No. 17-465

IN THE

Supreme Court of the United States

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

PETITIONER,

V.

UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

RESPONDENTS.

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

BRIEF FOR THE CATO INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can Congress use its power to regulate interstate commerce to regulate a wholly intrastate species with no commercial value?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the constitutional government that is the foundation of liberty. Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

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The Individual Rights Foundation is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. The IRF opposes attempts to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

This case interests *amici* because individual liberty is best preserved by a constitutionally constrained Congress consistent with the Framer's design.

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief. Petitioner filed a blanket consent; consent letters from respondent and intervener have been lodged with the Clerk. No party's counsel authored any part of this brief and nobody other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In no Commerce Clause case has this Court considered anything so worthless. The Utah prairie dog is not a marketable commodity. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). There is no illicit trade in prairie dog horns or hides for the government to suppress. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). They carry no firearms into school zones. *United States v. Lopez*, 514 U.S. 549, 551 (1995). Their domestic relations are none of the government's business. *United States v. Morrison,* 529 U.S. 598, 668 (2000). Finally, they have neither purchased health insurance nor plan to do so in future. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 561 (2012) (*NFIB).*

In upholding the application of the Endangered Species Act (ESA) to the Utah prairie dog, the Tenth Circuit made numerous errors that further expand this Court's already expansive Commerce Clause jurisprudence. The court below aggregated all listed species together as a single "comprehensive scheme," essentially holding that Congress's jurisdiction over a single species derives from its jurisdiction over all flora and fauna in the nation. The court reasoned that, just as Angel Raich's homegrown marijuana undermined federal drug prohibition, *Raich*, 545 U.S. at 18, removal of the prairie dog from federal jurisdiction will render the government impotent to bar trafficking in eagle feathers. *See* 16 U.S.C. § 668(a); 50 CFR 22. This attenuated justification pushes the Commerce Clause too far. Few species could be more remote from the importation of elephant tusks, 50 CFR 17.40(e), than the

Utah prairie dog,[2] and they are certainly far less consequential to the broader conservation of the nation's fauna than civil remedies were to the prevention of domestic violence or gun-free schools to the avoidance of firearms deaths. *Morrison*, 529 U.S. at 668; *Lopez*, 514 U.S. at 551.

Compounding the problem, the Utah prairie dog is not threatened in any ecological sense. In fact. the current population is large and expanding. *See* Pet. at 7. Instead, its legal status derives from the distribution of that population. While 70 percent of the population resides on private land, the government counts only the federal-land population on the theory that bloodthirsty Utahns would butcher privately domiciled prairie dogs if the species were delisted.[3] Thus this non-endangered "threatened" species is listed on a theory that, if taken to its logical conclusion, would place all organic life in the United States into congressional jurisdiction because some conjectural private party might impose some vaguely defined harm at some hypothetical date in the future.

The Court has long counseled against antiquarian understandings of commerce that fail to adapt our eighteenth century framework to contemporary needs. *See NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937). And nothing in this case questions longstanding regulations of pollution, food safety, finance or any other area squarely tied to the economic life of the nation. But to broadly define "commerce"—

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[2] Maybe a flea that lives on the back of the Utah prairie dog.

[3] *See* S. Nicole Frey, Managing Utah Prairie Dogs on Private Lands (2015), http://bit.ly/2gF9aRa; U.S. Fish & Wildlife Service Utah Prairie Dog (Cynomys parvidens) Final Revised Recovery Plan, Section 1.7.1, Mar. 2012. http://bit.ly/2gFyW80.

plus those things necessarily and properly related to it—does not mean the term lacks definitional limits.

This Court should affirm the constitutional limits it articulated in *Lopez*, *Morrison*, *Raich*, and *NFIB* by holding that Commerce Clause jurisdiction requires a regulation both necessary and proper to a *commercial* concern and leave commercially useless wildlife to the states, the sovereigns who policed it since our founding. To do otherwise would license a general police power that would turn the remainder of Article I, Section 8 into rambling surplusage.

ARGUMENT

I. THE DECISION BELOW THREATENS TO ELIMINATE ALL LIMITS ON FEDERAL POWER

Congress has been delegated "the power to regulate, that is, to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 196 (1824). In *Lopez*, the Court noted "three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. at 558–59. These categories include: 1) the channels of interstate commerce; 2) the instrumentalities of, objects in, and persons engaged in interstate commerce; and 3) activities that have substantial effects on interstate commerce. *Id.* All parties agree that the take regulation challenged here flows, if at all, from the third category.

