

No. 16-1351

In the Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS OF OTERO COUNTY,
NEW MEXICO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Amendment to the United States Constitution reserves to the States the authority to remove trees and other vegetation from National Forest System lands in order to reduce the risk of wildfire, without the consent of the United States Forest Service and in contravention of federal statutes and regulations governing use of those lands.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 843 F.3d 1208. The opinion of the district court (Pet. App. 16a-96a) is reported at 184 F. Supp. 3d 1097.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2016. A petition for rehearing was denied on February 3, 2017 (Pet. App. 97a-98a). The petition for a writ of certiorari was filed on May 1, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Organic Administration Act, 16 U.S.C. 473 *et seq.*, Congress provided in 1897 for the establishment of forest reservations to “improve and protect the forest

within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.” 16 U.S.C. 475. In 1907, pursuant to that authority, President Theodore Roosevelt designated most of the National Forest System (NFS) lands at issue in this case as part of the Sacramento National Forest, see Pet. App. 179a-181a,¹ and those lands subsequently became part of the Lincoln National Forest, see *id.* at 182a.

In 1905, Congress transferred responsibility for managing NFS lands to the Secretary of Agriculture. 16 U.S.C. 472, 551.² Congress directed the Secretary to “make provisions for the protection against destruction by fire and depredations upon the public forests and national forests” and to make rules and regulations governing “their occupancy and use and to preserve the forests thereon from destruction.” 16 U.S.C. 551. The regulations issued in accordance with that mandate prohibit, *inter alia*, “[c]utting or otherwise damaging any timber, tree, or other forest product, except as authorized by a special-use authorization, timber sale contract, or Federal law or regulation.” 36 C.F.R. 261.6(a); see Pet. App. 64a-65a.

The National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, requires the Secretary of Agriculture to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the

¹ Proclamation Setting Apart Sacramento National Forest, New Mexico, 35 Stat. 2127 (Apr. 24, 1907).

² Much of that authority has in turn been delegated to the Under Secretary of Agriculture for Natural Resources and Environment and then to the Chief of the Forest Service. 7 U.S.C. 6961; 7 C.F.R. 2.60(a).

National Forest System.” 16 U.S.C. 1604(a); see *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 728 (1998). Such plans must ensure that timber is not harvested from NFS lands unless it is done in compliance with environmental and other standards that protect those lands and the public interest. See, *e.g.*, 16 U.S.C. 1604(g)(3)(E).

2. In 2001, the State of New Mexico enacted a statute purporting to declare that the alleged failure of the United States Forest Service (Forest Service) to eliminate and reduce the threat of catastrophic forest fires “constitutes grounds for the forfeiture of jurisdictional supremacy” by the United States over NFS lands in New Mexico. N.M. Stat. Ann. § 4-36-11(A)(3) (2002); Pet. App. 147a. The New Mexico statute “declar[ed]” that the United States’ alleged forfeiture of supremacy “created” “a jurisdictional vacuum” that “require[d] the state of New Mexico to * * * authorize any action it presently deems necessary to fill the vacuum created by the federal government by assuming jurisdiction to reduce to acceptable levels, if not remove, the threat of catastrophic fires posed by present conditions in national forests within [the State’s] borders.” N.M. Stat. Ann. § 4-36-11(A)(4) (2002); Pet. App. 146a-148a. Purporting to rely on the State’s “police power,” the statute authorized counties to “take such actions as are necessary to clear and thin undergrowth and to remove or log fire-damaged trees” “within those areas of the national forests of New Mexico that suffered severe fire damage, as determined by the local board of county commissioners.” N.M. Stat. Ann. § 4-36-11(B) and (C) (2002); Pet. App. 148a.

On May 23, 2011, acting “pursuant to” the New Mexico statute, Otero County adopted Resolution #05-23-11/99-

50, Pet. App. 199a-203a, which “declares a state of emergency and disaster to exist in and around the communities and watersheds in the Sacramento Mountains,” *id.* at 201a. Through the resolution, the County purported to “formally notif[y] State and Federal officials” that the County “is empowered” by the state law to “take such actions as are necessary to clear and thin undergrowth and to remove or log fire-damaged trees within the area” declared by the County to be a “disaster” area, after consulting with state and federal officials, holding any necessary hearings, and developing a mitigation plan. *Id.* at 201a-202a.

