No. _____

In the Supreme Court of the United States

SWC, LLC; TIMOTHY A. SCHMIDT; FRIENDS OF SYLVANIA; AND THE UPPER PENINSULA ENVIRONMENTAL COALITION,
Petitioners,

v.

DAVID A. HERR AND PAMELA F. HERR, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A divided 2-1 Sixth Circuit panel reversed a district court decision upholding the Forest Service's regulations to limit the use of loud and disruptive gas-powered motorboats on Crooked Lake in the Congressionally-designated Sylvania Wilderness. The Sixth Circuit decision held that the Forest Service could not adopt these wilderness protections, pursuant to the Property Clause of the United States Constitution and the Wilderness Act of 1964, because the State of Michigan had not previously acted to limit motorboat use on the small portion of the lake outside the wilderness boundary.

The Sixth Circuit's decision conflicts with this Court's prior decisions and conflicts with the Eighth, Ninth and Eleventh Circuits' decisions on the federal government's authority under the Property Clause to limit harmful activities in the many National Wilderness Areas. The questions presented are:

1. Whether the United States Forest Service's powers under the Property Clause of the United States Constitution to limit gas-powered motorboat use on lakes in Congressionally-designated wilderness areas are dependent upon and subservient to whether a state has first acted to restrict motorboat activities on the same lakes?

2. Whether prior existing uses of property near the many national wilderness areas are immunized from and ossified against regulations to achieve the Wilderness Act of 1964's goal to protect wildernesses and keep them "unimpaired for future use and enjoyment as wilderness," 16 U.S.C. § 1131(a)?

PARTIES TO THE PROCEEDINGS

Petitioners SWC, LLC d/b/a Sylvania Wilderness Cabins, Timothy A. Schmidt, Friends of Sylvania and Upper Peninsula Environmental Coalition were defendant-intervenors in the district court below in support of the defendant United States Forest Service and were appellees in the court of appeals below. Petitioners include a small business, riparian and littoral property owners on Crooked Lake, and conservation organizations and their members.

Respondents David A. Herr and Pamela F. Herr were plaintiffs in the district court and were appellants in the court of appeals below. Respondents are also riparian and littoral property owners on Crooked Lake.

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state there is no parent or publicly held company owning ten percent or more of their corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sylvania Wilderness Cabins, Tim Schmidt, Friends of Sylvania and Upper Peninsula Environmental Coalition (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

The Sixth Circuit's 2-1 majority panel opinion, accompanied by a strong dissenting opinion, reversed the district court's grant of summary judgment in favor of the defendant Forest Service

and defendant-intervenors. The Sixth Circuit's decision misconstrues the federal government's well-established authority under the Property Clause of the United States Constitution by making that authority subservient to and dependent upon a state first taking regulatory action.

The Sixth Circuit's decision conflicts with this Court's decisions in *Kleppe v. New Mexico,* 426 U.S. 529, 540 (1976), and *Camfield v. United States*, 167 U.S. 518, 525 (1897), and creates conflicts with the Eighth, Ninth and Eleventh Circuits' decisions on the scope of the federal government's authority under the Property Clause to adopt reasonable regulations protecting the many Congressionally-designated wilderness areas. *See* U.S. CONST. art. IV, § 3, cl. 2, App. 45 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . .").

The Sixth Circuit's erroneous decision presents constitutional and federal statutory questions of law that are of exceptional national importance because of the potential uncertainties now created for the many types of reasonable limits that federal agencies impose to prevent harmful and disruptive activities in the many Congressionally-enacted National Wilderness Areas, National Wild and Scenic Rivers and National Wildlife Refuges, and to serve the public interest.

Petitioners Sylvania Wilderness Cabins, Timothy Schmidt, *et al.* are small business owners and riparian and littoral property owners along Crooked Lake who rely upon the Forest Service to implement its reasonable regulation of large loud and disruptive gas-powered motorboats that interfere with their and their customers' use and enjoyment in the

wilderness. Petitioner Sylvania Wilderness Cabin's business viability depends on paying customers coming to the Sylvania Wilderness to fish, canoe, hike, camp and enjoy the quiet and solitude of the outdoors. Noisy gas-powered motorboats racing through Crooked Lake disrupt their use and enjoyment, impact customers and tourist visitors who can choose instead to visit quieter areas, and harm the business and property interests of Petitioner Sylvania Wilderness Cabins and its owners, including Petitioner Tim Schmidt.