A. The Utah Prairie Dog Is Not Substantially Related to Interstate Commerce

The government seeks to protect an abundant, commercially irrelevant, and wholly intrastate rodent without regard for whether such regulation has any

connection to economic activity, let alone commerce among the several states. *Amici* wish the adorable little critters no ill will and hope that state wildlife authorities handle the population responsibly.[4] Indeed, when given the opportunity, Utah has outperformed the federal government, Pet. at 7—but the protection of cuteness is not a congressional power enumerated in Article I, Section 8.[5]

The district court found that the taking of the Utah prairie dog would exert no substantial effect on interstate commerce. *PETPO v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1345 (D. Utah 2014). There is "no evidence" that a decline in the prairie dog population would affect any other species for which a national market exists. *Id.* at 1346. The take of the Utah prairie dog is thus a commercial irrelevance, except insofar as its regulation is harming the human population of southwestern Utah. *See* Pet. at 8.

This is of course not the first case where the ESA protects a local pest to the detriment of the species *homo sapiens sapiens*. *See*, *e.g.*, *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (blocking the construction of housing on account of the Arroyo Southwestern Toad); *Gibbs v. Babbitt*, 214 F.3d 483, 490 (4th Cir. 2000) (barring the taking of Red Wolves unless they had actually started killing a resident's family or livestock); *Nat'l Ass'n of Home Builders v. Babbitt,* 130

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[4] *Amici* concede that the adorableness of the Utah Prairie Dog is not well evidenced in the record, but feel it's a subject appropriate for judicial notice under Federal Rule of Evidence 201(b)(2).

[5] Cuteness in fact proves to be a primary decision rubric as to which endangered species ultimately get saved. *See Too Cute to Die? Experts Say We're Too Selective about Species We Choose to Protect*, Nat'l Post, Apr. 23, 2012, http://bit.ly/2gFo8H0. Although cuteness is important, it is not commerce.

F.3d 1041 (D.C. Cir. 1997) (blocking construction of a community hospital to protect the Delhi Sands Flower-Loving Fly). The Court should put the brakes on this rampant speciesism and reaffirm that the Constitution's structural limitations exist to protect not flock and fowl, but "We the People."

B. The Tenth Circuit Failed to Consider the Limits to Federal Power Found in *Lopez*, *Morrison*, *Raich*, and *NFIB*

As the district court below recognized, the Utah prairie dog is completely disconnected from the commercial life of the nation. 57 F. Supp. 3d at 1345. But the court of appeals endeavored to find a connection anyway. It claimed three different links between the species and the national economy. *PETPO v. U.S. Fish & Wildlife Servs.*, 852 F.3d 990, 1006 (10th Cir. 2017). Each fails in turn.

1. First, the court of appeals used the take regulation's economic impacts to justify the take regulation. Since the prohibition blocks potential economic activity, it is therefore a regulation of commerce. Congress's regulation has economic consequences and thus self-justifies itself.

No. The Constitution does not work on rewind. Congress may not create an economic effect in order to regulate it, *NFIB,* 567 U.S. at 561, for the same reason it may not invade a country to declare war. Nor may it "pile inference upon inference" in order to regulate the whole of American life. *Lopez,* 514 U.S. at 567.

To be sure, Congress's power to regulate commerce includes its right to undermine certain economic activity, even to ban certain commerce outright. *Raich*, 545 U.S. at 18; *Champion v. Ames*, 188 U.S. 321 (1903).

But the prohibition on commerce in marijuana is not premised on the theory that prohibition creates a black market and therefore marijuana is a proper object of Commerce Clause regulation. Instead, unlike the Utah prairie dog, marijuana is a bought and sold commodity *before* government prohibition creates a black market. If the effects of Congress's own laws can create the jurisdictional hook for Commerce Clause regulation, then Congress is the progenitor of its own power.

2. Second, the court below points to economic benefits from species protection. A healthy environment is good for the national economy; protecting important species is good for the environment; a prairie dog in a small corner of Utah is an important species . . . ergo, the Utah prairie dog is vital to the national economy.

