No. 24-868

In The
Supreme Court of the United States

THE ART AND ANTIQUE DEALERS LEAGUE OF AMERICA, INC.; THE NATIONAL ANTIQUE AND ART DEALERS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

SEAN MAHAR, IN HIS OFFICIAL CAPACITY AS THE INTERIM COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE PROPERTY AND ENVIRONMENT RESEARCH CENTER AND SAFARI CLUB INTERNATIONAL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Interest of Amici Curiae[1]

The Property and Environment Research Center (PERC) is dedicated to advancing conservation through markets, incentives, property rights, and partnerships. As the national leader in market solutions for conservation, PERC has over 45 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife.[2] Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

Safari Club International (SCI) is a nonprofit organization with more than 100,000 members and advocates worldwide. SCI's missions include the promotion of sustainable use wildlife conservation, protection of the rights of all hunters, and education of the public concerning hunting and its use as a conservation tool. SCI fulfills its conservation mission in collaboration with its sister organization, SCI Foundation. SCI members and supporters include individuals who hunt abroad and subsequently seek

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[1] Amici curiae affirm that the counsel of record for all parties received notice of amici curiae's intention to file this brief. In addition, amici curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

[2] *See, e.g.,* Shawn Regan & Tate Watkins, *A Different Shade of Green*, 39 PERC Reports 30 (2020), https://www.perc.org/2020/07/06/a-different-shade-of-green/ (last visited Mar. 9, 2025).

to import hunting trophies into the United States, which for certain species requires compliance with the Endangered Species Act (ESA).

PERC and SCI submit this brief in support of the Petition for Writ of Certiorari to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties" and provide information that will "be of considerable help to the Court." Sup. Ct. R. 37(1). Specifically, PERC and SCI explain additional detrimental impacts the Second Circuit's holding could have on the effective implementation and operation of the ESA, which would harm PERC, SCI, SCI members, and endangered and threatened species.

Summary of Argument

In this case, the Second Circuit upended the settled understanding of who decides whether and in what circumstances regulated trade and commerce are used as tools to conserve endangered and threatened species. Its decision jeopardizes a proven model for recovering species and does damage to the ESA. The decision below is as consequential as it is wrong and merits this Court's review.

The ESA broadly preempts states from interfering with federal decisions to allow importation or exportation of, or interstate commerce in, listed species under a federal exemption, permit, or regulation. 16 U.S.C. § 1535(f). Contrary to the statute's text and consistent agency practice, the Second Circuit limited preemption to activities covered by "grants of individualized authorization by the Secretary." *Art & Antique Dealers League of Am., Inc. v. Seggos*, 121 F.4th 423, 433 (2d Cir. 2024). This decision created a circuit split with the Ninth Circuit.

See, e.g., *Man Hing Ivory & Imps., Inc. v. Deukmejian*, 702 F.2d 760 (9th Cir. 1983). *See also* Pet. at 11–14.

Regulated commerce and trade often help conserve species by making them an asset to landowners and communities.[3] The Second Circuit's decision could hobble the use of these tools for conservation by balkanizing the market. The ESA places the decision of whether to use regulated commerce for conservation in the hands of the federal government and states or foreign nations where the species is located. In direct conflict with the ESA, the Second Circuit would give every state a veto over decisions by other states, the federal government, and foreign nations to use these tools to recover wildlife.

The importance of this case is not limited to the ESA's preemption provision. The court's holding relied on a novel and exceedingly narrow interpretation of another part of the ESA, which authorizes the Fish and Wildlife Service (Service) to issue permits and exemptions from ESA prohibitions. *Seggos*, 121 F.4th at 429–31 (interpreting 16 U.S.C. § 1539). That narrow interpretation of the Service's permitting authority casts into significant doubt the common use of "permits" under other provisions of the ESA, especially "programmatic" permits that are self-executing, cover a number of entities or activities, or

