogs from residential areas to government-owned conservation areas. 50 C.F.R. § 17.40(g).

The Tenth Circuit identifies no limit to its interpretation of federal power. For good reason: there is none. To restore the balance between the federal government and the states, resolve a split among the circuits, and to settle an important constitutional question, this Court should grant the petition and reverse the Tenth Circuit's decision.

I

This Court Should Grant Review to Decide Whether the Necessary and Proper Clause Limits Congress' Power Under *Raich*

This Court should grant review to establish "that the 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." *NFIB*, 567 U.S. at 653 (Scalia, J., dissenting). Since this Court's decision in *Raich*, a circuit split has developed over whether regulations adopted under a comprehensive scheme must be necessary to Congress' ability to regulate commerce or whether they need only further any purpose Congress might wish to pursue. Several members of this Court have suggested that Congress' power cannot be interpreted so broadly, but the Court has not yet settled the conflict. It should grant review to answer this important question of federal law.

A. The courts of appeals are divided over how to interpret *Raich*

Several circuits have interpreted *Raich*, consistent with the Necessary and Proper Clause,[7] as limited to regulations necessary to Congress' ability to regulate the market for a commodity. Others have rejected any such limit, interpreting *Raich* to allow any regulation related to any goal Congress pursues under a comprehensive scheme.

In the former category, the First Circuit has interpreted *Raich* as applying to regulations necessary to Congress' ability to regulate the interstate market for a commodity. "[W]here 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[.]'" *United States v. Rene E.*, 583 F.3d 8, 18 (1st Cir. 2009). It upheld a federal firearms regulation because it suppresses demand and is "therefore an essential part of regulating the national market in firearms." *Id.*

The Fourth Circuit has interpreted *Raich* similarly. It upheld a federal firearms regulation because firearms are "a fungible commodity for which there is an established interstate market" and "Congress has a rational basis to believe that leaving intrastate firearm markets unregulated would affect

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[7] The Second Circuit has adopted the reasoning of Justice Scalia's concurrence, interpreting *Raich* as a Necessary and Proper Clause case. *See United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010). So too has the D.C. Circuit. *United States v. Sullivan*, 451 F.3d 884, 888-90 (D.C. Cir. 2006).

the interstate market[.]" *United States v. Hosford*, 843 F.3d 161, 171-72 (4th Cir. 2016); *see also United States v. Forrest*, 429 F.3d 73, 78 (4th Cir. 2005) (upholding federal regulation of child pornography because it "'directly' regulated economic activity in a 'fungible commodity'" and "Congress had a rational basis for concluding that prohibition of mere local possession of the commodity was essential to the regulation of 'an established, albeit illegal, interstate market'").

The Sixth Circuit is in accord, describing "[t]he question under *Raich*" as "whether Congress had a rational basis for concluding that leaving [some activity] outside federal control would affect price and market conditions of the larger interstate market that Congress was authorized to regulate." *United States v. Bowers*, 594 F.3d 522, 528 (6th Cir. 2010). "*Raich* indicates that Congress has the ability to regulate wholly intrastate manufacture and possession of [a commodity] . . . that it rationally believes, if left unregulated in the aggregate, could work to undermine Congress' ability to regulate the larger interstate commercial activity." *Id.* at 529; *see 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.'").

In light of *National Federation of Independent Businesses v. Sebelius*, the Eighth Circuit also interprets *Raich* as an application of the Necessary

and Proper Clause, with similar limits. *See United States v. Anderson*, 771 F.3d at 1068-70.

The Ninth Circuit, however, recognizes no such limits. It denies that *Raich* is limited to "economic or commercial statute[s]." *See San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1177. Rather it interprets *Raich* to authorize any federal regulation within a comprehensive scheme that furthers any congressional purpose. *See id.*; *but see United States v. Pendleton*, 658 F.3d 299, 307 n.5 (3d Cir. 2011) (suggesting the Ninth Circuit's approach is out-of-sync with this Court's precedents).

