No. 17-1398

In the Supreme Court of the United States

SWC, LLC, ET AL., PETITIONERS

v.

DAVID A. HERR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274, permits the U.S. Forest Service to set rules for the use of the Sylvania Wilderness, "[s]ubject to valid existing rights." § 5, 101 Stat. 1275.

The question presented is whether the court of appeals correctly determined that the Forest Service could not prohibit respondents from using gasoline-powered motorboats on Crooked Lake within the Sylvania Wilderness or from boating on that lake at higher than "no-wake" speeds, in light of what the court found to be respondents' "valid existing rights" under Michigan riparian law as owners of property on Crooked Lake.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-23) is reported at 865 F.3d 351. The opinion of the district court (Pet. App. 25-41) is reported at 212 F. Supp. 3d 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on July 26, 2017. A petition for rehearing was denied on January 4, 2018 (Pet. App. 43-44). The petition for a writ of certiorari was filed on April 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress has authorized the U.S. Forest Service, an agency within the U.S. Department of Agriculture, to manage the National Forest System (Forest System). Federal law directs the Secretary of Agriculture to "make such rules and regulations * * * as will

insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. 551. The forests are to be "administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," and for "multiple use and sustained yield." 16 U.S.C. 528, 529. To carry out this mandate, federal law provides for the Forest Service to develop and maintain a land and resource management plan, typically referred to as a forest plan, for each Forest System unit. 16 U.S.C. 1604(g)(1)-(3); see *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 728-729 (1998).

In the Wilderness Act, 16 U.S.C. 1131 *et seq.*, Congress further provided that "subject to existing private rights" and certain additional exceptions, "there shall be * * * no use of * * * motorboats * * * within" any area designated part of the National Wilderness Preservation System. 16 U.S.C. 1133(c). The Secretary is authorized to make exceptions for established uses, under a provision stating that "the use of * * * motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable." 16 U.S.C. 1133(d)(1).

Consistent with those directives, the Forest Service generally prohibits use of motorboats within the National Wilderness Preservation System. 36 C.F.R. 293.6. The Chief of the Forest Service may, however, permit "the use of motorboats at places within any Wilderness" where prior use has been established, "subject to such restrictions as he deems desirable." 36 C.F.R. 293.6(d).

b. The area that now comprises the Sylvania Wilderness has been part of the Ottawa National Forest since 1966. Pet. App. 6. The Sylvania Wilderness encompasses

over 18,000 acres of pristine lakes and virgin forest, and it offers numerous primitive back-country camp sites and opportunities for canoeing, hiking, and fishing. *Ibid.* The Sylvania Wilderness includes 95% of Crooked Lake, a three-mile-long body of water that is "[n]estled within an old growth forest." *Id.* at 5-6. The shoreline of Crooked Lake that is located within the Sylvania Wilderness is owned by the United States. In addition, the United States owns some of the shoreline of the small portion of Crooked Lake that lies outside the Sylvania Wilderness. See *Stupak-Thrall* v. *Glickman*, 346 F.3d 579, 584 (6th Cir. 2003). The remaining land abutting Crooked Lake outside the Sylvania Wilderness "belongs to approximately ten private landowners who own the property under state law." Pet. App. 6.

Congress directed in the Michigan Wilderness Act of 1987 (MWA), Pub. L. No. 100-184, 101 Stat. 1274, that the Sylvania Wilderness be managed "in accordance with" the Wilderness Act, "[s]ubject to valid existing rights." § 5, 101 Stat. 1275. The forest plan for the Ottawa National Forest, which covers the Sylvania Wilderness, prohibits use of gasoline-powered motors, and limits watercraft to a slow, "no-wake" speed on three lakes within the Sylvania Wilderness, including Crooked Lake. Pet. App. 27 (citations omitted); see *id.* at 8, 26-27. The forest plan does not constrain boating on the portion of Crooked Lake that is outside of the Sylvania Wilderness.