The Sixth Circuit's decision conflicts with this Court's previous determinations that the federal government's authority under the Property Clause is "analogous" to the state's police power. *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976); *Camfield v. United States*, 167 U.S. 518, 525 (1897). The Sixth Circuit's decision does not treat the Forest Service's authority to issue reasonable regulations limiting use of large, noisy gas-powered motorboats in a Congressionally-designated wilderness area as "analogous," but instead makes that authority subservient to the State of Michigan's inaction and dependent on the State actually invoking and initiating its allowable police powers.

The Sixth Circuit majority recognizes, as it must, that the State of Michigan *does* have authority to adopt regulations limiting the assumed "valid existing rights" of new property owners in the small, adjacent non-wilderness part (five percent) of Crooked Lake. *Herr v. U.S. Forest Service*, 865 F.3d 351, 358, App. 16 (6th Cir. 2017). These property owners (Respondents Herrs) want to use loud, large gas-powered motorboats throughout Crooked Lake even though ninety-five percent of the lake is within the federally-protected Sylvania Wilderness.

Because the State of Michigan has not acted to regulate motorboats on this particular lake, however, the Sixth Circuit majority holds that this *inaction* supersedes and precludes the Forest Service's authority under the Property Clause, the Wilderness Act of 1964 and the Michigan Wilderness Act of 1987 to apply reasonable regulations limiting disruptive gas-powered motorboat use on Crooked Lake for the ninety-five percent of the lake that lies within the Sylvania Wilderness Area. *Herr*, 865 F.3d at 358, App. 16 ("No doubt, Michigan could have regulated motorboat use on Crooked Lake. . . But the key point is that it never did.").

As Judge Donald recognized in her dissenting opinion to the Sixth Circuit's panel majority opinion:

> Congress has authorized the Forest Service to regulate the Sylvania Wilderness. This authority, "subject to valid existing rights," is coextensive with Congress' own authority under the Property Clause when the Forest Service acts to preserve the wilderness character of the Sylvania Wilderness. It thus follows that the Forest Service possesses a power that is "analogous to the police power of the several states," and where the Forest Service does not exceed the scope of the permissible police power of the state, it may exercise this power. . .
>
> Recognizing that the state may impose such regulations, the majority nevertheless concludes that the Forest Service may not regulate Crooked Lake in this manner because Michigan has not imposed such

> restrictions itself. But Forest Service's powers, while restricted, do not depend on state action. Put another way, state law determines the scope of the Forest Service's authority to regulate the surface of Crooked Lake because Congress has placed the specific constraint of "subject to valid existing rights"; rights that are determined by state law. But state regulation is not a prerequisite to the Forest Service's ability to regulate. The determining factor, rather, is whether the regulation is a proper exercise of the state's police power. And, as previously mentioned, Michigan state law confirms that restrictions on kinds of vessels and speed of motorboats are permissible.

Herr, 865 F.3d at 359–60, App. 20-21 (Donald, J., dissenting).

Respondents David and Pamela Herr were aware of the Forest Service's regulations limiting loud gas-powered motorboat use *before* they bought their property on the non-wilderness part (five percent) of Crooked Lake. *Herr v. U.S. Forest Service*, No. 14-105, 2014 WL 11309766, at *5 (W.D. Mich. 2014). They "could have anticipated public regulation might affect their enjoyment of their property" because the Forest Service's gas-powered motorboat limitations for the Sylvania Wilderness Area existed "long before [the Herrs] possessed the land." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1948 (2017) ("The land's location along the [Wild and Scenic] river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their

property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.").

There is no riparian right to gas-powered motorboat use in Michigan. The Sixth Circuit's decision recognizes that the State of Michigan can and does regulate motorboat use on many lakes: "No doubt, Michigan could have regulated motorboat use on Crooked Lake during this time. *See* Mich. Comp. Laws § 324.80108." *Herr*, 865 F.3d at 358, App. 16.

The Sixth Circuit majority decision's interpretation and misapplication of the "valid existing rights" clause of the Michigan Wilderness Act, however, ossifies previous uses and negates Congress' and the Forest Service's powers under the Property Clause. The panel majority hinges its decision on the prior exercise of state regulatory authority and improperly constrains the federal government's powers under the Property Clause to adopt reasonable regulations to protect a Congressionally-enacted national wilderness area. As the dissenting opinion below concludes:

> [T]he Herrs' right to engage in recreational motorboating under Michigan law, which does not necessarily equate to a *right* to use gas-powered motorboats, is not immune from reasonable future regulation. Congress chose to "grandfather" private rights in the "subject to valid existing rights" phrase, but in doing so, it never intended that those rights be ossified against further regulation. *Stupak-Thrall v. United States*, 89 F.3d 1269, 1271 (6th Cir. 1996) (memo) (Moore, J., concurring in order affirming district court opinion by

> divided en banc vote).
>
> Ultimately, I believe that Amendment No. 5 was squarely within the Forest Service's authority to enact, and that the restrictions do not infringe on the Herrs' "valid existing rights." For these reasons, I would affirm the district court. I respectfully dissent.