With the decision below, the Tenth Circuit is now firmly on both sides of this dispute. App. A-29 n.8 (noting the inter-circuit split). The decision below adopts the Ninth Circuit's broad reading of *Raich*. App. A-31. However, other decisions from the Tenth Circuit interpret *Raich* as a Necessary and Proper Clause case limited to regulations concerning traded commodities: "Congress may 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) (emphasis added); *see also United States v. Carel*, 668 F.3d 1211, 1219 (10th Cir. 2011) (*Raich* is a Necessary and Proper Clause case).

The Eleventh Circuit is similarly of two minds on this question. It has interpreted *Raich* as broadly as the Ninth and Tenth Circuits to uphold Endangered Species Act regulations. *See Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007). But it has also described the test under *Raich*, in another case, 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) (emphasis added).

B. This case is an ideal vehicle to resolve a question left open by *Raich* and *NFIB*

The confusion among the circuit courts is understandable; *Raich* is no paragon of clarity. It suggests that the power to regulate intrastate activity under a comprehensive scheme arises under the Necessary and Proper Clause. *See Raich*, 545 U.S. at 22 (Congress "was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States" . . . .). However, as the Tenth Circuit notes, the decision also cites the Commerce Clause and Commerce Clause precedents. App. A-29 n.8.[8]

National Federation of Independent Businesses v. Sebelius further muddied the waters. In that case, Chief Justice Roberts' opinion for the Court interpreted *Raich* as a Necessary and Proper Clause case. *See NFIB*, 567 U.S. at 561 ("'Congress was acting well within its authority' *under the Necessary and Proper Clause*" in *Raich* because "marijuana is a fungible commodity" and "Congress' attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could

[8] Justice Scalia, concurring in *Raich*, would have been more explicit. *Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("[T]he Necessary and Proper Clause . . . allow[s] Congress 'to take all measures necessary or appropriate to' the effective regulation of the interstate market[.]" (quoting *Shreveport R. Co. v. United States*, 234 U.S. 342, 353 (1914))).

not also regulate intrastate possession and consumption." (emphasis added)). But, because the concurring Justices did not join this part of the opinion, there is a split among the circuits over whether it is controlling. *Compare* App. A-30 n.9 *with Anderson*, 771 F.3d at 1068-70.

Although the four dissenting Justices agreed with the Chief Justice that the Necessary and Proper Clause limits Congress' power to those regulations necessary to its ability to regulate commerce, the circuit courts have been reluctant to consider this agreement. *See, e.g., Anderson*, 771 F.3d at 1068 n.2 ("We cannot read the conglomeration of the dissenting opinion of four Justices combined with the concurring opinion of the Chief Justice to constitute binding precedent interpreting the Commerce Clause."). Without clarification from this Court, the courts of appeals will continue to be uncertain how to interpret *NFIB* and *Raich*. Guidance is urgently needed both to clarify this Court's jurisprudence and delineate the limits on Congress' power.

This case is a good vehicle for providing that guidance because the facts of the case, and the disagreement between the district court and the Tenth Circuit, raise several issues central to this Court's Necessary and Proper Clause cases:

First, the outcome depends on whether, to withstand constitutional scrutiny, a regulation must be necessary to Congress' ability to regulate Commerce. *See* U.S. Const. art. I, § 8, cl. 18 (Congress may make laws "necessary and proper *for carrying into Execution the foregoing Powers*" (emphasis added); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (The Necessary and Proper