2. a. Respondents David and Pamela Herr, who are private landholders on Crooked Lake, brought an as-applied challenge seeking to enjoin the Forest Service from applying to them (and their guests, licensees, and successors) the restrictions on motorboat use and the no-wake speed limit on the portions of Crooked Lake

within the Sylvania Wilderness. Pet. App. 9, 26-27. They argued that the MWA's directive that regulations of the Sylvania Wilderness be "[s]ubject to valid existing rights," § 5, 101 Stat. 1275, barred those applications because, in their view, they had riparian rights as lakefront property owners under Michigan law to use motorboats on the entirety of the lake.[1] Two other owners of property on Crooked Lake (SWC, LLC and Timothy Schmidt) and two environmental groups (Friends of Sylvania and the Upper Peninsula Environmental Coalition) intervened as defendants. Pet. App. 27 n.1.

b. The district court rejected respondents' as-applied challenge. Pet. App. 25-41. The court concluded that the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, gives Congress broad authority to adopt restrictions "respecting" public property, including rules that "will sometimes include the exercise of power over purely private property, in order to ensure adequate protection of the federal interest." Pet. App. 31 (citation omitted). The court concluded that the Wilderness Act and MWA were valid exercises of that authority. *Id.* at 33-34.

The district court then concluded that the Forest Service could permissibly apply motorboat and speed restrictions to respondents' boating on Crooked Lake within the Sylvania Wilderness, in light of its authority under the Wilderness Act and the MWA. The court acknowledged that those statutes permit the Forest

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[1] Strictly speaking, land that abuts a lake is littoral property, and lakefront property owners' rights are littoral rights, whereas the term riparian refers to land that abuts a river. See Pet. App. 5. Michigan courts, however, often use the term "riparian" to encompass both littoral and riparian property. *E.g.*, *Holton* v. *Ward*, 847 N.W.2d 1, 4 n.1 (Mich. Ct. App. 2014), appeal denied, 861 N.W.2d 20 (Mich. 2015).

Service to regulate in the Sylvania Wilderness only "[s]ubject to valid existing rights," such as riparian rights. Pet. App. 30-38. But the court determined that application of the gasoline-powered motorboat prohibition and no-wake speed limit did not violate respondents' riparian rights. *Id.* at 35-41. The court agreed that Michigan law conferred on respondents "the riparian right to boat across the water of Crooked Lake." *Id.* at 36. But it determined that under Michigan law, "this right is subject to reasonable restrictions," and that "boating size and speed are precisely the type of regulation that Michigan courts have upheld as reasonable." *Id.* at 36-37. The court further determined that the motorboat restrictions were "reasonable because they are rationally related to achieving the MWA's goal of preserving the wilderness character of Sylvania." *Id.* at 37. The court also concluded that the application of the boating limitations did not violate respondents' "valid existing rights" because respondents acquired their property many years after the enactment of both the MWA and the boating restrictions applicable to Crooked Lake. *Id.* at 39.

c. The court of appeals reversed, concluding that the MWA did not permit application of the challenged rules to respondents in light of respondents' riparian rights under Michigan law. Pet. App. 3-19. The court began by noting that the Property Clause of the Constitution permits the United States to establish rules concerning federal property, and that when "private property affects public lands, the government may regulate the private property to the extent needed to 'protect[]' the relevant 'federal property.'" *Id.* at 11 (quoting *Kleppe* v. *New Mexico*, 426 U.S. 529, 538 (1976)) (brackets in original). The court further noted that Congress enacted

the MWA under its Property Clause authorities, and that the MWA authorized "the Forest Service to regulate the public's use of Crooked Lake for boating and related recreation, 'subject to valid existing rights.'" *Id.* at 12. Finally, the court observed that "[s]tate-law riparian and littoral rights represent a form of protected rights under the" MWA's proviso regarding "valid existing rights." *Ibid.*

The court of appeals next concluded that the Forest Service lacked authority to enforce against respondents its motorboat restrictions on Crooked Lake in light of the "valid existing rights" proviso. The court explained that "[l]ittoral rights give property owners authority to use lakes on or adjacent to their property." Pet. App. 12. It wrote that since every owner of littoral property has a "right to reasonable use of [a lake's] full surface," "the surface of Crooked Lake, even the part in the Sylvania Wilderness * * * belongs jointly to the federal government and the private owners of state land on Crooked Lake, both of which maintain a littoral right to 'reasonable use' of the lake's surface." *Id.* at 13.

