No. 17-465

# In The Supreme Court of the United States

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS,

*Petitioner,*

v.

UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* PROPERTY AND ENVIRONMENT RESEARCH CENTER IN SUPPORT OF PETITIONER

LAWRENCE REED WATSON
Executive Director
PROPERTY AND ENVIRONMENT RESEARCH CENTER
2048 Analysis Drive, Suite A
Bozeman, Montana 59718
Telephone: (406) 587-9591
Email: reed@perc.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## MOTION OF THE PROPERTY AND ENVIRONMENT RESEARCH CENTER FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the Property and Environment Research Center (PERC) respectfully moves for permission to file the attached brief *amicus curiae*. Petitioner has consented to PERC's filing of a brief.[1] In accordance with Rule 37.2(a) PERC has provide notice to counsel for Respondents of PERC's intent to file a brief. Respondents have not yet consented.

Founded in 1980, the Property and Environment Research Center (PERC) is a non-profit conservation organization dedicated to improving environmental quality through property rights and markets. PERC scholars have published dozens of academic books and journal articles on endangered species conservation, property rights, and the Endangered Species Act.

PERC is deeply concerned about the effect the decision below will have on the recovery of the Utah prairie dog as well as the conservation of other endangered species. This case presents significant issues for wildlife management and, in particular,

[1] The letter expressing consent has been filed with the Clerk of the Court.

the conservation of endangered species only found within a single state.

Respectfully submitted,

LAWRENCE REED WATSON
Executive Director
PROPERTY AND ENVIRONMENT
RESEARCH CENTER
2048 Analysis Drive, Suite A
Bozeman, Montana 59718
Telephone: (406) 587-9591
Email: reed@perc.org

October 30, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

## INTEREST OF *AMICUS CURIAE*[1]

Founded in 1980, the Property and Environment Research Center (PERC) is a non-profit conservation organization dedicated to improving environmental quality through property rights and markets. PERC scholars have published dozens of academic books and journal articles on endangered species conservation, property rights, and the Endangered Species Act. PERC is deeply concerned about the effect the decision below will have on the recovery of the Utah prairie dog as well as the conservation of other endangered species.

## SUMMARY OF THE ARGUMENT

This case presents significant issues for wildlife management and, in particular, the conservation of endangered species only found within a single state. Wildlife management has traditionally been an area of state concern. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896). Yet, the United States Fish and Wildlife Service's regulation of the Utah prairie dog effectively forbids

[1] Pursuant to Sup. Ct. R. 37.6, amicus curiae states that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. Notice was given to Respondents on the day of filing, and though the Respondents have not consented, a motion for leave to file has been submitted to the court. Petitioner has filed a letter expressing consent with the Clerk of the Court.

the state of Utah from taking action to protect the species from extinction. Specifically, the regulation prohibits and would federally criminalize state biologists from relocating prairie dogs from residential areas to government-owned conservation areas where their chances of survival would be improved. 50 C.F.R. § 17.40(g).

This punitive regulatory approach discourages states and private parties from engaging in innovative species recovery efforts and, in some documented cases, actually encourages preemptive habitat destruction. Moreover, the inflexible nature of the Endangered Species Act's regulatory structure assumes a blanket prohibition on taking even a single animal is the most effective means of conserving endangered species. It is not. Relative to the more than 2,300 listed plants and animal species, less than 40 species have been delisted due to recovery. Those paltry few success stories will become even rarer following the Tenth Circuit's unconstitutional expansion of the Endangered Species Act's strict take prohibition.

## ARGUMENT

### I. THIS COURT SHOULD GRANT REVIEW TO PRESERVE FEDERALISM

#### A. Wildlife management has traditionally been an area of state concern

The Constitution limits federal power to preserve federalism and the ability of states to develop

innovative solutions to complex policy issues. For this reason, the Tenth Amendment to the Constitution explains the powers withheld from the federal government are retained by the states or the people. Wildlife management is one such power that has traditionally been an area of state concern. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896). Indeed, the North American Model of Wildlife Conservation and the public trust doctrine, which both guide wildlife management and conservation decisions in the United States and Canada, squarely place wildlife management authority on the shoulders of the states.[2]

The retention of wildlife management authority with the states allows for more flexible, adaptable, and ultimately successful management approaches because wildlife management decisions must be tailored to fit location-specific scientific information, as well as local economic and social considerations. The one-size-fits-all approach of federal wildlife regulation often fails to protect wildlife because federal wildlife officials lack the local information and the flexibility to incorporate that information into federal wildlife management policies.

Devolving wildlife management authority to the states, particularly in circumstances where a species'

---

[2] *See* Sax, J. L., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 490 (1970); Watson, R. *Public Wildlife on Private Land: Unifying the Split Estate to Enhance Trust Resources*, 23 Duke Envtl. L. & Pol. Forum 291 (2013).

range is wholly confined to a single state, allows for states to experiment with different management approaches. This experimentation is one of the primary virtues of federalism, as each state becomes a laboratory for experimentation and successful approaches discovered in one state can be replicated by others.