Clause only authorizes regulation of activities "which in a substantial way interfere with or obstruct the exercise of the granted power."). Applying this rule to the Commerce Clause, "Congress may regulate noneconomic intrastate activities *only* where the failure to do so 'could . . . undercut' its regulation of interstate commerce." *Raich*, 545 U.S. at 38 (Scalia, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)); *see NFIB*, 567 U.S. at 653 (Scalia, J., dissenting); *cf. Reid v. Covert*, 354 U.S. 1, 66 (1957) (Harlan, J., concurring) ("[T]he constitutionality of the statute . . . must be tested, not by abstract notions of what is reasonable 'in the large,' so to speak, but by whether the statute, as applied in these instances, is a reasonably necessary and proper means of implementing a power granted to Congress by the Constitution."). The disagreement between the district court and the Tenth Circuit is on exactly this issue—the district court held that *Raich* requires a regulation to be necessary to Congress' ability to regulate commerce and the Tenth Circuit rejected that limit. *Compare* App. B-16 ("[A]ny appeal to the Necessary and Proper Clause" is futile because "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.") *with* App. A-30 (denying that *Raich* is limited to activity that "would frustrate a comprehensive regulatory scheme's ability to function *as a regulation of commerce*.").

The case also turns on whether an interpretation of Congress' power must be "narrow in scope," *United States v. Comstock*, 560 U.S. 126, 148 (2010), to withstand scrutiny, or whether it may "work a substantial expansion of federal authority." *NFIB*,

567 U.S. at 560. The Tenth Circuit suggests that the further a comprehensive statute gets from the regulation of commerce the more insulated it is from constitutional scrutiny. App. A-33 (stressing that approximately 68% of listed species are found in only one state).[9] The district court disagreed because, otherwise, "there would be no logical stopping point to congressional power under the Commerce Clause." App. B-13; *cf.* Hon. Alex Kozinski, *Introduction to Volume Nineteen*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995) (Asking, prior to *Lopez*, "why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey-you-can-do-whatever-you-feel-like Clause.'")

The facts of the case also raise federalism concerns. *See infra* Part III.B. If Congress' power under *Raich* is limited by the Necessary and Proper Clause, federalism is an important constraint on that power. "It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause . . . ." *Comstock*, 560 U.S. at 153 (Kennedy, J., concurring).

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[9] *See* Lee Pollack, Note, *The "New" Commerce Clause: Does Section 9 of the ESA Pass Constitution Muster After* Gonzales v. Raich*?*, 15 N.Y.U. Envtl. L.J. 205, 241 (2007) ("[M]any if not most of the animals currently listed . . . would not be in any sort of commerce even if they were not listed.").

II

The Constitutionality of Federal Take Regulations Has Generated Disagreement Among the Circuits

Whether the federal government may constitutionally regulate take of species found in only one state with no tie to interstate commerce is an issue that has been percolating in the circuit courts for years without guidance from this Court. Six circuits have upheld such regulations[10] but have adopted conflicting rationales. *Compare Rancho Viejo*, 323 F.3d at 1072 *with GDF Realty Invs.*, 326 F.3d at 634. Some have upheld these regulations because the particular plaintiff wished to engage in economic activity. *See Rancho Viejo*, 323 F.3d at 1072; *Gibbs v. Babbitt*, 214 F.3d 483, 495 (4th Cir. 2000);[11] *but see GDF Realty*, 326 F.3d at 634 (this rationale would "effectually obliterate" limits on the federal government's power). Some have upheld the regulations because take affects the environment, which in turn affects interstate commerce. *See Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1250;

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[10] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (Ninth Circuit); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (Eleventh Circuit); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (Fifth Circuit); *Ranch Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Circuit); *Gibbs v. Babbitt*, 214 F.3d 483 (Fourth Circuit); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

[11] These decisions conflict with *Lopez*, which struck down a federal ban on gun possession in a school zone as a regulation of intrastate, noneconomic activity on its face, notwithstanding that the individual defendant was paid to deliver the gun to a gang member in the school zone. *United States v. Lopez*, 514 U.S. 549.