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[3] *See, e.g.*, Ass'n of Fish & Wildlife Agencies, *Case Study: State Management of American Alligator*, https://www.fishwildlife.org/application/files/5415/1388/9474/Alligatorwebsite.pdf (last visited Mar. 9, 2025); Int'l Union for Conservation of Nature (IUCN), *Informing Decisions on Trophy Hunting: A Briefing Paper regarding issues to be taken into account when considering restrictions of imports of hunting trophies* (Sept. 2016), https://cites.org/sites/default/files/eng/cop/17/InfDocs/E-CoP17-Inf-60.pdf (last visited Mar. 14, 2025).

do not involve individualized analysis.[4] These permits are essential to the effective implementation of the ESA, while avoiding needless burdens on the Service and private parties. A judicial interpretation raising serious questions about the Service's authority to issue these permits affects every entity and activity regulated under the ESA. A decision with such sweeping consequences merits review.

Argument

I. The Decision Below Upends the Settled Understanding of the ESA's Preemption Provision

The ESA was enacted to recover species to the point at which they are no longer endangered or threatened with extinction. *See* 16 U.S.C. § 1532(3). The statute broadly prohibits activities that may harm endangered species, including trade and commerce in such species, *id.* § 1538(a); and authorizes regulations prohibiting such activities for threatened species when "necessary and advisable" for a threatened species' conservation, *id.* § 1533(d).But, recognizing the consequences of such broad prohibitions—especially on activities necessary to recover species—Congress gave the Secretaries of the Interior and Commerce broad authority to craft exceptions from these prohibitions. *Id.* §§ 1533(d), 1539, 1540(f). Congress sought to provide "flexibility" for the Secretaries to achieve the end goal of protecting and then recovering listed species, and it

[4] *See, e.g.,* U.S. Fish & Wildlife Serv., *Candidate Conservation Agreements* (Oct. 2017) (describing one such program), https://www.fws.gov/sites/default/files/documents/candidate-conservation-agreements-fact-sheet.pdf (last visited Mar. 9, 2025).

recognized the potential benefits of sustainable use of wildlife.[5]

Given Congress' intent to use the ESA to encourage conservation, at home and abroad, the ESA also preempts state laws that interfere with its conservation measures, including state laws that "prohibit what is authorized pursuant to an exemption or permit provided for" in the ESA or "in any regulation" implementing the ESA. *See id.* § 1535(f).[6] This provision has long been understood to preempt state laws seeking to obstruct commerce or trade in endangered and threatened species that the "statute or its implementing regulations permit." *See, e.g.*, *Man Hing Ivory*, 702 F.2d at 763. *See also* Pet. at 11–14 (citing cases, legislative history, and Service interpretations).

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[5] H. Consideration and Passage of H.R. 37 with Amends., U.S. Cong. Record (Sept. 18, 1973), p. H8013–30 (Rep. Dingell statement that prior law needs to be made more flexible; Rep. Goodling statement that: "Greater flexibility is provided while at the same time additional means of protection, conservation, and management is permitted and required."); Endangered Species Conservation Act of 1972 Hearings before the Subcomm. on the Envt. of the S. Comm. on Commerce, Aug. 4 & 10, 1972, Serial No. 92-81 (Statement of Hon. N.P. Reed, Asst. Sec'y for Fish & Wildlife & Parks) ("The intent of this legislation is to encourage countries to adopt effective wildlife conservation programs, and to give the Secretary the flexibility of assisting by regulating the permits.").

[6] Because import, export, and commerce regarding a species depends on the ability to first lawfully harvest that species, the effect of these provisions is to require the assent of both the federal government and the state or foreign nation where the species is harvested. *See, e.g.*, 50 C.F.R. § 17.42(a)(2) (authorizing commerce in alligators if taken in compliance with the laws of the state where the animal was taken).

The Second Circuit's decision departs from this understanding. Under that decision, the ESA only preempts state laws that prohibit commerce or trade in a species that has been authorized by "grants of individualized authorization by the Secretary." *Seggos*, 121 F.4th at 433. The court divined this limitation under an unfounded and narrow interpretation of the terms "permit" and "exemption" throughout the ESA. *Id.* at 428–35; *see also* 16 U.S.C. §§ 1536(g), 1539. In doing so, the court ignored the Service's authority to, and longstanding practice of, issuing self-executing and programmatic permits. *See infra* Part III.