Herr, 865 F.3d at 360, App. 22 (Donald, J., dissenting).

The Sixth Circuit's decision renders Congress' and the Forest Service's authority under the Property Clause to adopt reasonable regulations to preserve and protect wilderness areas subservient to the State of Michigan's inaction. That inversion of the constitutional authority is contrary to this Court's decisions on the scope of the Property Clause in *Kleppe* and *Camfield*.

The Sixth Circuit's panel majority decision also creates new conflicts with decisions of the Eighth, Ninth, and Eleventh Circuits on the scope of the federal government's authority under the Property Clause to protect public lands and waters. All of these decisions uphold federal agencies' reasonable regulations to protect public lands and waters without requiring a state's exercise of police powers as a necessary predicate. *See e.g.*, *Minnesota v. Block*, 660 F.2d 1240, 1246–47, 1249 (8th Cir. 1981) (upholding Congress' prohibition of the use of motorboats on lakes in the Boundary Waters Canoe Area Wilderness); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (upholding a federal regulation prohibiting campfires near a federally-protected Wild and Scenic River in the Hells Canyon National

Recreational Area because "[i]t is well established that [the Property] Clause grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters."); *High Point v. Nat'l Park Service*, 850 F.3d 1185, 1199 (11th Cir. 2017) (holding that the Property Clause allows the federal government to "regulate activities on non-federal public waters in order to protect wildlife and visitors on [federal National Park] lands.").

This Court's review of the Sixth Circuit's conflicting decision is imperative. The decision below precludes reasonable federal regulation to protect public lands and waters in Congressionally-designated wilderness areas unless a state has first exercised its police power to regulate the exact same activity in the exact same location within a federally-protected wilderness area.

That erroneous constitutional interpretation undermines Congress' and federal agencies' well-established authority under the Property Clause, conflicts with this Court's decisions, creates a substantial conflict among Circuits, and creates significant uncertainties over reasonable regulations that are adopted by federal agencies to legitimately limit harmful and disruptive activities in the many national wildernesses, national wild and scenic rivers, and national wildlife refuges.

OPINIONS BELOW

The opinion of the court of appeals is reported at 865 F.3d 351 (6th Cir. 2017). App. 3-23. The opinion of the district court granting the Petitioners' and the Defendant Forest Service's motions for summary judgment is reported at 212 F. Supp. 3d 720 (W.D. Mich. 2016). App. 25-41.

JURISDICTION

The court of appeals entered judgment on July 26, 2017. App. 1. Petitioners filed a timely petition for rehearing *en banc*, which the court of appeals denied on January 4, 2018. App. 43. The Court's jurisdiction rests on 28 U.S.C. § 1254(1) and S. Ct. R. 13(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix to this petition. The relevant provisions are:

U.S. CONST. art. IV, § 3, cl. 2. App. 45.
U.S. CONST. art. VI, cl. 2. App. 45.
16 U.S.C. § 1131(a). App. 46.
16 U.S.C. § 1131(c). App. 47.
16 U.S.C. § 1133(d)(1). App. 48.
Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274, § 3(b). App. 48.
Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274, § 5. App. 49.

STATEMENT OF THE CASE

A. Factual Background

The Sylvania Wilderness is a large, beautiful 18,327-acre area of interconnected lakes and woods in the Ottawa National Forest in Michigan's Upper Peninsula. It is among the last remaining tracts of pristine old-growth forest in the Midwest. The pristine glacial lakes of the Sylvania Wilderness include Crooked Lake, which is home to world-class smallmouth bass and bluegill fisheries. *Herr*, 865 F.3d at 354, App. 5-6. The Sylvania Wilderness lakes offer visitors the opportunity to paddle deep into the wilderness to fish, to camp, to view loons and wildlife, and to enjoy the quiet of the great outdoors.[1]

In total, ninety-five percent of Crooked Lake and the nearby adjacent land are within the Sylvania Wilderness' boundary. The remaining five percent of land belongs to private owners including Petitioners Sylvania Wilderness Cabins and Timothy Schmidt, and Respondent Herrs, among others. *Id.*

Petitioner Timothy Schmidt owns riparian and littoral property along Crooked Lake, and he also owns the Sylvania Wilderness Cabins, a small business which offers seven cabins for paying guests to rent along the quiet lakefront.[2] The pristine nature of Crooked Lake is important to the Sylvania Wilderness Cabins' business, to his customers and to

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[1] *See Herr v. U.S. Forest Service*, Case No. 14-00105 (W.D. Mich.), ECF No. 15-2, Page ID # 162–63; ECF No. 15-3, Page ID # 166 (filed on July 25, 2014).