Nat'l Ass'n of Home Builders, 130 F.3d at 1052-54; *but see GDF Realty*, 326 F.3d at 638 (this "would render meaningless any 'economic nature' prerequisite" under the Commerce Clause). Others have upheld regulations under the broad theory adopted by the Tenth Circuit. *See* App. A-30 to A-33; *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1163; *GDF Realty*, 326 F.3d at 638-39.

These inconsistent decisions have evoked several pointed dissents. Then-Judge Roberts dissented from the D.C. Circuit's denial of rehearing *en banc* in *Rancho Viejo*, observing that the D.C. Circuit's theory "seems inconsistent with the Supreme Court's holdings." *See Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting). Judge Sentelle dissented in an earlier D.C. Circuit case because "there can be no doubt" the federal government exceeds its power to regulate interstate commerce when it attempts to regulate take, which is neither interstate nor commerce. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1061 (Sentelle, J., dissenting). Judge Luttig dissented from the Fourth Circuit's decision because take of species for which there is no commerce cannot be characterized as economic activity and the attenuated reasoning required to connect it to interstate commerce would require overruling *Lopez* and *Morrison*. *Gibbs*, 214 F.3d at 507-10 (Luttig, J., dissenting).

The approach taken by the Tenth Circuit has also generated substantial dissent. Judge Sentelle, in *National Association of Home Builders*, observed that Congress' power to regulate under a "general regulatory scheme of interstate commerce *in a commodity*" does not apply to species for which there

is no such commerce. 130 F.3d at 1066-67 (Sentelle, J., dissenting) (emphasis added). Judge Jones, joined by five of her Fifth Circuit colleagues, argued that *Raich* cannot be extended beyond comprehensive schemes to regulate the market for a commodity. *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 290-92 (5th Cir. 2004) (Jones, J., dissenting). Criticizing the majority for adopting the sort of "'but-for casual chain' approach twice rejected by the Supreme Court in *Lopez* and *Morrison*[,]" Judge Jones reminded that "the Commerce Clause regulates commerce, not ecosystems" and abandoning that limitation "'would result in a significant impingement of the States' traditional and primary power over land and water use.'" *Id.* at 292 (quoting *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001)).

Defining the limits of *Raich* and its applicability to Endangered Species Act regulations is an important federal question which this Court has not resolved. It should. The facts of this case and the broad theory articulated by the Tenth Circuit make this an ideal vehicle to finally decide the issue.

III

The Tenth Circuit's Decision Flouts This Court's Decisions, Recognizes No Limit to Congress' Power, and Undermines Federalism

Although the conflict among the circuits on the meaning of *Raich* alone merits this Court's review, this case is a particularly good vehicle for resolving that conflict because the Tenth Circuit's decision also flouts this Court's decisions, recognizes no limit to Congress' power, and undermines federalism. Each of

these raises important federal questions that merit this Court's careful consideration.

A. The Tenth Circuit's opinion expands federal power beyond this Court's precedents

Congress' power "is acknowledged by all, to be one of enumerated powers." *M'Culloch v. Maryland*, 4 U.S. 316, 405 (1819). The enumeration necessarily limits Congress' power because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824); *see NFIB*, 567 U.S. at 647 ("Whatever may be the conceptual limits upon the Commerce Clause . . . they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs."). Judicial policing of the boundary between federal and state powers "protects the liberty of the individual from arbitrary power." *See Bond v. United States*, 564 U.S. 211, 222 (2011). "[T]here can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits." *NFIB*, 567 U.S. at 538.

1. The Tenth Circuit's opinion flouts this Court's decisions limiting Congress' power to regulate intrastate, noneconomic activity

"[P]erhaps the most far reaching example of Commerce Clause authority over intrastate activity" is *Wickard v. Filburn*, which upheld federal regulation of local production of wheat because of its effect on the interstate market for that commodity. *Lopez*, 514 U.S. at 560; *see Wickard v. Filburn*, 317 U.S. 111, 127-28

(1942); *see also NFIB*, 567 U.S. at 648 (Scalia, J., dissenting) (describing *Wickard* as "the *ne plus ultra* of expansive Commerce Clause jurisprudence"). Yet the Tenth Circuit's rationale is a significant step beyond *Wickard*.