The Second Circuit also gave no weight to the Service's authority to establish self-executing permits and exemptions in "any regulation which implements" the ESA, despite the preemption provision's unambiguous application to such regulations. 16 U.S.C. § 1535(f). *See Seggos*, 121 F.4th at 428–35 (omitting any discussion of this part of the preemption provision). The Service has issued a regulation, for instance, establishing a self-executing "exemption" for the importation of threatened species without an individual ESA permit for species covered by Appendix II of the Convention of International Trade in Endangered Species (CITES). 50 C.F.R. § 17.8 (relying upon 16 U.S.C. § 1538(c)(2)). The Service has created similar exemptions under its authority to tailor regulations for threatened species under 16 U.S.C. § 1533(d). *See* 50 C.F.R. § 17.40(k)(4)(iii) (establishing an "exemption on interstate commerce" for lynx pelts with a CITES permit). *See also id.* § 17.40(e) (regulatory exemption for import and export of, and commerce in, African elephant parts and products other than ivory and sport-hunted trophies); *id.* § 17.40(n) (allowing import of sport-

hunted trophies of straight-horned markhor from an "established conservation program" that meets listed criteria); *id.* § 17.42(a)(3) (authorizing import and export of American alligators).

The Second Circuit's decision undermines these categorical exceptions that the Service promulgates as "necessary and advisable" for the conservation of listed species and means that these regulations adopted in reliance of the Service's longstanding interpretation of the ESA's preemption provision have suddenly and unexpectedly lost their preemptive effect within that circuit. Under the Service's and Ninth Circuit's interpretation of the preemption provision, these regulations are a permissible way for the Service to preempt state laws that prohibit import and export of, and commerce in, these species. *See April in Paris v. Bonta*, 659 F. Supp. 3d 1114, 1127–30 (E.D. Cal. 2023) (giving preemptive effect to the alligator regulation referenced above). *See also* Pet. at 12–13 (citing "Chief's Directive" describing the Service's position). But, under the Second Circuit's interpretation, the Service would be required to amend and repromulgate every such regulation to give it the intended preemptive effect.

Despite the Second Circuit's superficial appeal to policy, *Seggos*, 121 F.4th at 432, its decision does not actually advance any. The court's decision does not turn on the character or substance of the federal exemption at issue or how it will advance the conservation of listed species, but only the means of implementation. *Id.* The Second Circuit's decision presents the Service a Hobson's choice: if it adopts regulations that provide efficient self-executing exemptions for essential conservation efforts, it invites states to interfere with that decision and

balkanize the market. But, to give preemptive effect to its decision, it would need to instead approve these activities through a slower and more burdensome individual permitting process that would also be a detriment to wildlife conservation and its administration of the ESA. If the Service began issuing pro forma permits for individuals covered by the statutory exemption at issue in this case, for instance, those permits would have the preemptive effect that Petitioners seek. The statute authorizes the Service to develop such a permitting program. 16 U.S.C. § 1540(f) (authorizing "such regulations as may be appropriate to enforce this chapter"). But doing so to satisfy the Second Circuit would be a colossal waste of administrative energy and resources. Thus, rather than any plausible policy goal, the Second Circuit's rationale favors administrative *in*efficiency for its own sake.

II. The Second Circuit's Decision Undermines the Use of Regulated Commerce and Trade as Tools for Conservation

This case concerns statutory and regulatory exceptions for commerce involving ivory antiques and products containing a de minimis amount of ivory. 16 U.S.C. § 1539(h)(2); 50 C.F.R. § 17.40(e)(3). These exceptions appear to be motivated by a desire to avoid needless regulation of commerce that does not threaten listed species. *See, e.g.*, 81 Fed. Reg. 36,388, 36,397 (June 6, 2016).