[2] *Herr v. U.S. Forest Service*, Case No. 14-00105 (W.D. Mich.), ECF No. 15-2, Page ID # 162 (filed on July 25, 2014).

Mr. Schmidt personally.[3] The customers seek quiet lakes on which to paddle their canoes to fish, camp, watch wildlife, and enjoy the quiet outdoors. Their wilderness experience, however, is often disrupted and upset by noise and wakes from loud and disruptive large gas-powered motorboats that speed across Crooked Lake.[4]

Congress passed the Wilderness Act of 1964 and then enacted the Michigan Wilderness Act of 1987, which created the Sylvania Wilderness and several other protected areas.[5] The Michigan Wilderness Act states that "[s]ubject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act of 1964 governing areas designated by that Act as wilderness areas. . . ."[6] In designating the Nordhouse Dunes Wilderness in the Michigan Wilderness Act, Congress stated that it is provided "subject to valid existing rights and reasonable access to exercise such rights." Congress' designation of the Sylvania Wilderness, however, does not include the "and reasonable access to exercise such rights" text.[7]

The Forest Service is a sub-agency of the United States Department of Agriculture, which manages and has jurisdiction over the Sylvania Wilderness. It has the authority to regulate activities in this area in a manner that "leave[s] [the wilderness] unimpaired for future use and enjoyment as

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3 *Id*.

4 *Id*., at Page ID # 163.

5 Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274, § 3. App. 48.

6 *Id*. at § 5. App. 49.

7 Compare Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274, § 3(a) with § 3(b). App. 48.

wilderness." 16 U.S.C. § 1131(a), App. 46.

In 1995, pursuant to its authority under the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(1), App. 48, the Forest Service promulgated regulations limiting gas-powered motorboat use and setting no-wake speed limits on Crooked Lake to preserve its wilderness character, prevent pollution and ensure public safety. Quieter, small electric motors on boats are allowed on the lake. These motorboat regulations are commonly referred to as Amendment No. 5 to the Ottawa National Forest's Forest Plan.

Before restricting gas-powered motorboat use, the Forest Service studied the full range of issues and found that gas-powered motorboats cause "damage to aquatic vegetation, damage to the nests of species such as loons who require the shoreline for nesting, damage to the shoreline itself through wakes created by fast moving watercraft, and the potential introduction of exotic species or petroleum products into the lake." UNITED STATES FOREST SERVICE, ENVIRONMENTAL ASSESSMENT FOR THE USE OF MOTORIZED WATERCRAFT IN SYLVANIA WILDERNESS, Chapter 3, at 4 (1995).[8]

Eighteen counties in Michigan have likewise banned gas-powered motorboats on at least 40 lakes. *See, e.g.*, Mich. Admin. Code R 281.703.5 (Allegan County: Ely Lake); R 281.705.4 (Antrim County: Wetzel Lake); R 281.707.5 (Baraga County: Clair Lake); R 281.707.1 (Baraga County: Craig Lake); R 281.707.2 (Baraga County: Crooked Lake).

In 2010, the Herrs bought property along Crooked Lake. They had visited the area for many years, and they were well aware of the limitations on

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[8] *Herr v. U.S. Forest Service*, Case No. 14-00105 (W.D. Mich.), ECF No. 50-8, Page ID # 3958 (filed on Jan. 29, 2016).

gas-powered motorboat use on Crooked Lake when they purchased their property. *Herr v. U.S. Forest Service*, No. 14-105, 2014 WL 11309766, at *5 (W.D. Mich. 2014).

B. Procedural Background

In 2013, the Herrs sued to enjoin the Forest Service from enforcing the gas-powered motorboat regulations against them. The Herrs claimed that the Forest Service lacks authority to apply the restrictions against them because they are riparian owners on Crooked Lake.[9]

In 2014, the Petitioners intervened as parties-defendants in support of the defendant Forest Service and its reasonable regulations to limit gas-powered motorboat use in the Sylvania Wilderness area. Petitioners have long-standing business, property and recreational interests and wilderness protection values, including their own littoral and riparian rights on Crooked Lake.

On June 13, 2016, the district court granted summary judgment in favor of the Forest Service and the Petitioners. Following this Court's precedent, the district court held that the Property Clause of the United States Constitution grants Congress, and by its delegation the Forest Service, the power to protect wilderness areas with restrictions on motorboat use—even if such limits affect adjacent non-wilderness private property.

