PACIFIC LEGAL FOUNDATION

February 4, 2015

Mr. Barry A. Tibbetts
Town Manager
Town of Kennebunk
1 Summer Street
Kennebunk, ME 04043

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
91 7199 9991 7034 0747 6729

Dear Mr. Tibbetts:

I understand that Kennebunkport is considering adopting a leash law for dogs. According to an article in the *Kennebunk Post*, the city recently received testimony on that update from Laura Minich Zitske of Maine Audubon arguing that the city could face substantial fines under the Endangered Species Act if it fails to adopt the leash law.[1] Although Pacific Legal Foundation (PLF) takes no position on whether Kennebunkport should adopt a leash law, I wanted to explain that Ms. Zitske's assertion is incorrect—the United States Constitution does not permit the federal government to compel state or local governments to regulate its citizens, under the Endangered Species Act or any other law.

PLF is the nation's largest and oldest nonprofit legal foundation supporting individual rights, property rights, and the free market. Since 1973, we have litigated numerous cases in which environmental laws and the Constitution and individual rights have come into conflict. Our most recent such case was *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service*, in which a federal court in Utah struck down an Endangered Species Act regulation for exceeding the federal government's constitutional authority.[2]

---

[1] Duke Harrington, *Dire warning on dogs*, Kennebunk Post, Jan. 30, 2015, *available at* http://post.mainelymediallc.com/news/2015-01-30/Front_Page/Dire_warning_on_dogs.html.

[2] *People for Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, ____ F. Supp. 3d ____, 2014 WL 5743294 (D. Utah Nov. 5, 2014).

HEADQUARTERS: 930 G Street | Sacramento, CA 95814 | (916) 419-7111 | FAX (916) 419-7747
ALASKA: 121 West Fireweed Lane, Suite 250 | Anchorage, AK 99503 | (907) 278-1731 | FAX (907) 276-3887
ATLANTIC: 8645 N. Military Trail, Suite 511 | Palm Beach Gardens, FL 33410 | (561) 691-5000 | FAX (561) 691-5006
HAWAII: P.O. Box 3619 | Honolulu, HI 96811 | (808) 733-3373 | FAX (808) 733-3374 OREGON: (503) 241-8179
WASHINGTON: 10940 NE 33rd Place, Suite 210 | Bellevue, WA 98004 | (425) 576-0484 | FAX (425) 576-9565
DC: 300 New Jersey Avenue, NW, Suite 900 | Washington, DC 20001 | (202) 888-6881 | FAX (202) 888-6855
E-MAIL: plf@pacificlegal.org
WEB SITE: www.pacificlegal.org

I

THE U.S. CONSTITUTION FORBIDS THE FEDERAL GOVERNMENT FROM COMMANDEERING STATE AND LOCAL GOVERNMENTS

The federal government has *no* constitutional authority to require a state or local government to regulate its citizens in any particular way. The United States Supreme Court has consistently invalidated any federal effort to force other governments to regulate on its behalf.

In *New York v. United States*, the United States Supreme Court explained that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[3] If the federal government supports a particular policy, it should adopt that policy under federal law.[4]

Under a doctrine called "cooperative federalism," it may offer states a *choice* of regulating in its stead.[5] But, if states decline, the federal government's only option is to enforce its laws itself. It *cannot* punish the states for exercising this constitutional choice. Alternatively, Congress can encourage state and local governments to adopt policies by imposing conditions on the receipt of federal funds.[6] But it cannot leverage this power to the point where states are not offered a meaningful choice. When "[financial] pressure turns into compulsion,"[7] it violates the Constitution.[8]

"[T]he Constitution simply does not give Congress the authority to *require* the States to regulate."[9] A contrary rule would threaten political accountability:

---

[3] 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

[4] Assuming the federal government has the constitutional authority to do so.

[5] *See id.* at 167-68.

[6] *See id.* at 167; *see also South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

[7] *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

[8] *National Federation of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

[9] *New York*, 505 U.S. at 178 (emphasis added).

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.[10]

This concern does not arise when state and local governments retain a meaningful choice, only when the federal government compels them to act.

The Supreme Court reiterated this rule in *Printz v. United States*.[11] It clarified that the rule also applied to federal commandeering of local governments and officials.[12] And it noted that the important interests served by the federal law are irrelevant: "It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."[13]

II

IT WOULD BE UNCONSTITUTIONAL TO IMPOSE LIABILITY UNDER THE ENDANGERED SPECIES ACT ON A LOCAL GOVERNMENT'S FAILURE TO ADOPT A LEASH LAW

Reportedly, the federal government threatened Scarborough, Maine, with $12,000 in Endangered Species Act fines after a dog killed a piping plover.[14] The city neither injured the bird nor owned the dog. Rather, the government's theory was that the city caused the "take"[15] by failing to require its owner to have it on a leash. Ms. Zitske relied on this incident as precedent for her claim that Kennebunkport could also face liability if it does not adopt a leash law.

---

[10] *Id.* at 169.

[11] 521 U.S. 898 (1997).

[12] *Id.* at 927-28.

[13] *Id.* at 932-33.

[14] David Harry, *Feds want to slap Scarborough with $12,000 fine for death of protected bird on beach*, Bangor Daily News, Sept. 12, 2013, *available at* http://bangordailynews.com/2013/09/12/news/portland/feds-want-to-slap-scarborough-with-12000-fine-for-death-of-protected-bird-on-beach/.

[15] 16 U.S.C. §§ 1532(19) (defining take), 1538 (prohibiting take).

This legal theory is contrary to the Constitution and Kennebunkport should not make its decision based on it. As explained, the federal government has no authority to compel a local government to adopt a particular law. Thus, it cannot punish governments who exercise this constitutional choice. Yet that is precisely what it allegedly did in the Scarborough case.

That case appears to be nothing more than overly aggressive enforcement of a statute beyond its terms.[16] The "take" prohibition does not contain any requirement that local governments regulate their citizens to ensure that they do not harm listed species. The prohibition cannot be violated by inaction. Furthermore, if the city affirmatively authorized its citizens to have their dogs off-leash, rather than merely failing to prohibit it, the city would not be liable for take.[17] If anyone violates the Endangered Species Act when an off-leash dog harms a protected species, the owner alone does so.[18]

CONCLUSION

Kennebunkport should decide whether to adopt a leash law based on what's best for its citizens. Hopefully, this letter will help the city make its decision on that basis, rather than out of fear of unconstitutional threats. The Constitution's anti-commandeering principle does not permit the federal government to fine Kennebunkport if it doesn't adopt the leash law.

Sincerely,

JONATHAN WOOD
Attorney

---

[16] This over-criminalization phenomenon appears to be growing, and numerous Supreme Court justices have recently expressed concern about it. *See* Transcript of Oral Argument, *Yates v. United States*, No. 13-7451 (U.S. Nov. 5, 2014), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-7451_4gd5.pdf.

[17] *See Aransas Project v. Shaw*, ____ F.3d _____, 2014 WL 7460757 (5th Cir. Dec. 15, 2014) (state's issuance of water diversion licenses did not proximately take species in downstream habitat).

[18] It's doubtful whether even the owner violates the statute, because she likely would not satisfy its state of mind requirement. The Endangered Species Act only forbids "knowingly" harming a listed species. 16 U.S.C. § 1540.