While PERC and SCI are not advocates for exceptions for commerce in antique and de minimis amounts of elephant ivory, they promote and support statutory and regulatory exceptions that leverage

trade and commerce to encourage species conservation. Banning all trade and commerce related to a species can have the effect of making the species a liability, rather than an asset, for the people on whom its recovery depends.[7] As a former director of the Service has observed, "[i]f I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears. We've got to turn it around to make the landowner want to have the bird on his property."[8] Regulated commerce has proven effective at avoiding this problem by encouraging the propagation of listed species, rewarding communities and landowners that conserve habitat, and generating resources for recovery efforts. State laws that obstruct such commerce, however, can have the opposite effect and harm the very species they purport to protect.

One of the ESA's signature success stories is the recovery of the American alligator. Poaching drove the population down to a mere 100,000 in the 1950s.[9] As a consequence, it was one of the original endangered

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[7] PERC, *A Field Guide for Wildlife Recovery* (Sept. 20, 2023), https://perc.org/2023/09/20/a-field-guide-for-wildlife-recovery/ (last visited Mar. 14, 2025); *Informing decisions on trophy hunting*, *supra* n.3 at 2.

[8] Tate Watkins, *The Endangered Species Act at 50*, PERC (Dec. 11, 2023), https://perc.org/2023/12/11/the-endangered-species-act-at-50-2/ (last visited Mar. 9, 2025).

[9] *E.g.*, *Alligator is Making a Strong Comeback*, N.Y. Times (Nov. 25, 1979), https://www.nytimes.com/1979/11/25/archives/alligator-is-making-a-strong-comeback-reptile-still-called-an.html (last visited Mar. 9, 2025).

species when the ESA was enacted.[10] By 1979, the population had rebounded to the point that it could be downlisted to threatened. *Id*. To facilitate the species' continued recovery, the Service also authorized regulated commerce in the species after it was downlisted from endangered to threatened. *Id.* This legal commerce started with "limited commercial export and import of lawfully taken American alligator hides," and was later expanded to include trade in "legally harvested animals, their skins, and products made from them." 86 Fed. Reg. 5,112, 5,114–15 (Jan. 19, 2021). Creating a market for legally harvested alligators and their products resulted in "sustainable regulated harvests, protect[ion] [of] important alligator habitat, and provid[ed] economic incentives for private landowners to maintain alligator habitat." *Id.* That incentive worked. As of 2019, there were approximately one million adult alligators in the wild and "more than 923,000 American alligators on farms in Louisiana alone." *Id.* at 5,113. The Service has repeatedly credited commerce, including "[a]lligator farming and ranching," for its contribution to the species' recovery and downlisting. *See id*. As noted above, the Service has facilitated this commerce through self-executing regulatory exceptions that, prior to the Second Circuit's decision, have been understood to preempt state laws that seek to disrupt this conservation tool. *April in Paris*, 659 F. Supp. 3d at 1127–30.

Likewise, the largest populations of non-native listed species like rhino, elephant, and lion inhabit the

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[10] Olivia Loyack, *Gator Gold: How American Alligator Permits Benefit the U.S. Economy*, U.S. Fish & Wildlife Serv., https://www.fws.gov/story/american-alligators-cites-export-programs (last visited Mar. 9, 2025).

countries where they are hunted *and* traded internationally. The U.S. hunting market is the world's largest.[11] U.S. hunters are also the most willing to invest in conservation hunting programs. They will pay the highest fees to hunt, and also to bring home, species considered threatened or endangered under the ESA but which thrive in these countries.[12] The contributions of hunting to international conservation programs are well-recognized by the Service and other wildlife experts such as the IUCN.[13]

For example, the recovery of white rhinoceros in South Africa and Namibia is grounded on the expansion of regulated hunting and international trade in hunting trophies, including import into the United States. The white rhino population in these countries grew from 1,800 in 1968 when hunting began to over 19,000 in 2016. *Informing decisions on trophy hunting*, *supra* n.3. at 3. These countries

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[11] *E.g.*, Southwick Assocs., *The Economic Contributions of Hunting-Related Tourism in Eastern & Southern Africa*, for SCI Found., iii, 49 (Nov. 2015), https://safariclubfoundation.org/wp-content/uploads/2020/06/Southwick-Associates-2015_FINAL.pdf (last visited Mar. 15, 2025).