[9] The previous and more detailed procedural history is flagged in the Sixth Circuit's decision, *Herr*, 865 F.3d at 353-356, App. 5–11, and explained in more detail in the District Court's decision below. *Herr*, 212 F. Supp. 3d at 722–724, App. 26-27; *see also Herr v. U.S. Forest Service*, No. 14-105, 2014 WL 11309766, at *1-3 (W.D. Mich. 2014).

Herr v. U.S. Forest Service, 212 F. Supp. 3d 720, 724–25, App. 30-32; *see also Camfield*, 167 U.S. at 527 (holding that Congress could prohibit fences on private property that block access to federal lands).

The district court reasoned that because the Forest Service's power under the Property Clause is analogous to the police powers of the state, *Kleppe*, 426 U.S. at 540, and because the State of Michigan enacted similar motorboat restrictions on other lakes affecting riparian owners, the Forest Service could promulgate analogous motorboat limits affecting riparian owners on Crooked Lake. *Herr*, 212 F. Supp. 3d at 726–27, App. 34-41. The Herrs appealed.

On July 26, 2017, the Sixth Circuit issued a 2-1 decision reversing the district court's order granting summary judgment. *Herr*, 865 F.3d at 359, App. 18. The majority panel opinion, written by Circuit Judge Sutton and joined by District Court Judge Zouhary sitting by designation, held that only the State of Michigan may enact motorboat limits affecting riparian owners adjacent to Crooked Lake even though ninety-five percent of Crooked Lake lies within the Sylvania Wilderness.

The panel majority reasoned that because Michigan had not specifically enacted motorboat limits over Crooked Lake, even though it does have the power to do so, the Forest Service then lacks power under the Property Clause to do so. *Id.* at 358–59, App. 16-18. The majority opinion held that because "the prior property owners had [littoral] rights before Congress passed the [Michigan Wilderness] Act. . . . they sold those rights along with the rest of the property to the [Respondents] Herrs in 2010." *Id.* at 357, App. 14. The majority opinion partially rested on the premise that Michigan recognizes a riparian right to "recreational

motorboating," but the opinion cited no Michigan law in support of this alleged right. *Id.* at 359, App. 18.

Circuit Judge Donald wrote a dissenting opinion concluding that the "Forest Service's powers, while restricted, do not depend on state action" and "state regulation is not a prerequisite to the Forest Service's ability to regulate." *Id.* at 360, App. 21 (Donald, J., dissenting). Judge Donald recognized this Court's precedents in *Kleppe* and *Camfield* and determined that the controlling question is "whether the regulation is a proper exercise of the state's police power." *Id.*, App. 21.

The dissenting opinion explained that "Michigan state law confirms that restrictions on kinds of vessels and speed of motorboats are permissible," and, therefore, concluded that the Forest Service's corresponding motorboat restrictions on gas-powered motorboat use in the Sylvania Wilderness area are likewise permissible and lawful. *Id.*, App. 21. In reaching this result, Judge Donald pointed out that Michigan law allows regulation of a riparian owners' gas-powered motorboat use and that the Respondents Herrs' right to engage in boating under Michigan law does not "equate to a *right* to use gas-powered motorboats." *Id.*, App. 22. (emphasis in original).

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review Because the Sixth Circuit's Decision Conflicts with this Court's Decisions on the Scope of Congress' and Federal Agencies' Authority under the Property Clause of the United States Constitution.

The Sixth Circuit's decision conflicts with multiple "relevant decisions of this Court," S. Ct. R. 10(c), by unreasonably constraining the federal government's authority to reasonably regulate activities affecting its property. The Property Clause provides the federal government with "the power to determine what are 'needful' rules 'respecting' the public lands," and this Property Clause power is "analogous" to state police power. *Kleppe*, 426 U.S. at 539–40; *Camfield*, 167 U.S. at 525; *see also* CONST. art. IV, § 3, cl. 2, App. 45.

In *Kleppe*, this Court found that regulations under the Property Clause may permissibly have an "effect on private lands not otherwise under federal control." *Kleppe*, 426 U.S. at 546 (citing *Camfield*). As this Court explained, a federal action pursuant to the Property Clause may restrict use of private land governed by state law because federal protection "necessarily overrides conflicting state laws under the Supremacy Clause." *Id.* at 543; *see also* U.S. CONST. art. VI, cl. 2, App. 45.