The Tenth Circuit's decision not only expands Congress' power beyond what this Court has previously described as its outer limits, the decision also flouts specific limits articulated by this Court. In *United States v. Lopez*, this Court struck down a federal prohibition on possessing a gun in a school zone. 514 U.S. at 556. In *United States v. Morrison*, it struck down a federal cause of action for domestic violence. 529 U.S. 598, 601-02, 613-17 (2000). In both cases, this Court stressed the challenged provisions regulated intrastate, noneconomic activity, with no jurisdictional hook to limit the regulation to its constitutional applications. *See Morrison*, 529 U.S. at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature." (emphasis added)); *Lopez*, 514 U.S. at 560-66. The Court also placed great weight on the lack of a direct, significant tie between the regulated activity and interstate commerce. *Morrison*, 529 U.S. at 615 (rejecting an attenuated "cost of crime" rationale to justify federal regulation).

Like *Lopez* and *Morrison*, this case involves federal regulation of intrastate, noneconomic activity. App. B-12 ("[T]he Service is regulating every activity, regardless of its nature, if it causes harm to a Utah prairie dog."); *see* 50 C.F.R. § 17.40(g). This is not the production, distribution, or consumption of commodities. *See Raich*, 545 U.S. at 24-26 (defining

economic activity). Nor is there a jurisdictional hook to limit the regulation to its constitutional applications. App. B-12. Take of the species is also attenuated from any interstate commerce. App. B-17 (Any connection between the species and commerce is "far too attenuated" and would result in "no logical stopping point to congressional power . . .").

Despite these congruencies with *Lopez* and *Morrison*, the Tenth Circuit upheld the regulation under *Raich*. App. A-30 to A-33. *Raich* was concerned with preserving Congress' power to regulate intrastate, economic activity where necessary to the regulation of an interstate market, not allowing Congress to regulate any noneconomic activity by bootstrapping it with economic activity. 545 U.S. at 17 (discussing *Perez v. United States*, 402 U.S. 146, 151 (1971)). Thus, *Raich* upheld federal regulation of the local production and use of marijuana, "quintessentially economic" activities, because withholding that authority would frustrate Congress' ability to regulate the interstate market for that commodity. *See* 545 U.S. at 18-22.

Unlike the Controlled Substances Act, the Utah prairie dog regulation does not regulate "quintessentially economic" activity but intrastate, noneconomic activity. App. B-12. And, because there is no market for Utah prairie dogs or other commerce involving the species, the regulation is unnecessary to Congress' ability to effectively regulate the market for any commodity. App. B-11 to B-17.

The decision below is thus a significant step beyond *Raich* and other decisions from this Court. *Cf.* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 Fordham L. Rev. 411, 428-31 (2013)

(arguing that this Court's decisions reflect a "this far and no farther" theory of federal power under the Commerce Clause). Review should be granted to decide whether this dramatic expansion of federal power is permissible.

2. The Tenth Circuit's decision permits Congress to exercise an unlimited police power

The Tenth Circuit's decision also merits review because it interprets federal power coextensive with the states' police power, contrary to decisions from this Court. *See, e.g., Morrison*, 529 U.S. at 618-19. The same standard the Tenth Circuit applied below also demarcates the states' police powers under the Due Process Clause. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955) (state regulation is constitutional so long as the state has a rational basis to believe that it advances some government purpose). By expanding Congress' power to purposes unrelated to commerce, the Tenth Circuit has blurred the distinction between the national and the local. *Morrison*, 529 U.S. at 617-18.