[12] *E.g.*, *id.* at 32, 58–60. SCI regularly provides declarations on this point in litigation challenging trophy imports or comments on federal actions that would potentially restrict imports. *E.g.*, Motion to Intervene by Safari Club International, Dkt. 12-2 to 12-7, *Ctr. for Biological Diversity v. Bernhardt*, No. CV-20-00461-TUC-JGZ, 2021 WL 2439287, (D. Ariz. June 15, 2021) (No. 4:20-cv-461-JGZ).

[13] The IUCN is the world's foremost conservation organization. Sustainable use is part of the IUCN's focus, and its Sustainable Use and Livelihoods Specialist Group regularly defends well-managed hunting programs. *See, e.g.*, *Informing decisions on trophy hunting*, *supra* n.3.

protect more than 90% of the world's rhinos and hunt them in small numbers—but this hunting is "crucial to conservation."[14] Hunting encourages the conservation of these species on private lands. As of 2016, a third of white rhinos in South Africa inhabited private and community land outside state parks.[15]

Likewise, more than 81% of the world's African elephants inhabit the seven countries where elephants are hunted and exported.[16] These countries maintain abundant populations of elephants and other wildlife due to the benefits generated by regulated hunting. Among other things, hunting areas protect significantly more habitat than national or state parks.[17] Hunting raises substantial revenue

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[14] Richard Emslie & Michael Knight, *Prince William is talking sense – trophy hunting is crucial to conservation*, The Independent (Mar. 18, 2016), https://www.the-independent.com/voices/comment/prince-william-is-talking-sense-trophy-hunting-is-crucial-to-conservation-a6940506.html (last visited Mar. 10, 2025) (providing an example of a private reserve that received over three times as much income from hunting than from photographic tourism).

[15] *Id.*

[16] C.R. Thouless et al., *African Elephant Status Report 2016*, IUCN, 138 (2016), https://portals.iucn.org/library/sites/library/files/documents/SSC-OP-060_A.pdf (last visited Mar. 14, 2025).

[17] *E.g.*, P.A. Lindsey et al., *Economic and conservation significance of the trophy hunting industry in sub-Saharan Africa*, 134 Biological Conservation 455 (2007), https://www.perc.org/wp-content/uploads/2015/08/Economic-and-conservation-significance.pdf (last visited Mar. 10, 2025). Hunting areas have only grown since this study, with extensive habitat conserved in communal and private areas. *E.g.*, Namibian Association of CBNRM Support Organisations, *State of Community Conservation in Namibia* (2023), http://www.nacso.org.na

from leases, license fees, taxes, and other charges levied by national and local governments and landholders. Elephant hunting is typically the highest or among the highest sources of hunting revenues.[18] A large percentage of these revenues are used for law enforcement and anti-poaching by national wildlife authorities and private hunting operators.[19] These revenues and in-kind benefits like employment and game meat distributions incentivize conservation among private and communal stakeholders.[20] Currently, importation of elephants is subject to a permit requirement under 50 C.F.R. § 17.40(e). But that requirement was implemented by the Service only within the past eight years. Prior to that, elephants were imported under countrywide enhancement findings, without any permit required.

/resources/state-of-community-conservation (last visited Mar. 14, 2025); *Informing decisions on trophy hunting*, *supra* n.3.

[18] *E.g.*, P.A. Lindsey et al., *The Significance of African Lions for the Financial Viability of Trophy Hunting and the Maintenance of Wild Land*, PLoS ONE 7(1) (2012), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0029332 (last visited Mar. 10, 2025); Robin Naidoo et al., *Complementary benefits of tourism and hunting to communal conservancies in Namibia*, 30 Conservation Biology 628, 632 (2016), https://conbio.onlinelibrary.wiley.com/doi/pdf/10.1111/cobi.12643 (last visited Mar. 10, 2025).