In *Camfield*, this Court held that Congress could permissibly prohibit fences on private property that blocked access to federal lands. *Camfield*, 167 U.S. at 528. Congress can create legislation to protect

public lands even if the land is within the jurisdiction of a state. *Id.* at 525–26. Consequently, as this Court recognized, the federal government must necessarily be able to protect its property to the fullest extent—including in a manner that has an incidental effect on neighboring private property—because any lesser power "places the public domain of the United States completely at the mercy of state legislation." *Id.* at 526.

The Sixth Circuit's decision renders the federal government's power to protect its property subservient to specific predicate action by the State of Michigan. Under the Sixth Circuit's decision, in order to determine whether the Forest Service's exercise of Property Clause power delegated by Congress through the Michigan Wilderness Act is permissible, the operative question is whether the State of Michigan has previously enacted the same regulation for the same lake. *Herr*, 865 F.3d at 358, App. 16.

In reaching this result, the Sixth Circuit reasoned that: "No doubt, Michigan could have regulated motorboat use on Crooked Lake during this time. . . But the key point is that it never did . . ." and "[u]nless or until the State permissibly says otherwise," the Forest Service cannot enforce its gas-powered motorboat limitation on Crooked Lake. *Id.* at 358–359, App. 16-18. According to the Sixth Circuit, "the Forest Service or the Herrs' neighbors may. . . petition the State of Michigan to change the boating rules on the surface of Crooked Lake." *Herr*, 865 F.3d at 359, App. 18.

The Sixth Circuit's decision conflicts with this Court's prior decisions in four fundamental respects.

First, the Sixth Circuit's decision creates a situation where a state's action is a necessary

prerequisite to the federal government's ability to adopt reasonable regulations to protect its property interests. This situation conflicts with this Court's determination that the Property Clause power is "analogous"—not subservient—to a state's police power. *Kleppe*, 426 U.S. at 540; *Camfield*, 167 U.S. at 525. The Sixth Circuit's decision also inverts *Kleppe*'s finding that federal authority under the Property Clause is supreme over a state's authority. *Kleppe*, 426 U.S. at 543.

In this case, there is no state regulation that conflicts with the Forest Service's reasonable regulation. Instead, the Sixth Circuit held that the State of Michigan's inaction is sufficient to forestall the Forest Service from exercising its constitutional and statutory authority to exercise reasonable policy powers to protect federal property.

Second, the Sixth Circuit's decision impermissibly "places the public domain of the United States completely at the mercy of state legislation." *Camfield*, 167 U.S. at 526. If the lack of a state's action can preempt what the Forest Service deems "necessary" for the protection of national wilderness areas, as the Sixth Circuit held, then the Forest Service cannot carry out the duties imposed by Congress under the Wilderness Act of 1964 and the Michigan Wilderness Act of 1987, which by their plain terms allow the federal government to regulate motorboat use in wilderness areas. *See* 16 U.S.C. § 1133(d)(1)(explicitly allowing motorboat regulation in wilderness areas), App. 48; Michigan Wilderness Act of 1987, §§ 3(b), 5, App. 48-49 (incorporating the provisions of the Wilderness Act of 1964). The Sixth Circuit's decision runs contrary to the supremacy principles articulated by this Court in *Kleppe*, 426 U.S. at 543.

Third, the Forest Service's reasonable restriction of gas-powered motorboat use on Crooked Lake in a manner that affects adjacent private property does not render such regulation impermissible. This Court has recognized that regulation under the Property Clause may permissibly affect adjacent private property. *Kleppe*, 426 U.S. at 546. In addition, this Court recently held that the governmental action and "effort[s] to preserve river[s] and surrounding land" near a National Wild and Scenic River were a reasonable land-use regulation. *Murr*, 137 S. Ct. at 1949–50. Following this Court's decisions in *Kleppe* and *Murr*, the Forest Service is fully within its powers to protect and preserve Crooked Lake and the public's wilderness values and experience by limiting the use of loud and disruptive gas-powered motorboats.

The Forest Service has authority to regulate use for the entirety of Crooked Lake. Limiting large, loud and disruptive gas-powered motorboats is a reasonable regulation based on a thorough administrative record, especially because it does not affect the ability to use less harmful and disruptive boats with small, quieter electric motors, canoes and kayaks. The Sixth Circuit's decision erroneously deprives the Forest Service of necessary authority to protect public lands and waters in Congressionally-designated national wilderness areas.

Fourth, the Sixth Circuit's interpretation of the savings clause "subject to valid existing rights" requires that a state not just have authority to regulate an activity, but, indeed, actually act to exercise its authority to regulate that activity before the federal government can regulate the same activity. This outcome elevates state power over federal power in violation of the Supremacy Clause.