Amici will not quarrel directly with this chain of inferences, except to point out the Court has seen this particular syllogism at least twice before:

1. A healthy national economy requires an educated workforce; in order for the workforce to be educated we must have quality education; people toting guns around schools undermines educational quality; therefore congress can outlaw bringing a gun to school. *Lopez,* 514 U.S. at 618 (Breyer, J., dissenting).

2. Women are a vital contributors to the economic life of the nation; domestic and sexual violence endangers women; this endangerment harms their ability to contribute to the economy; thus Congress can create a civil remedy for women who suffer domestic or sexual violence. *Morrison*, 529 U.S. at 631 (Souter, J., dissenting).

There's a reason the foregoing citations are to dissents.

3. Third, the court below references the illicit market in endangered species and products made from them. But Congress's power to bar importation of African elephant tusks, 50 CFR 17.40(e), could not be more remote from the protection of prairie dogs. There is no market for Utah prairie dogs: not their hide, nor their bones or organs. They are an ingredient in no mystic remedy[6] or an element of no artistic form;[7] they produce nothing of importance except the annoyance of the surrounding population[8]—and they make terrible pets.[9] Different commodities are different *and the Utah prairie dog is not a commodity to begin with*. If the government in *Raich* had claimed that the need to control backyard production of "weed" gave it power to regulate the weeds in grandma's garden, *amici* suspect this Court would have cast a skeptical eye.

Wickard and *Raich* stand for the proposition that when dealing with a fungible commodity there's no zone of consumption that can be considered truly detached from the national market for that commodity. Aggregate demand is aggregate demand, and that which is satisfied at home might as well be satisfied at market. *Wickard*, 317 U.S. at 127; *Raich*, 545 U.S at 18. That may make some sense when the commodities in question are the same—that is, backyard wheat/weed and commercial wheat/weed. Well, it

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[6] Gwynn Guilford, *Why Does a Rhino Horn Cost $300,000? Because Vietnam Thinks It Cures Cancer and Hangovers*, The Atlantic, May 15, 2013, http://theatln.tc/2gHgbRr.

[7] Jonathan Jones, *Ivory: The Elephant in the Art Gallery*, The Guardian, May 15, 2014, http://bit.ly/2gGPz3k.

[8] *The Utah Prairie Dog Menace*, Fox News, Jun. 26 2012, http://bit.ly/2gElKQN.

[9] Mary Carmichael, *The Prairie Dog Problem*, Newsweek, Jun. 22, 2003, http://bit.ly/2ySnxMp.

seems ridiculous to even have to say it, but Utah's backyard prairie dog is not the same thing as a wolf bounding across Yellowstone or the Kauaʻi cave wolf spider. U.S. Fish & Wildlife Service Fact Sheet, *Kaua'i Cave Wolf Spider and Kaua'i Cave Amphipod*, Aug. 2010, http://bit.ly/2h6I8D0. Species aren't fungible.

It's easy to see how a constitutional exemption for medicinal homegrown marijuana could undermine federal marijuana prohibition. Marijuana is marijuana, after all; marijuana grown for personal, medical use could start flooding the interstate market. But exempting citizens of Utah from federal prosecution if they take the Utah prairie dog would undermine what federal program, exactly? The protection of wolves? That seems too laughable to deserve a response.

Or, perhaps carving out an exemption for one species would undermine the ESA because it would open the floodgates, so to speak, on exempting other animals from federal protection. That is an even odder argument. It essentially claims that the Constitution is an impediment to comprehensive federal protection of all species in the nation, which is of course the point. *Amici* will gladly concede that the Constitution, by design, impedes many comprehensive federal schemes—and we feel compelled to remind the Court of a fundamental, if forgotten, truism in our constitutional system: if the federal government can't do something, that doesn't mean it won't be done.

C. The Opinion Below Has No Limiting Principle and Would Grant Congress Unlimited Power

The Tenth Circuit arrives at the foregoing errors in part by aggregating all listed species for purposes of

the Commerce Clause analysis. That is, the lower court looks not to the substantial connection between the Utah prairie dog and some commercial end, but at all the various species covered. Then it asks whether there is a substantial connection between the listed species and interstate commerce. 852 F.3d at 1004. This is little more than constitutional negation.