Pursuant to its resolution, the County prepared a plan (the Garrett Plan) to cut and remove trees and other forest materials from approximately 69,000 acres of NFS lands in the Sacramento Ranger District of the Lincoln National Forest. Pet. App. 20a, 183a-190a (Executive Summary). The proposed work would entail removing primarily small- and medium-sized standing live and dead trees and wood materials. *Id.* at 186a-187a.³ The

³ On its face, the Garrett Plan belies petitioner’s claim that “[t]he federal government has refused to act, or to cooperate with the State and County.” Pet. 31-32, see Pet. 11, 18, 21. The plan notes that “Otero County has cooperated with federal, state, Mescalero Apache Tribe and local governments and agencies and the general public for over a decade in planning and implementing restoration type projects.” Pet. App. 187a. The plan further notes that “[a]pproximately 50-60% of the area proposed in the Cloudcroft Area Restoration Project is also being proposed in the Southern Sacramento Mountains Restoration Project by the [Forest Service]. This proposed program is a [Forest Service] Collaborative Forest Landscape Restoration Project (CFLRP) that encompasses over 290,000 acres of the Sacramento River Drainage.” *Id.* at 183a-184a; see *id.* at 191a-192a (letter from Forest Supervisor describing the Southern Sacramento Mountains Restoration Project and noting

County, through its officials, thereafter “repeatedly indicated that it will implement the Garrett Plan without regard for whether it obtains the Forest Service’s consent.” *Id.* at 35a; see *id.* at 22a (describing Forest Supervisor’s declaration recounting threats by County Commissioner to arrest federal personnel if they interfered with County’s actions on NFS lands).

3. On February 7, 2012, the United States filed a complaint for declaratory and injunctive relief against the State and County. C.A. App. A14-A28. The first count of the complaint sought a declaration against the State of New Mexico that its statute conflicts and interferes with federal law, and is therefore preempted pursuant to the Supremacy Clause, U.S. Const. Art. VI, Cl. 2. C.A. App. A24-A25, A27. The second count sought a declaration against Otero County that its resolution conflicts and interferes with federal law, and is likewise preempted. *Id.* at A26-A27.

On cross-motions for summary judgment, the district court granted summary judgment to the United States, holding that the New Mexico statute and Otero County resolution are preempted by federal law. Pet. App. 16a-96a. The court first held that Otero County’s threats to implement the Garrett Plan without Forest Service authorization provided the necessary imminent injury to establish the United States’ standing to sue and the ripeness of its claims. *Id.* at 27a-44a.

that it “was developed in collaboration with a diverse group of stakeholders and partners, including the Otero County Working Group,” and that it covers “close to 60%” of the area included in the Garrett Plan and has some of the same purposes). The Garrett Plan also recognizes that “[m]ultiple areas around Cloudcroft have received harvest or thinning treatments from 1980 to present.” *Id.* at 188a; see *id.* at 185a (describing past timber sales and thinning projects in area).

On the merits, the district court rejected both of petitioner's arguments. First, the court rejected petitioner's contention that the Tenth Amendment reserved to the States the power to undertake actions to abate perceived nuisances on federal lands even where those actions are contrary to federal regulations. Pet. App. 53a-58a. The court concluded that the Property Clause's express grant to Congress of the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const. Art. IV, § 3, Cl. 2, has the effect of withholding "from the states" "any sovereign police power to regulate lands" notwithstanding any conflicting federal laws. Pet. App. 57a-58a.

The district court also rejected petitioner's alternative argument that, even if the Tenth Amendment does not reserve sovereign police power over federal lands to the States exclusively, the state statute and county resolution are not preempted because States have concurrent jurisdiction over federal lands within their borders. Pet. App. 58a-87a. The court explained that the New Mexico statute and the Otero County resolution are not permissible exercises of state and local concurrent jurisdiction over NFS lands because they directly conflict with federal statutes and regulations that prohibit cutting or damaging timber without proper authorization and because they frustrate the objectives of Congress's comprehensive legislative scheme governing NFS planning and management. *Ibid.*

The district court also rejected the State's sole argument that the New Mexico statute could be construed to eliminate any conflict with federal law by interpreting it to require consent of the Forest Service before a County could cut timber on federal land. Pet. App. 88a-

95a. The district court held that the plain language of the statute, as well as the clearly expressed intent of the legislature, precluded such an interpretation. *Id.* at 90a-93a.

4. Petitioner appealed, but the State did not. Pet. App. 6a. The court of appeals affirmed. *Id.* at 1a-15a. On appeal, petitioner argued only that the Tenth Amendment reserves to the States (and their political subdivisions) the power to take actions on federal land that they deem necessary to protect their citizens from harm. *Id.* at 8a. Petitioner did not argue that the resolution or statute can be construed not to conflict with federal law. *Id.* at 6a-7a. The court of appeals rejected petitioner's argument, holding that binding precedent compels the conclusion that "the Property Clause gives the federal government plenary power, including legislative and police power, over federal property"—and that state and local governments' ordinary "police powers over federal land within their boundaries * * * must yield under the Supremacy Clause when they conflict with federal law under the Property Clause." *Id.* at 8a-9a; see *id.* at 9a-13a (citing *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 543-545 (1976); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917); *Camfield v. United States*, 167 U.S. 518, 526 (1897); *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002)). Because the state and local laws at issue here conflict with federal law, the court of appeals held that they are preempted and "must yield to federal law regarding conduct on federal land." *Id.* at 15a.