One sign of the extremism of the Tenth Circuit's holding is that it suggests *Lopez* and *Morrison* were wrongly decided.[12] Both cases considered the

[12] The Tenth Circuit distinguished *Lopez* and *Morrison* for two reasons. First, it relied on *ipse dixit*—those omnibus crime laws were not comprehensive because *Lopez* and *Morrison* said so. App. A-26. Second, it declared the omnibus crime bills too comprehensive for *Raich* to apply, although announcing no standard to judge that question. *Id.* (noting that the omnibus crime bills dealt with many types of crimes, including "subjects as diverse as international money laundering, child abuse, and victims' rights").

constitutionality of criminal provisions contained within larger comprehensive crime bills.[13] Despite the provisions' placement within a larger scheme, this Court declared them unconstitutional and refused to credit the attenuated connections between crime and commerce as a basis for upholding them. *See Morrison*, 529 U.S. at 601-02, 613-17; *Lopez*, 514 U.S. at 556.

Under the Tenth Circuit's approach, this Court should have asked whether Congress' comprehensive scheme to regulate crime also regulated any economic activity or could plausibly lead to future commerce, both of which were satisfied in *Lopez* and *Morrison*. The omnibus crime bills regulated a host of criminal economic activities. *See supra* n.13. And this Court acknowledged that suppressing crime could plausibly lead to future commerce. *See, e.g., Lopez*, 514 U.S. at 563-64. Because the criminal provisions at issue in *Lopez* and *Morrison* advanced Congress' anti-crime purposes, they should have been upheld as constitutional under the Tenth Circuit's theory.

However, this Court rejected reliance on Congress' broader anti-crime goals in *Lopez* and *Morrison*, reasoning that they were too attenuated from commerce. *Lopez*, 514 U.S. at 564 ("[U]nder its 'costs of crime' reasoning, . . . Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."). So it is here. The government's conservation rationale is "far too

[13] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990).

attenuated to suggest that regulating takes of Utah prairie dogs is a necessary part of the ESA's economic scheme." App. B-17.

The Tenth Circuit's theory acknowledges no logical limit to federal power. Nor could it, because any activity could be grouped with economic activity to create a comprehensive scheme. *Cf. Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

B. The Court Should Grant Review to Preserve Federalism

1. The Utah prairie dog regulation intrudes on the states' traditional authority to manage wildlife and regulate land use

This case is also a good vehicle to decide the constitutional issue because it involves federal intrusion into areas of traditional state concern. Such intrusions have been a primary concern in this Court's Commerce Clause cases. *See Morrison*, 529 U.S. at 611; *see also Solid Waste Agency*, 531 U.S. at 173-74; *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("[W]e must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.").

The Utah prairie dog regulation intrudes on not one but two areas of traditional state concern: managing wildlife and regulating land use. *See Geer*, 161 U.S. at 527-28 (managing wildlife is an area of

traditional state concern)[14]; *Solid Waste Agency*, 531 U.S. at 174 (regulating land use is too); *see also GDF Realty*, 362 F.3d at 292 n.6 (Jones, J., dissenting).

This federalism conflict is not merely theoretical; the Utah prairie dog regulation forbids Utah from continuing to implement its management plan for the species. It does so in a particularly intrusive way: by making continued implementation of that plan a federal crime. *See* 16 U.S.C. § 1540.[15] Adding to this concern, several circuits have interpreted the Endangered Species Act's take prohibition to affirmatively require states to regulate their citizens in furtherance of the federal policy.[16]

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[14] In *Hughes*, this Court held that, "when a wild animal 'becomes an article of commerce[,]'" the Dormant Commerce Clause forbids the states from exercising this power to discriminate against out-of-state citizens. *See* 441 U.S. at 335-36, 339 (quoting *Geer*, 161 U.S. at 538 (Field, J., dissenting)). Otherwise, *Hughes* preserves the state's primary role in protecting wildlife.

[15] Prosecutorial discretion is no protection against this federalism violation, as the Endangered Species Act also authorizes "any person"—including groups like intervenor Friends of Animals—to sue states for violations of the take prohibition. 16 U.S.C. § 1540(g).