The court of appeals further concluded that respondents' littoral rights existed at the time the MWA was enacted, making them "valid existing rights" for purposes of the statute. Pet. App. 14. The court emphasized that littoral rights "run with the land." *Ibid.* Accordingly, it concluded, so long as "prior property owners had" the relevant littoral rights before the MWA was enacted, those rights passed to respondents when they purchased their lakefront property. *Ibid.*

The court of appeals then determined that respondents had valid littoral rights under Michigan law to gasoline-powered motorboat use on Crooked Lake at above no-wake speeds. It concluded that "[r]ecreational

boating * * * amounts to a reasonable use" under state law. Pet. App. 15. It further concluded that the long history of motorboat use on Crooked Lake reinforced that the use was a littoral right because "[l]ongstanding prior use is one indicator that a co-riparian * * * acts reasonably relative to others." *Ibid.* The court acknowledged that Michigan "could have regulated motorboat use on Crooked Lake during this time," but it emphasized that Michigan had never done so, observing that "[t]he best evidence of reasonable use under Michigan law is what Michigan law allows on this lake." *Id.* at 16. Further, it wrote, "[n]o less significantly, the Forest Service long allowed motorboat use on all of the lake after it obtained [its] regulatory authority" under the MWA, and even facilitated that use, until 2013. *Ibid.* In addition, the court observed, the Forest Service still allowed motorboat use on Crooked Lake by one of the ten littoral property owners on the lake and her guests, because the government had declined to appeal an injunction authorizing such use in a prior case. *Ibid.* The court found the fact that the Forest Service permitted such use by one littoral property owner was evidence that such use was permissible by all littoral property owners, because "[i]f motorboat use is objectively unreasonable for one, it is objectively unreasonable for all." *Ibid.*

The court of appeals cautioned that "[a] pre-existing use * * * may not invariably amount to a right in all settings" and that respondents' littoral rights did not extend to use of "any size boat at any speed on any part of the lake." Pet. App. 17. Nevertheless, it concluded that here, where "Michigan law tells us that boating is typically one stick in the bundle of littoral and riparian rights," "[t]he long history of pre-existing use confirms

that it is not unreasonable to use a gas-powered motorboat at speeds above five miles per hour on Crooked Lake." *Ibid.*

The court of appeals rejected the government's argument that the MWA permitted the Forest Service to impose restrictions on riparian rights to the same extent that state regulators could impose such restrictions. Pet. App. 17-18. The court stated that it need not decide whether the Property Clause allowed the government to regulate in that manner, because the MWA "does not grant the Forest Service a power coextensive with Congress' plenary authority under the Property Clause." *Id.* at 17. Instead, it concluded, because the MWA granted the Forest Service regulatory authority that was "subject to valid existing rights," the Forest Service "must respect pre-existing property rights, not just the limits of state power." *Id.* at 18.

Judge Donald dissented. Pet. App. 19-23. She would have held that under the MWA, the Forest Service had authority to regulate littoral and riparian activity that is "analogous to the police power of the several states." *Id.* at 20. In her view, the challenged boating restrictions could be applied to respondents because they were reasonable regulations within the scope of the police power. *Id.* at 21-22.

ARGUMENT

Petitioners seek further review of the court of appeals' determination that the Forest Service lacked authority under the MWA to enforce certain boating regulations against respondents on Crooked Lake. The United States agrees with petitioners that the court's determination was erroneous. But the court's decision does not conflict with any decision of this Court or another

court of appeals or otherwise warrant this Court's review. The petition for a writ of certiorari should be denied.

1. The court of appeals erred in concluding that the MWA does not allow application to respondents of motorboat limits for Crooked Lake, on the ground that such applications would violate respondents' "valid existing rights" as riparian landowners. § 5, 101 Stat. 1275. Under Michigan law, the owner of riparian property enjoys, in common with other riparians, the right to make use of the entire surface and subsurface of the abutting waterbody. *Dyball* v. *Lennox*, 680 N.W.2d 522, 526 (Mich. Ct. App. 2004) (per curiam); *Rice* v. *Naimish*, 155 N.W.2d 370, 372 (Mich. Ct. App. 1968). Each riparian owner "shares such rights with all other [riparian] owners and none may interfere, unreasonably, with like rights of the others." *Rice*, 155 N.W.2d at 372.

The court of appeals was mistaken, however, in determining that respondents' rights as lakefront property owners included a right to use gasoline-powered motorboats and to travel at speeds exceeding the "no-wake" limits imposed by the Forest Service on Crooked Lake. Michigan law recognizes that restrictions like those at issue here do not deprive property owners of their riparian rights to make use of a lake's surface and subsurface. For example, the Michigan Marine Safety Act, Mich. Comp. Laws Ann. §§ 324.80101 *et seq.* (West 2009), imposes numerous limitations on the use and operation of vessels within the State, and those limitations apply to riparian owners as well as the general public. That Act authorizes the Michigan Department of Natural Resources (DNR) to

> establish vessel speed limits; prohibit the use of vessels * * * ; restrict the use of vessels * * * by day and hour; establish and designate areas restricted

> solely to [certain uses]; and prescribe any other regulations relating to the use or operation of vessels * * * that will assure compatible use of state waters and best protect the public safety.

