Nos. 25-5109, 25-6193, 25-6196, 25-6212

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs-Appellees

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,
Defendants-Appellants

and

SPORTSMEN'S ALLIANCE FOUNDATION, et al.,
Intervenor Defendants-Appellants

Appeal from the United States District Court for the District of Montana, Nos. 9:24-cv-00086, 9:24-cv-00087, 9:24-cv-00097 (Molloy, J.)

PROPERTY AND ENVIRONMENT RESEARCH CENTER'S AMICUS BRIEF SUPPORTING DEFENDANT-APPELLANTS/REVERSAL

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Corporate Disclosure Statement

The Property and Environment Research Center is a nonprofit corporation organized under the laws of Montana, which has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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The Property and Environment Research Center (PERC) respectfully submits this amicus brief supporting Defendants-Appellants, United States Fish and Wildlife Service et al., Intervenor Defendants-Appellants, Sportsmen's Alliance Foundation et al., and reversal of the district court.[1]

Statement of Interest

PERC is the national leader in market solutions for conservation, with 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. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

For decades, PERC has sought to make the Endangered Species Act

[1] Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this amicus brief, with the Western Watersheds Project coalition of Plaintiffs-Appellees requesting that the brief state that they take no position on its filing. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than PERC, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

(ESA) work better to promote species recovery.[2] PERC and its researchers have produced extensive scholarship on how improving incentives for restoring habitat[3] and incorporating federalism principles in the ESA's implementation[4] boosts species recovery prospects. The decision below undercuts both without legal or scientific justification.

Summary of the Argument

The recovery of the gray wolf is one of the ESA's signature success stories. In 1978, there were only an estimated 1,235 wolves in the lower 48, and now there are more than 6,000 wolves biologically connected to

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[2] *See, e.g.,* PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It* (2023), https://www.perc.org/wp-content/uploads/2023/09/PERC_Field-Guide-for-Wildlife-Recovery.pdf; Katherine Wright & Shawn Regan, *Missing the Mark*, PERC (July 26, 2023), https://www.perc.org/2023/07/26/missing-the-mark/ (finding that only 11 species recovered out of the 300 that federal officials predicted to recover).

[3] *See* Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons from the Dusky Gopher Frog*, 51 Envtl. L. Rep. 10565 (2021); Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Pol'y Rep. (Apr. 25, 2018), https://perc.org/wp-content/uploads/2023/06/endangered-species-road-to-recovery.pdf.

[4] *See* Temple Stoellinger, *Wildlife Issues Are Local—So Why Isn't ESA Implementation*?, 44 Ecology L.Q. 681 (2017); Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 Iowa L. Rev. 377, 428–30 (2005).

nearly 30,000 wolves in Canada.[5] Thanks to a reintroduction effort, federal and state management, and investments in conflict-reduction, gray wolves in the Northern Rockies were biologically recovered in 2002 and the population was delisted piecemeal by the Fish and Wildlife Service (the Service) and Congress in 2011 and 2012[6]—a rare ESA milestone that only 43 domestic animals have reached.[7] In the fifteen years since, that recovery has been sustained and expanded. The population not only remains well above its biological recovery goals but has expanded and established populations in four additional states.[8]

Ignoring this ESA success story, the district court paints a bleak picture of the Act as creating "a *Catch-22*," under which the federal government recovers a species and delists it, states drive the species back

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[5] Removing the Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife, 85 Fed. Reg. 69778, 69788 (Nov. 3, 2020).

[6] Removal of the Gray Wolf in Wyoming From the Federal List of Endangered and Threatened Wildlife, 77 Fed. Reg. 55530, 55531–33 (Sept. 10, 2012).

[7] U.S. Fish and Wildlife Serv., *Environmental Conservation Online System (ECOS): Species Reports: Delisted Species* (last visited Apr. 17, 2026), https://ecos.fws.gov/ecp/report/species-delisted.

[8] Removing the Gray Wolf From the Federal List, 85 Fed. Reg. at 69784.

to the precipice of extinction, and the species has to be relisted. *See Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 801 F. Supp. 3d 1151, 1162 (D. Mont. 2025) (*FWS)*. The court cited no evidence of this "fruitless cycle of delisting and relisting." *Id.* It is pure fiction. To date, no recovered and delisted species has backslid under state management and required relisting.[9]

Some species, including the wolf, have been trapped in a "yo-yo process" but not the one the district court imagined. *Id.* Instead, the pattern has been driven by perpetually moving goalposts: The Service sets recovery goals, the species biologically recovers and is delisted, a lawsuit is filed, a court flyspecks the Service's analysis and orders the species back on the list, the Service does another analysis and again finds the species has recovered, and the cycle repeats. That is the problem here. The district court elevated disapproval of state management above biological recovery and substituted judicial second-guessing for deferential review of an agency's scientific determinations. This Court must reverse.

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[9] *See A Field Guide for Wildlife Recovery*, *supra* note 2, at 15; *see also ECOS: Species Reports: Delisted Species* (last visited Apr. 17, 2026).