[16] *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). So interpreted, the Endangered Species Act appears to violate this Court's anti-commandeering cases. *See Printz v. United States*, 521 U.S. 898, 960-61 (1997); *New York v. United States*, 505 U.S. 144 (1992); Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 428-30 (2005).

2. The Tenth Circuit's decision invites further federal intrusion into areas of traditional state concern

Although the Utah prairie dog regulation's direct intrusion into areas of traditional state concern merits this Court's review, the breadth of federal intrusions permitted by the Tenth Circuit's decision makes review even more urgent. By expanding *Raich* to authorize any regulation that furthers any goal Congress might wish to advance, the Tenth Circuit's decision invites the federal government to intrude further into the state's authority. No area is off-limits under this theory, despite this Court's repeated holdings to the contrary. *See* Part III.A.2 *supra*.

Congress could usurp the state's traditional authority to regulate local land use by passing a comprehensive statute directing a federal agency to adopt zoning regulations for all private land in the country. *GDF Realty*, 362 F.3d at 287 (Jones, J., dissenting). Such a broad regulation would affect commerce under the Tenth Circuit's rationale, thus any local land use regulations adopted pursuant to it would be constitutional if they advance Congress' general development or environmental goals. *But see Solid Waste Agency of Northern Cook Cnty.*, 531 U.S. at 173-74 (land use regulation is a traditional area of state concern).

Congress could also enact a comprehensive criminal code. So long as some of the crimes concerned economic activity or victims could conceivably contribute to future commerce, a comprehensive criminal code would "affect commerce" under the Tenth Circuit's opinion. Any criminal provision contained within the comprehensive code would then

be constitutional so long as it advanced Congress' anti-crime goals. *But see Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 560-61.

Congress could even enact a statute comprehensively regulating the full gamut of human activity. If the Endangered Species Act has a sufficient effect on interstate commerce to qualify as a comprehensive scheme, a broader regulatory scheme undeniably would also. *Cf. Morrison*, 529 U.S. at 615 ("[I]f Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part."). Any regulation contained within such a scheme would be constitutional if it furthered any police power purpose Congress might favor, giving Congress the states' full police power.

Because the Utah prairie dog regulation intrudes into traditional areas of state concern, this case is an opportunity for the Court to preserve the states as laboratories for policy experimentation. *See Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring). Federal intrusion into areas of traditional state authority "forecloses the State[] from experimenting and exercising [its] own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

That experimentation is particularly important in the environmental realm, where the states enjoy the benefit of local knowledge and greater accountability

to those affected by regulatory decisions.[17] The Utah prairie dog regulation, and similar federal regulations "beyond the realm of commerce in the ordinary and usual sense[,]" foreclose this much-needed experimentation. *See id.*

CONCLUSION

This case in an opportunity for the Court to resolve a split among the circuits interpreting *Raich* and answer lingering questions about Congress' ability to use the Commerce Clause and Necessary and Proper Clause to regulate activity which is not interstate commerce, does not substantially affect interstate commerce, and does not frustrate Congress' ability to regulate interstate commerce. The limitless theory of federal power endorsed by the Tenth Circuit, and the stark facts of the case, makes this an ideal vehicle to resolve the issue. The significant federalism concerns presented in the case make this Court's review even more urgent. The petition for a writ of

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[17] *See* Jonathan H. Adler, *The Green Aspects of* Printz*: The Revival of Federalism and Its Implications for Environmental Law*, 6 Geo. Mason L. Rev. 573, 627 (1998) ("There is little reason to believe that genuine environmental protection will suffer from judicially enforced limits on federal power."); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1266 (1977) (The "sobering fact is that environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington."); *cf.* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1581 (1994) ("To put it bluntly, we need long-term sources of regulatory creativity more than we need short-term efficiency.").

certiorari should be granted and the judgment reversed.

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Respectfully submitted,

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