Id. § 324.80108. Under this authority, DNR (in coordination with local governments) has adopted "special local watercraft controls" establishing no-wake zones, banning the use of gas-powered motors, or banning all motorboats on hundreds of waterways throughout Michigan. Mich. Admin. Code r. 281.700.1-281.783.2 (2018) (listing more than 300 "no-wake" waterways, more than 20 "electric-only" waterways, and more than 60 waterways where all motorboats are prohibited).

In addition, the Michigan Legislature has authorized township boards to "adopt ordinances and regulations to secure the public peace, health, safety, welfare and convenience." *Miller* v. *Fabius Twp. Bd.*, 114 N.W.2d 205, 206 (Mich. 1962) (citation omitted). Townships have used this authority to enact a wide range of ordinances regulating the operation of watercraft, and the Michigan courts have consistently upheld the application of those ordinances to riparian landowners. In *Miller,* for example, the Michigan Supreme Court upheld an ordinance limiting the hours that lake users—including riparian landowners—could waterski. *Id.* at 206, 209. Similarly, in *Square Lake Hills Condominium Ass'n* v. *Bloomfield Township*, 471 N.W.2d 321 (1991), the Michigan Supreme Court upheld an ordinance that limited the number of boats that riparian owners could dock at or launch from their property. *Id.* at 324; see *id.* at 324, 328 (township could address "problems inherent in overcrowded lakes, pollution, and destruction of wildlife" through reasonable use of police power).

Those statutes and ordinances strongly indicate that the Michigan riparian right to use surface waters does not include an absolute right to travel on those waters using gas-powered motorboats or at speeds in excess of no-wake speed. Michigan judicial decisions specify that "[r]iparian rights are property, for the taking or destruction of which by the State compensation must be made, unless the use has a real and substantial relation to a paramount trust purpose." *DiFronzo* v. *Village of Port Sanilac*, 419 N.W.2d 756, 758 (Mich. Ct. App. 1988) (quoting *Hilt* v. *Weber*, 233 N.W. 159, 168 (Mich. 1930)). But neither the parties nor the courts below identified any Michigan decision holding that common limits on speeds or permissible types of watercraft infringe riparian rights or require the State or municipality to pay just compensation. The absence of such decisions confirms that, under Michigan law, riparian rights do not include an absolute right to use gas motors or travel at high speeds.

Moreover, under Michigan common law, all recreational or artificial riparian uses are limited by the doctrine of "reasonable use." *Michigan Citizens for Water Conservation* v. *Nestlé Waters N. Am. Inc.*, 709 N.W.2d 174, 194 (Mich. Ct. App. 2006), aff'd in part, rev'd in part, 737 N.W.2d 447 (Mich. 2007). Whether a use is reasonable depends on such factors as the size, character and natural state of the watercourse; the type, extent, necessity, and effect of the use on the quantity, quality, and level of the water; and "the proposed artificial use in relation to the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights and interests of other riparian proprietors and also on the interests of the State, in-

cluding fishing, navigation, and conservation." *Thompson* v. *Enz*, 154 N.W.2d 473, 485 (Mich. 1967). Here, the United States owns all of the land abutting the 95% of Crooked Lake that falls within the Sylvania Wilderness, and the motorboat restrictions apply only within the Sylvania Wilderness's boundaries. Pet. App. 6. It manages the Sylvania Wilderness as a pristine natural area for such activities as backcountry camping, canoeing, hiking, and fishing. *Ibid.* Respondents' use of gasoline-powered motorboats, in excess of no-wake speeds, on the portions of the lake that do not abut their property, is not a protected reasonable use under these circumstances, because of its deleterious impact on the correlative rights and interests of the United States in safeguarding Crooked Lake as a wilderness preserve for the public.

2. Nonetheless, the court of appeals' determination that the Forest Service may not enforce a motorboat prohibition and no-wake speed limit against respondents on Crooked Lake does not warrant this Court's review.