U.S. CONST. art. VI, cl. 2, App. 45. Congress could not have intended an interpretation of such "political significance . . . in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

The majority opinion attempts to circumvent this Supremacy Clause violation by declaring that this is a statutory construction issue that does not implicate the Property Clause:

> The Forest Service tells us that it can regulate littoral and riparian rights under the Property Clause to the same extent that state regulators can regulate them. Maybe; maybe not. But we need not decide. For the Michigan Wilderness Act does not grant the Forest Service a power coextensive with Congress' plenary authority under the Property Clause.

Herr, 865 F.3d at 358, App. 17.

The majority opinion, however, cannot so blithely ignore the extent to which its decision impermissibility limits the Property Clause and renders federal authority dependent on a state's action and constricted by a state's inaction.

This constitutional power under the Property Clause is not a "maybe" – it is a yes. Under this Court's precedent and other Circuits' decisions, the Forest Service has constitutional authority to limit gas-powered motorboat use in this national wilderness area.

As the dissenting opinion explained: "Congress chose to 'grandfather' private rights in the 'subject to valid existing rights' phrase, but in doing so, it never intended that those rights be ossified against further

regulation." *Herr*, 865 F.3d at 360–61, App. 22–23 (Donald, J., dissenting) (quoting *Stupak–Thrall v. United States*, 89 F.3d 1269, 1271 (6th Cir. 1996)). The dissenting opinion further stated:

> Congress has placed the specific constraint of "subject to valid existing rights"; rights that are determined by state law. But state regulation is not a prerequisite to the Forest Service's ability to regulate. The determining factor, rather, is whether the regulation is a proper exercise of the state's police power. And, as previously mentioned, Michigan state law confirms that restrictions on kinds of vessels and speed of motorboats are permissible.

Herr, 865 F.3d at 360, App. 21 (Donald, J., dissenting).

II. This Court Should Grant Review Because the Sixth Circuit's Decision Conflicts with Decisions of the Eighth, Ninth and Eleventh Circuits on the Scope of the Property Clause Power.

The Sixth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). With respect to the Property Clause, the Eighth, Ninth and Eleventh Circuits have upheld federal regulations that: (1) protect public lands and waters; and (2) have an effect on adjacent private property. The Sixth Circuit's decision conflicts with these other Circuits' decisions and forbids the federal government from adopting reasonable regulations to

protect public lands and waters in a Congressionally-designated national wilderness area when such regulation has an incidental but reasonable effect on adjacent private property.

The Forest Service's reasonable regulation in this case limiting use of large, loud gas-powered motorboats is necessary to preserve the integrity and values of federal-protected wilderness areas, and it strikes an appropriate balance among the interests of all property owners on Crooked Lake and the public who visit the national Sylvania Wilderness. Respondents can use boats with smaller and quieter electric motors, canoes and kayaks, and they can fish, swim, picnic and enjoy their home and lakefront property. The Forest Service's reasonable regulation respects the uses and enjoyment of other neighboring property owners, a neighboring small business and its customers, and visitors seeking to safely canoe, fish, hike, camp, watch wildlife and enjoy the quiet of the outdoors in the Sylvania Wilderness area.

The Eighth Circuit held in *Minnesota v. Block* that Congress has authority to regulate actions not occurring on federal waters in order to protect public lands and waters. 660 F.2d 1240, 1249 (8th Cir. 1981). In that case, the federal government prohibited the use of motorboats on the lakes in the Boundary Waters Canoe Area Wilderness. *Id.* at 1246–47. The Eighth Circuit found that, because the "United States owns close to ninety percent of the land surrounding the waters at issue," and there was "ample support for Congress' finding that use of motorboats . . . must be limited in order to preserve the area as a wilderness," Congress "acted within its power under the Constitution to pass needful regulations" to protect the waters of the wilderness

area. *Id.* at 1251.

Following the reasoning in *Minnesota v. Block*, the Forest Service's reasonable regulations limiting gas-powered motorboat use in the present case would be permissible because ninety-five percent of Crooked Lake lies within the Sylvania Wilderness and the Forest Service provided ample record support and evidence for limiting use of loud and disruptive gas-powered motorboats in order to protect the unique character and value of the lakes in the Sylvania Wilderness, which Congress enacted legislation to protect.

The Sixth Circuit's decision also conflicts with *United States v. Brown*. 552 F.2d 817 (8th Cir. 1977). In *Brown*, the Eighth Circuit held that the Property Clause permits the federal government to prohibit duck hunting on waters in a national park even if a state did not cede jurisdiction over those waters. *Id.* at 821. The Eighth Circuit confirmed federal authority without requiring that existing state laws prohibit hunting over the same waters.