As described above, "endangered species" as a whole are not a fungible commodity. *Cf. Raich,* 545 U.S at 18; *Wickard,* 317 U.S. at 127. The district court found that the government had submitted no evidence to show the prairie dogs' continued existence was vital to the survival of any other species, endangered or otherwise. 57 F. Supp. 3d at 1345. Some species of course rely on others as a source of food and sundry benefits, but the claim that the fate of the Puerto Rican Sharp-Shinned Hawk, Swayne's Hartebeest, or Dwarf Wedgemussel—*See Find Endangered Species*, U.S. Fish & Wildlife Service, http://bit.ly/2gGnDwg—is critically tied to the fate of the Utah prairie dog is built on a foundation of inferences all the way down. The butterfly effect does not establish federal jurisdiction.[10]

Indeed, the Court has explained that this six-degrees-of-separation approach to Commerce Clause analysis renders the principle of enumerated powers a fiction. *Lopez,* 514 U.S. at 565 (the argument "lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial"). The approach sweeps so broadly that, if correct, it is baffling that the Framers spilled some much ink in Article I, Section 8. *Id.* at 589 (Thomas, J., concurring). Under this approach Congress has the power to

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[10] Peter Dizikes, *When the Butterfly Effect Took Flight*, MIT Technology Review, Feb. 22, 2011, http://bit.ly/2gGp26d.

create a navy to prevent piracy because pirates raid merchant ships on their commercial routs. A reduction in piracy will mean a reduction in the price of goods shipped along the coasts protected by the navy, so clearly creating a navy is implied in the Commerce and Necessary and Proper Clauses. It's so obvious, that one wonders why the Framers bothered to spell out any other powers. Perhaps, in the words of Dr. Franklin, "the most august and respectable assembly he ever was in in his life," didn't understand what it were doing? Quoted in Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* 83 (2016). Or perhaps the mistake lies elsewhere?

Under the Tenth Circuit's reasoning, Congress's power must extend to all flora and fauna in the United States, endangered or not. Being "endangered" after all, is not a jurisdictional hook for the Commerce Clause—something even the government doesn't claim. The Tenth Circuit's reasoning would apply to all animals, meaning that a general jurisdiction over all wildlife is hidden in the Commerce Clause. Congress, it is said, does not "hide elephants in mouseholes," but apparently the Constitution hides all animals in the nation in a prairie dog hole? *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Moreover, because the ESA isn't limited to animals but includes plants too, 16 U.S.C. § 1541, Congress apparently has the power to oversee all living organisms because some living organisms may have a substantial effect on interstate commerce. We therefore stand on the threshold of what James Madison derided as "an indefinite supremacy over all persons and things." *The Federalist* No. 39, at 245 (C. Rossiter ed. 1961).

II. THIS COURT SHOULD HOLD THE LINE AGAINST FURTHER EXPANSION OF THE COMMERCE POWER

A. *Raich* and *NFIB* Limit Congressional Jurisdiction over Noncommercial Activity to What Is Necessary and Proper to a Commercial Regulation

All agree that the first two *Lopez* categories—those that constitute actual regulations of commerce—do not apply here. 852 F.3d at 1000. The sole remaining justification is in in the third *Lopez* category: those laws that are necessary and proper for carrying into execution Congress's power to regulate interstate commerce. *Raich*, 545 U.S. at 34 (Scalia, J., concurring) (distinguishing the core "commerce" that Congress can directly regulate from those things it regulates incidentally). The government must therefore rely on that "last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Printz v. United States*, 521 U.S. 898, 923 (1997).

In his concurring opinion in *Raich*, Justice Scalia highlighted the distinction between that which is at the core of the commerce power and that which is in its penumbras. 545 U.S. at 33 (Scalia, J., concurring). He explained that the "substantial effects" prong actually relates not to the Commerce Clause, but the operation of the Necessary and Proper Clause:

> [U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce

> Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72, 9 L.Ed. 1004, (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.

Id. at 34 (Scalia, J., concurring).

While many cases involving economic regulation by Congress are referred to as "Commerce Clause cases," this is often not technically accurate. In the words of prominent scholars, "[m]any of the cases that drastically expanded Congress's regulatory reach during the New Deal are actually Necessary and Proper Clause cases." Brief of Authors of *The Origins of the Necessary and Proper Clause* as Amici Curiae at 5, *NFIB v. Sebelius*, 567 U.S. 519 (2012) (No. 11-398). The "substantial effects" decisions *Jones & Laughlin* and *Wickard*, for example, are "applications of the Necessary and Proper Clause in the context of the commerce power." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 591 (2010).