Contrary to petitioners' contention, the decision below does not conflict with any decision of this Court. Petitioners assert (Pet. 2, 16-21) a conflict with *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) and *Camfield* v. *United States*, 167 U.S. 518 (1897), which set out the scope of Congress's authority under the Property Clause. But the decision below acknowledges the broad scope of Congress's authority under this Court's decisions. See Pet. App. 11-12 (discussing the Property Clause, *Kleppe*, and *Camfield*). And it declined to address the full extent of Congress's power under the Property Clause, *id.* at 17, because it concluded that the Forest Service had exceeded its statutory authority. In particular, the court of appeals determined that the

MWA's specification that the Forest Service could regulate only "subject to valid existing rights" prevented the Forest Service from barring respondents' motorboat activities because respondents had a right under Michigan riparian law to use gasoline-powered motorboats on Crooked Lake and to travel above no-wake speeds. *Id.* at 17-18. That statutory determination, which in turn looked to state law, does not conflict with *Kleppe* or *Camfield*.

Petitioners' argument (Pet. 21-26) that the decision below conflicts with decisions of the Eighth, Ninth, and Eleventh Circuits is similarly unfounded. Petitioners principally rely on decisions that found distinct federal prohibitions, or applications of those prohibitions, to be valid exercises of federal authority under the Property Clause. *Minnesota* v. *Block*, 660 F.2d 1240, 1246 (8th Cir. 1981) (upholding statutory provision that "barr[ed] the use of motorized craft in all but designated portions" of the Boundary Waters Canoe Area), cert. denied, 455 U.S. 1007 (1982); *United States* v. *Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (per curiam) (affirming application of regulations concerning camping and fires on a river bed to which the title was held by Idaho); *United States* v. *Brown*, 552 F.2d 817, 819 (8th Cir.) (affirming enforcement of rules concerning firearms and hunting on waters within Voyageurs National Park), cert. denied, 431 U.S. 949 (1977); see *Free Enter. Canoe Renters Ass'n* v. *Watt*, 711 F.2d 852, 855-856 (8th Cir. 1983) (affirming enforcement of regulations concerning rented canoes within Ozark National Scenic Riverways in light of "undisputed" federal authority under the Property Clause). Those decisions pose no conflict because the decision in this case did not adopt a limited construction of the Property Clause, and instead rested on statutory

limits that were not at issue in petitioners' Property Clause cases.[2]

The statutory decisions that petitioners cite also pose no conflict. *High Point, LLLP* v. *National Park Service*, 850 F.3d 1185 (11th Cir. 2017), determined that the Park Service's denial of permission for a property owner to relocate or extend a dock was consistent with the Wilderness Act's prohibition on any "structure or installation" within wilderness areas, "subject to existing private rights." *Id.* at 1197 (quoting 16 U.S.C. 1133(c)) (emphasis omitted). The court concluded that the property owner had no "existing private right" to relocate or extend the dock, rejecting the property owner's argument that it had "retained a private right of deep-water access to Cumberland Island" under the terms of a particular deed. *Id.* at 1198. That determination does not conflict with the decision below regarding respondents' existing private rights, which rested on the court of appeals' assessment of littoral landowners' boating rights under Michigan's riparian law. *United States* v. *Hells Canyon Guide Service, Inc.*, 660 F.2d 735 (9th Cir. 1981), is also consistent with the decision below. The Ninth Circuit in that case rejected a challenge to a Forest Service permitting system for boat services in Hells Canyon National Recreation Area that was premised on the distinct language of a statutory provision not at issue here. *Id.* at 737-738 (addressing 16 U.S.C. 460gg-7).

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[2] Similarly, because the decision below does not rest on a constricted view of the Property Clause, petitioner is mistaken in suggesting (Pet. 25-26) that the decision below conflicts with the Sixth Circuit's own prior decision acknowledging the breadth of Congress's authority under the Property Clause in *Burlison* v. *United States*, 533 F.3d 419 (2008).

3. The petition for a writ of certiorari does not present a question of exceptional importance warranting this Court's review in the absence of a circuit conflict. The decision below concerns the riparian rights of about ten owners of littoral property on Crooked Lake, and those property owners' guests, licensees, and successors. Moreover, the decision rests on a highly context-specific assessment of state-law riparian rights on a particular body of water, taking into account Michigan case law, historical practice regarding motorboat use on Crooked Lake since the 1940s, the acknowledged rights of another littoral property owner, and other factors. Pet. App. 15-16. Such an assessment of the rights of approximately ten private landowners under Michigan riparian law does not warrant certiorari in the absence of a conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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