[19] *E.g.*, Zimbabwe Parks & Wildlife Mgmt. Auth., *Zimbabwe National Elephant Management Plan*, 11–12, 14 (2021–2025), https://www.fao.org/faolex/results/details/es/c/LEX-FAOC217295/ (last visited Mar. 10, 2025).

[20] *E.g.*, R. Cooney et al., *The Baby and the bathwater: trophy hunting, conservation and rural livelihoods*, 68 Unasylva 249 (2017), https://www.fao.org/3/i6855en/I6855EN.pdf (last visited Mar. 10, 2025).

And under the plain terms of the ESA, most elephant imports should not require any permit.

According to Rep. John Dingell, the architect of the ESA, the Act sought to protect *and* promote international trade in listed foreign species. *See* 16 U.S.C. § 1538(c)(2).[21] Rep. Dingell explained that the ESA was "carefully drafted to encourage State and foreign governments to develop healthy stocks of animals occurring naturally within their borders."[22] He emphasized that when animals were given value through hunting, "and [were] not endangered, they should be regarded as a potential source of revenue to the managing agency and they should be encouraged to develop to the maximum extent compatible with the ecosystem upon which they depend."[23]

At the same time, Rep. Dingell noted concern with the possibility of regulatory barriers that would lessen the benefits of these international conservation measures and confirmed with the Department of the Interior "that they will carefully review the status of animal stocks in foreign countries and that where nonendangered trophy animals are being managed in such a way as to assure their continued and healthy existence, no barriers will be placed upon the continued harvesting of those animals by the

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[21] Section 9(c)(2) of the ESA allows for importation of threatened-listed species if certain criteria are met. 16 U.S.C. § 1538(c)(2). This provision, promulgated in regulation as an "exemption," is self-executing without need for an import permit. 50 C.F.R. § 17.8.

[22] H. Consideration and Passage of H.R. 37 with Amends., U.S. Cong. Record, 195 (Sept. 18, 1973).

[23] *Id*.

government."[24] Rep. Dingell emphasized "[t]his is as it should be, because it is only in the understanding that these animals have a real and measurable value that many of the less developed countries will agree to take steps to assure their continued existence."[25]

Despite Congress' clear recognition that international trade in hunting trophies of threatened-listed species is beneficial to conservation and importation of such animals should be allowed without restriction, the Second Circuit's decision threatens to upend relevant conservation programs. For example, southern white rhino is listed under the Act as threatened due to similarity of appearance to other listed rhinos. 79 Fed. Reg. 28,847 (May 20, 2014). Because southern white rhino from South Africa and Eswatini (formerly Swaziland) meet the criteria in Section 9(c)(2) of the ESA, hunters are able to import such trophies into the United States without an import permit. *Id.* at 28,848.[26] As explained above, conservation programs for southern white rhino are largely driven by hunting and subsequent trade in hunting trophies. Allowing individual states to upend this conservation success story under the Second Circuit's holding would contradict Congress' intent in

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[24] *Id.*

[25] *Id.*

[26] The Section 9(c)(2) exception can apply to other species. For example, prior to its removal from the CITES appendices, Canadian wood bison were imported into the United States because such import complied with all Section 9(c)(2) criteria. 77 Fed. Reg. 26,191, 26,917 (May 3, 2012).

enacting the self-executing exception in Section 9(c)(2).[27]

The harmful impacts of regulatory barriers are not limited to foreign nations. Consider the scimitar-horned oryx, native to the grasslands near the Sahara Desert.[28] The oryx was driven extinct in the wild by 2000.[29] But, in 2012, 11,000 of these animals resided on private ranches in Texas.[30] This was made possible by a Service regulation exempting captive-bred members of the species from certain prohibitions under the ESA. 70 Fed. Reg. 52,310 (Sept. 2, 2005). The Service created this regulatory exemption in recognition that captive breeding and sport hunting had enhanced the survival of the species. *Id.* This sport hunting made the oryx an asset for the ranchers, "generat[ing] revenue that support[ed] these captive-breeding operations." *Id.* at 52,311. The Service chose