ARGUMENT

Petitioner seeks review (Pet. 16-36) of the court of appeals' holding that a state or local law that purports to govern conduct on federal land is preempted under the Supremacy Clause of the United States Constitution when it conflicts with federal law. Review is unwarranted because the court of appeals correctly rejected petitioner's argument. Petitioner does not suggest, moreover, that the court's decision conflicts with any decision of another court of appeals, and the United States is not aware of any such conflict. That is a sufficient reason to deny the petition for a writ of certiorari.

The court of appeals correctly held that the New Mexico statute and the Otero County resolution are preempted under the Supremacy Clause because they directly conflict with federal statutes and regulations that vest sole authority in the Forest Service to determine the circumstances under which the cutting and removal of timber may be conducted on NFS lands. The Property Clause of the United States Constitution vests in Congress "plenary" authority over the property of the United States, *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987)—and "[t]he power over the public land thus entrusted to Congress is without limitations," *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (brackets in original) (quoting *United States v. City & County of San Francisco*, 310 U.S. 16, 29 (1940)). As this Court has recognized, when "a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992). Because the Constitution vests in Congress "complete power" "over particular public property entrusted to it," *Kleppe*, 426 U.S. at 540 (quoting

City & County of San Francisco, 310 U.S. at 30), the Tenth Amendment does not reserve to the States any such power with respect to federal land. The court of appeals correctly so held. Pet. App. 8a (“[T]he Property Clause gives the federal government plenary power, including legislative and police power, over federal property.”).

Petitioner errs in contending (Pet. 20) that the court of appeals held that the Property Clause contemplates “the exclusion of any State power” on federal lands. The court expressly held to the contrary, confirming that “state and local governments can ordinarily exercise their police powers over federal land within their boundaries,” while explaining that “those powers must yield under the Supremacy Clause when they conflict with federal law under the Property Clause.” Pet. App. 8a-9a. Indeed, this Court has held exactly that, explaining that “[t]he Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands” if such laws do not “conflict with * * * legislation passed pursuant to the Property Clause.” *Kleppe*, 426 U.S. at 543. Petitioner’s further suggestion (see Pet. 17, 24, 36) that the court of appeals’ holding recognizes some sort of federal authority over non-federal lands that abut federal land also finds no support in the court of appeals’ decision. To the contrary, the court relied on this Court’s observation in *Kleppe* that the limit of federal power over property found *outside* federal land “ha[s] not yet been definitively resolved.” Pet. App. 9a (quoting *Kleppe*, 426 U.S. at 539); see *id.* at 7a (“There is no dispute that a local government can ordinarily exercise its police powers to mitigate fire danger within its territorial boundaries.”).

Because the state and local laws at issue in this case conflict with federal laws and regulations, the court of appeals correctly held that those state and local laws are preempted. Pet. App. 15a. In the district court and court of appeals, petitioner declined to argue that the state and local laws at issue do not conflict with federal laws and regulations. *Id.* at 6a-7a (“[C]onsistent with the position it took in the district court, [petitioner] offers no argument that the [county] resolution or [state] statute can be read in a manner consistent with federal law.”). Petitioner therefore should not be heard to make such an argument now. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (“Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.”). The district court extensively analyzed the many conflicts between federal law and the state and local laws at issue here, Pet. App. 58a-87a, and correctly concluded that petitioner’s “proposed actions of cutting and removing trees from NFS lands without Forest Service authorization are in direct conflict with federal regulations prohibiting these unauthorized actions on NFS lands,” *id.* at 73a.

Petitioner nevertheless suggests (Pet. 26) that the court of appeals erred by “ignor[ing]” (and rendering null, see Pet. 29) federal statutes that authorize cooperation with interested state and local governmental agencies, see 16 U.S.C. 530, and that direct the Forest Service to coordinate with state and local governments when developing management plans for the National Forests, see 16 U.S.C. 1604. Petitioner is incorrect. The court did not discuss those provisions because petitioner did not rely on them. Even setting aside that

omission by petitioner, nothing in those statutes undermines the court of appeals' holding. Statutorily required federal-state consultation is not unusual, particularly in the area of land and environmental regulation. But nothing in the provisions that petitioner now relies on undermines the court of appeals' conclusion that, when federal and state entities differ in their preferred approach to management of federal land, the federal preference must prevail. Petitioner explains (Pet. 11) that it disagrees with the federal government's "policies and practices with respect to forest management." Petitioner is free to express that disagreement and to seek any judicial relief that might be appropriate under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or any other federal statute. But petitioner is not free to act on its disagreement by enacting and implementing a local law that directly conflicts with applicable federal law. To the contrary, the court of appeals correctly concluded that, when the state and federal sovereigns disagree in their policy or land-management assessments concerning federal lands, "one must prevail, and the Supremacy Clause says that in these circumstances it must be the United States." Pet. App. 14a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 2017