The Tenth Circuit's opinion substantially erodes federalism and fails to even articulate a limit on federal power because there is none. The Tenth Circuit reversed the district court's decision without reversing any of the district court's findings that (1) take is noneconomic activity, (2) the Utah prairie dog has no substantial effect on interstate commerce, and (3) the regulation is not necessary to Congress' ability to regulate commerce. Thus, the Tenth Circuit has broadly expanded the Supreme Court's holding in *Gonzales v. Raich*, 545 U.S. 1 (2005) to authorize federal regulation of any activity pursuant to a comprehensive scheme, so long as the scheme affects commerce and the challenged regulation is rationally related to some general government purpose, including purposes unconnected to commerce. To restore the balance between the federal government and the states, particularly on an issue that has traditionally been an area of state concern, this Court should grant the petition and reverse the Tenth Circuit's decision.

### B. The Tenth Circuit's decision intrudes on states' wildlife management authority and discourages innovation in endangered species recovery

The erosion of federalism described above is not insubstantial or unrelated to the ultimate survival of the Utah prairie dog. To the contrary, the Tenth Circuit's opinion upholds the federal criminalization of wildlife recovery efforts by state wildlife biologists. *See* 16 U.S.C. § 1540. This intrusion on Utah's wildlife management authority is likely to have significant and deleterious consequences far beyond the borders of Utah, as other state wildlife agencies will discontinue relocation and other species recovery efforts that risk federal prosecution.

By interpreting the Endangered Species Act's prohibition on the take of listed species to include a prohibition on species recovery efforts by state wildlife agencies, such as the relocation efforts by the Utah Division of Wildlife Resources, the United States Fish and Wildlife Service has intruded on a traditional area of state concern and done so in way that will erode important principles of federalism as well as the prospects of recovery for the Utah prairie dog and countless other imperiled species. The Tenth Circuit's opinion upholding this regulation requires review.

## II. THIS COURT SHOULD GRANT REVIEW TO PRESERVE AND RECOVER ENDANGERED SPECIES

### A. The Endangered Species Act fails to protect endangered species and often encourages preemptive habitat destruction

Since its passage in 1973, the Endangered Species Act has been hailed as a hallmark piece of environmental legislation. Unfortunately, this reputation is undeserved. Of the more than 2,300 plant and animal species that have been listed as threatened or endangered under the Act, a paltry 35 have been delisted to recovery. As testament to the law's ineffectiveness, more species have been delisted to extinction or a finding that listing was never warranted than were delisted due to recovery.[3]

The law's poor performance at recovering species is well understood: Rather than encouraging states and private parties to engage in recovery efforts, the law punishes landowners whose property contains or could contain listed species. Specifically, the Endangered Species Act federally criminalizes the "take" of even a single animal. 16 U.S.C. § 1540. Under the law, "take" is defined broadly to include, among many other things, harassing, harming, or capturing a member of the species. 16 U.S.C. § 1532 (19). Thus, the Endangered Species Act substantially limits the use and

[3] U.S. Fish and Wildlife Service, Environmental Conservation Online System, https://ecos.fws.gov/ecp0/reports/box-score-report (last visited October 29, 2017).

market value of property that contains or could contain listed species.

The failure of the Endangered Species Act is not limited to the dearth of species delistings. Economic analysis suggests the law actively encourages preemptive habitat destruction by landowners fearing the encroachment of listed species on their land and the resulting decline in their property values. For example, private landowners in North Carolina were observed harvesting pine trees earlier and less profitably as the density of Red-cockaded Woodpecker colonies increased in nearby forests.[4] This was done to avoid the draconian restrictions imposed by the Endangered Species Act. Similar evidence of preemptive habitat destruction has been observed throughout the country.[5]

### B. State and private conservation efforts have been highly successful at recovering wildlife populations.

A return to federalism would allow for more experimentation and innovation in the recovery of imperiled species. The effectiveness of Utah's prairie dog relocation efforts are not yet known, but what is known is that state-based recovery efforts produce far better results than the one-size-fits-all federal approach of

---

[4] *See* Lueck, D., & Michael, J. A., Preemptive Habitat Destruction under the Endangered Species Act, 46 J.L. & Econ. 27 (2003).

[5] Adler, J. H., *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* 16 (2011).

prohibiting the take of endangered species and defining "take" so broadly as to federally criminalize the relocation of a single animal. The state-led management of the Dunes Sagebrush Lizard in Texas, Oklahoma, New Mexico, and Arizona is one recent example. Similarly, the greater sage grouse has benefited from numerous state-led recovery plans that incorporate local scientific information and flexibility.

## CONCLUSION

The U.S. Fish and Wildlife Service's regulatory structure is unconstitutional and ineffective; and the tortured logic of the Tenth Circuit's opinion upholding that regulation will not only erode settled principles of federalism but also recovery prospects of countless endangered species. This Court should review the Tenth Circuit's opinion to not only preserve the balance of power between the federal government and the states, but also to preserve the imperiled species the Endangered Species Act was enacted to protect.

Respectfully submitted,

LAWRENCE REED WATSON
Executive Director
PROPERTY AND ENVIRONMENT
RESEARCH CENTER
2048 Analysis Drive, Suite A
Bozeman, Montana 59718
Telephone: (406) 587-9591
Email: reed@perc.org