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[27] Regulatory barriers to trade and commerce in well-managed listed species repeatedly have been shown to discourage conservation and deplete wildlife. For example, Service restrictions on the import of elephant and lion hunting trophies from Tanzania contributed to the forfeiture of over 23,000 square miles of protected and managed hunting areas to the wildlife authority. United Republic of Tanzania, AC30 Doc. 15, Annex 4, 9–13 (May 2018), https://cites.org/sites/default/files/eng/com/ac/30/E-AC30-15-A4.pdf (last visited Mar. 15, 2025).

[28] Smithsonian's National Zoo & Conservation Biology Institute, *Once Extinct in the Wild, Scimitar-horned Oryx Are Back From the Brink* (Feb. 21, 2024), https://nationalzoo.si.edu/conservation/news/once-extinct-wild-scimitar-horned-oryx-are-back-brink (last visited Mar. 9, 2025).

[29] *Id.*

[30] PERC, *Endangering the Endangered* (Nov. 4, 2014), https://perc.org/2014/11/04/endangering-the-endangered/ (last visited Mar. 9, 2025).

not to require an individual permit for landowners to benefit from the exemption, citing a streamlined process as "an important incentive" for landowners to continue contributing to the species' conservation. *Id.*

However, animal rights groups challenged the exemption and the D.C. district court vacated it. *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009). Under that decision, ranchers were forced to obtain individual permits for their activities—precisely the regime the Second Circuit would require to give preemptive effect to an exemption. Many landowners chose not to jump through these hoops but, instead, ceased to participate in the conservation of the species. As a result, the number of oryx on Texas ranches declined by fifty percent. *Endangering the Endangered*, *supra* n.30. Fortunately, Congress intervened and reinstated the regulation, recognizing that regulated sport hunting of the species "contribut[ed] to increasing or sustaining captive numbers" that may support "potential reintroduction to range countries." 79 Fed. Reg. 15,250, 15,250 (Mar. 19, 2014). Congress was right that giving scimitar-horned oryx value would promote their recovery, with populations in Texas ranches growing back to 12,000,[31] and the species was reintroduced back into the wild with members of captive-bred populations in 2016, *Back From the Brink*, *supra* n.28.

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[31] Craig Nyhus, *Conservationists save scimitars, turn to dama gazelle*, Lone Star Outdoor News (June 19, 2024), https://www.lsonews.com/conservationists-save-scimitars-turn-to-dama-gazelle/ (last visited Mar. 14, 2025).

III. The Second Circuit's decision also threatens critical permitting programs under the ESA

The consequences of the Second Circuit's decision are not limited to the ESA's preemption provision or the use of regulated commerce and trade as a conservation tool. By basing its holding on a novel and exceedingly narrow interpretation of "permit" and "exemption" under Section 10 of the statute, the decision also causes collateral damage to the implementation of that section. According to the Second Circuit's reasoning, the Service's authority to issue permits and establish exemptions under Section 10 is likewise limited to "grants of individualized authorization by the Secretary." *See Seggos*, 121 F.4th at 433. And any self-executing permits or exemptions are now subject to challenge under the decision below.

To promote the efficient implementation of the ESA and encourage proactive conservation efforts, the Service has established many such permits and exemptions. For example, the Service has established candidate conservation agreements with assurances (CCAAs) to encourage proactive conservation of species that are candidates for listing under the ESA. *See Candidate Conservation Agreements*, *supra* n.4. In exchange for conservation efforts, the Service issues a permit exempting CCAA participants from further regulatory burdens if the species is later listed. *See id.* While these can be developed as one-off permits consistent with the Second Circuit's interpretation, doing so is slower, more costly, and labor intensive.[32]

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[32] *See* Paul Henson et al., *Improving Implementation of the Endangered Species Act: Finding Common Ground Through*