Chief Justice Roberts endorsed this view in his majority opinion in *NFIB*. The terms "necessary" and "proper" each have meaningful content that cannot be ignored. *NFIB*, 567 U.S at 560. That is, the regulation must be *both* necessary *and* proper for executing the Commerce Clause. Without those limitations, this Court would "license the exercise of . . . great substantive and independent power[s] beyond those specifically enumerated." *Id.* at 559 (quoting *McCulloch v.*

Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819)) (internal quotation marks removed).

Allowing Congress to claim jurisdiction over every animal in the country *qua* animal, see *supra* part I.C, would license a "great substantive and independent power" that would undermine this Court's multi-decade effort to keep the Commerce Clause from swallowing the enumeration of powers. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 Fordham L. Rev. 411, 428–31 (2013) (describing the Court's approach to the Commerce Clause as "this far and no farther"). This Court teaches that, broad as the commerce power may be, it must but cabined to its rightful scope. *Morrison,* 529 U.S. at 615. To do otherwise would be to grant a "great substantive and independent power" devoid of all limitation.

B. Constitutionally Limiting the Endangered Species Act Would Be Consistent with This Court's Delineation of Federal Power

The Utah prairie dog occupies a small, discrete portion of one state, so a ruling in favor of the petitioner need only occupy a small, discrete portion of Commerce Clause doctrine. While the damage in allowing Congress regulatory authority over all living things would prove substantial, nothing in this case questions the longstanding power of Congress to regulate our economic life, our backyard agriculture, and the species that *do* substantially affect commercial concerns.

The Tenth Circuit looked at the overall scheme of the ESA as having substantial effects on commerce, and worried that addressing the particular circumstances of a given species would subject the ESA to

"death by a thousand cuts." 852 F.3d at 1004. However, to place intrastate, non-commercial species outside the ESA would not limit Congress's ability to protect those species which are important to the economic life of the nation. A ruling for the petitioner will simply confine Congress to national problems, and leave to the states their traditional powers to protect local wildlife, upholding the principles of our federalist system. *Lopez,* 514 U.S. at 583 (Kennedy, J, concurring).

Nor would a small limitation on the ESA undermine the longstanding regulation of those things substantially related to commerce, from the production of and traffic in food and drugs, to the maintenance of workplace standards, to the prevention of environmental degradation. To be sure, there would be questions about whether a *de minimis* local activity is properly within the scope of federal power, but that's the nature of judicial review in a system of enumerated powers.

The Tenth Circuit's premise is precisely the one rejected in *Lopez* and *Morrison*. Those cases show that there are some constitutional limits on comprehensive, nationwide schemes—and that sometimes states have to fill in those gaps. In *Lopez*, Congress passed a multifaceted piece of legislation to curtail gun violence; prosecuting those who brought guns into school zones arguably furthered that end. 514 U.S. at 551. In *Morrison*, Congress passed a multifaceted piece of legislation to curtail domestic and sexual violence; providing injured woman a civil remedy arguably furthered that end. 529 U.S at 605. Under the lower court's reasoning, *Morrison* and *Lopez* were wrongly decided.

Raich holds *not* that any particular part of a larger system of regulation is immune merely by its membership in the scheme, but that the Constitution allows

those necessary pieces without which the scheme would collapse. 545 U.S. at 23. As discussed *supra*, allowing millions of people to grow marijuana in their backyards could stymie federal drug prohibition. *Lopez* and *Morrison* are different—and this case is more like those. Leaving to local authorities the ability to impose civil remedies for domestic violence or criminal prosecutions for school-zone gun possession may remove a tool from Congress's utility belt, but the remaining initiatives can carry on unabated.

Likewise, reserving wholly intrastate, non-commercial species to state regulation would reduce the number of species Congress oversees, but it would not undermine the protection of those species concededly within its jurisdiction. This court should therefore feel no compunction that it is drawing some large area of federal regulation into question. Despite protestations to the contrary, a ruling for the petitioner would not render federal bureaucrats an endangered species.

CONCLUSION

For the foregoing reasons, and those stated by the petitioner, the Court should grant the petition.

Respectfully submitted,

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