The Ninth Circuit in *United States v. Lindsey* likewise upheld a federal regulation prohibiting campfires on adjacent non-federal land because "[i]t is well established that [the Property] clause grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." 595 F.2d 5, 6 (9th Cir. 1979). The Court emphasized that the "danger depends on the nearness of the fire not the ownership of the land." *Id.*

In the present case, the Forest Service regulated gas-powered motorboat use on Crooked Lake in order to protect it and the rest of the Sylvania Wilderness. Following *Lindsey*, the "nearness" of

gas-powered motorboats on the five percent of Crooked Lake outside of the wilderness area extends into and threatens the rest of Crooked Lake, and, therefore, the Forest Service's gas-powered motorboat limits permissibly address the harms caused by gas-powered motorboat use in the Sylvania Wilderness. Accordingly, the Sixth Circuit's decision conflicts with the Ninth Circuit's decision in *Lindsey*.

The Sixth Circuit's decision also conflicts with other analogous cases from the Eighth and Ninth Circuits holding that the federal government may regulate the use of boats on federal waters and adjacent non-federal waters. In *Free Enterprise Canoe Renters Ass'n of Missouri v. Watt*, the Eighth Circuit held that the National Park Service could regulate canoe renters operating outside of the National Park in order to alleviate canoe traffic congestion problems within the National Park. 11 F.2d 852, 854–56 (8th Cir. 1983). In *United States v. Hells Canyon Guide Service, Inc.*, the Ninth Circuit ruled that the Forest Service could regulate boat services on waters connected to and in the vicinity of a national recreation area. 660 F.2d 735, 737–38 (9th Cir. 1981). Following these cases, the Forest Service has the authority to regulate motorboat use on Crooked Lake of which ninety-five percent lies within the Sylvania Wilderness. The Sixth Circuit's decision to the contrary is in conflict.

The Eleventh Circuit in *High Point v. Nat'l Park Service* similarly held that the Property Clause allows the federal government to "regulate activities on non-federal public waters in order to protect wildlife and visitors on [federal] lands." 850 F.3d 1185, 1199 (11th Cir. 2017). The Eleventh Circuit recognized that the "ownership of the marshlands

makes no difference to the National Park Service's statutory obligation and authority to prohibit dock construction" on a national seashore. *Id.* at 1192.

In the present case, the Forest Service has authority to protect wilderness areas like the Sylvania Wilderness and to regulate motorboat use. *See* 16 U.S.C. §§ 1131, 1133(d)(1). Following the reasoning of the Eleventh Circuit in *High Point*, the Forest Service's gas-powered motorboat use regulations are permissible because they "regulate activities on non-federal waters in order to protect wildlife and visitors on [federal] land." *High Point*, 850 F.3d at 1199. The Sixth Circuit's decision to the contrary is in conflict.

The Sixth Circuit's majority decision even conflicts with a prior decision within its own Circuit. In *Burlison v. United States*, the Sixth Circuit held that the federal government's authority under the Property Clause is "analogous to the police power of the several states," and that "regulations under the Property Clause may have some effect on private lands not otherwise under federal control." *Burlison*, 533 F.3d 419, 432, 439 (6th Cir. 2008). In *Burlison*, the Sixth Circuit did not determine that the federal government's Property Clause power is contingent on prior state action. Rather, under *Burlison*, the "Forest Service's powers, while restricted, do not depend on state action" and "state regulation is not a prerequisite to the Forest Service's ability to regulate." *Herr*, 865 F.3d at 360, App. 21 (Donald, J., dissenting).

The Sixth Circuit panel majority's decision in this case did not cite or otherwise distinguish *Burlison* when it deemed the Forest Service's power under the Property Clause to be contingent on whether the State of Michigan had previously enacted a ban on

gas-powered motorboat use on the five percent of Crooked Lake outside of the Sylvania Wilderness. Instead, the Sixth Circuit's panel majority impermissibly "places the public domain of the United States completely at the mercy of state legislation." *Kleppe*, 426 U.S. at 543 (quoting *Camfield*, 167 U.S. at 526).

CONCLUSION

The Sixth Circuit's decision impermissibly: (1) renders the federal government's constitutional powers under the Property Clause to enact reasonable regulations limiting gas-powered motorboat use in the national Sylvania Wilderness area subservient to the State of Michigan's inaction; (2) creates a conflict with this Court's precedents; and (3) creates new conflicts with decisions of the Eighth, Ninth and Eleventh Circuits.

Accordingly, this Court should grant review of the Sixth Circuit's decision.

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