To approve CCAAs more efficiently and to encourage states and landowners to participate in them, the Service frequently develops "programmatic" CCAAs that may cover all landowners in a region or an entire industry without the need for an individual analysis. *See id.*

To conserve Montana's arctic grayling, for instance, the Service issued an "umbrella" CCAA under which any landowner in the Big Hole River watershed that enrolled with the state would automatically be covered. 70 Fed. Reg. 70,877 (Nov. 23, 2005). In exchange for improving habitat and reducing water diversions to help the fish, these landowners would automatically be excluded from any further regulation if the species were later listed. *Id.* Thirteen years later, the Service credited the CCAA for recovering the species and avoiding the need to list it. 85 Fed. Reg. 44,478, 44,480–81 (July 23, 2020) (finding that the CCAA had addressed threats to the species, improved habitat, and led to a doubling of the grayling's population).

Another example is safe harbor agreements (SHAs), which encourage landowners to undertake recovery efforts for listed species by shielding them from increased regulatory burdens in the future.[33] While these permits, too, can be done on a one-off basis, the Service has recognized that recovering a species on one parcel often affects neighboring parcels.

Common Sense, 68 BioScience 861 (2018), https://carangeland.org/wp-content/uploads/2018/10/Thompson-and-Henson-Improving...ESA_.pdf (last visited Mar. 9, 2025).

[33] *See* U.S. Fish & Wildlife Serv., *Safe Harbor Agreements*, https://www.fws.gov/service/safe-harbor-agreements (last visited Mar. 9, 2025).

Therefore, SHAs frequently cover not only the individual that applied for the permit but many surrounding landowners. *See* 69 Fed. Reg. 24,084, 24,089 (May 3, 2004). And, like CCAAs, the Service has developed programmatic SHAs that prospectively cover any landowner in a region or state that undertakes recovery efforts. *See Safe Harbor Agreements*, *supra* n.33.[34]

Even routine permits, known as habitat conservation plans, defy the Second Circuit's characterization of what can constitute an ESA permit.[35] These plans permit "activities that would otherwise result in the unlawful take of listed species," conditioned on measures to protect the species.[36] With nearly 1,700 listed species in the United States and the ESA regulating virtually any activity that affects one of those species, issuing individualized authorizations in every case would quickly swamp the Service in paperwork and deplete its ability to recover species. Therefore, the Service has issued categorical permits covering developments throughout a county or region for a span of decades,

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[34] The Service recently merged CCAAs and SHAs into a single, new permit type: conservation benefits agreement. U.S. Fish & Wildlife Serv., *Conservation Benefit Agreements*, https://www.fws.gov/service/conservation-benefit-agreements (last visited Mar. 9, 2025).

[35] *See* U.S. Fish & Wildlife Serv., *Habitat Conservation Plans*, https://www.fws.gov/service/habitat-conservation-plans (last visited Mar. 9, 2025).

[36] *Id.*

subject to general conditions and mitigation requirements.[37]

There is no indication that the Second Circuit considered how ESA permitting works in practice or intended to cast doubt on the Service's ability to implement it efficiently and effectively.[38] Yet that is the potential consequence of its rationale. Considering the economic, social, and environmental stakes of ESA permitting, that is not a consequence that should escape this Court's scrutiny.

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[37] *See, e.g.,* U.S. Fish & Wildlife Serv., *San Joaquin County Multi-Species Habitat Conservation and Open Space Plan* (fifty-year permit authorizing take of 13 species for agricultural, construction, commercial, and recreational activities across nearly a million acres), https://ecos.fws.gov/ecp/report/conservation-plan?plan_id=52 (last visited Mar. 9, 2025).

[38] Neither the Service nor any party that routinely obtains ESA permits participated in the case below.

Conclusion

The Second Circuit's decision upends the settled understanding of the ESA's preemption provision. Considering the consequences of that decision for species conservation and the Act's permitting regime, the Court should grant certiorari to resolve the circuit split and settle the question presented.

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Respectfully submitted,

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