Argument

I. The Decision Below Relies on Skepticism of State Wildlife Management and the Service's Scientific Determinations, Contrary to the ESA

The ESA's goal is to recover every imperiled species to the point that it is no longer endangered or threatened with extinction. See 16 U.S.C. §§ 1531(b), 1532(3). It pursues that goal through a straightforward process: 1) species for which the best available science shows are endangered or threatened are listed; 2) recovery goals are set for them to motivate proactive recovery effort; and 3) when those goals are met, the species is delisted and returned to state management. 16 U.S.C. § 1533. Few species have navigated this entire process yet. But recovery has been sustained for those that have. To date, 80 (out of more than 2000) endangered and threatened species have recovered and been delisted.[10] None of them have backslid under state management and required relisting.[11] Yet the district court's skepticism of this process and

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[10] *Compare* U.S. Fish and Wildlife Serv., *ECOS: Listed Species Summary (Boxscore)* (last visited Apr. 17, 2026), https://ecos.fws.gov/ecp/report/boxscore, *with ECOS: Species Reports: Delisted Species* (last visited Apr. 17, 2026).

[11] The status of each recovered species was verified by checking each species' page in ECOS from the Delisted Species Database. *Id*. According to the Service's data, only one recovered species has been relisted, but not

state wildlife management led it to convert the wolf's *recovery* goal into "an *extinction* threshold,"[12] inject politics into listing decisions,[13] reject the agency's scientific judgments based on mere uncertainty,[14] and elevate the district court's understanding of the ESA's purpose over its text.[15]

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because of a failure of state management. The American Alligator was declared recovered in 1987 and immediately relisted due to its similarity of appearance to the endangered American crocodile. Reclassification of the American Alligator to Threatened Due to Similarity of Appearance, 52 Fed. Reg. 21059 (June 4, 1987); *see* 16 U.S.C. § 1533(e) (allowing nonimperiled species to be listed based on their similarity to other species). While the American alligator is listed, federal rules embrace and protect state management of the species, including licensed farming, trade, and hunting. *See* Tate Watkins, *The Gator Traders*, PERC (June 19, 2019), https://perc.org/2019/06/19/the-gator-traders/; Ass'n of Fish and Wildlife Agencies, *Case Study: State Management of American Alligator* (last visited Apr. 17, 2026), https://www.fishwildlife.org/application/files/5415/1388/9474/Alligatorwebsite.pdf. All other recovered species remain delisted.

[12] *FWS*, 801 F. Supp. 3d at 1203 (emphasis added). Here, the district court wrongly renamed the wolf's recovery goal—the population criteria used to delist the wolf, *id.* at 1168—as an "extinction threshold." But delisting criteria is not the same as a biological extinction benchmark, and the states' minimum population commitments do not mean wolves will necessarily be managed to those levels.

[13] *Id.* at 1202–04.

[14] *Id.* at 1198–99.

[15] *Id.* at 1181.

A. The ESA does not permit species to be listed based on disapproval of state wildlife management alone

This Court should reverse because the district court treated skepticism of state wildlife management as a sufficient basis to relist wolves, even though the Service found that wolves in the Western United States are not biologically threatened. Under the ESA, the Service must consider five listing factors when determining whether to list a species. 16 U.S.C. § 1533(a)(1). Three of these factors focus on the biological condition of the species, one is a catch-all, and one requires the Service to consider "the inadequacy of existing regulatory mechanisms." *Id*. This "existing regulatory mechanisms" factor does not allow a species to be listed solely based on the Service's disapproval of state policy but must be evaluated in the context of the other factors. *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 436 (D.C. Cir. 2012). The district court departed from that listing framework by elevating speculative concerns about state management over the Service's findings that the wolf population "remains large" and that occupied range "continue[s] to expand despite current levels of human-caused mortality." *FWS*, 801 F. Supp. 3d at 1197. That approach substitutes a political inquiry for a biological one and is incompatible with the ESA's text and structure.

As the D.C. Circuit has explained, the approach taken below would produce absurd results because "the Service could never delist a species unless some regulatory mechanism was in place to protect it." *Salazar*, 691 F.3d at 436. The same would apply to all species that are not listed; they would have to "either (1) be protected by regulations of some sort or (2) be classified as endangered or threatened." *Id.* This Court must "not attribute to the Congress the intent to create such an absurd overabundance of regulation." *Id.* Instead, "the adequacy or inadequacy of regulations," *id.*, should be analyzed in the context of biological factors to determine whether they mitigate established threats, along with other measures that may also reduce risk, such as habitat refugia, ongoing conservation efforts, and adjustments of hunting seasons based on population changes. *See Rocky Mountain Wild v. Walsh*, 216 F. Supp. 3d 1234, 1246–48 (D. Colo. 2016).

The district court's skepticism of state management is also inconsistent with the ESA's cooperative federalism structure. States have long had primary management over wildlife. *See Geer v. Connecticut*, 161 U.S. 519 (1896) (overruled on other grounds by *Hughes v. Oklahoma*, 441 U.S. 322 (1979)). The ESA preserves that role by

requiring the Service to "cooperate to the maximum extent practicable with the States" and limiting the preemption of state law by the Act to narrow circumstances. 16 U.S.C. § 1535(a), (f). These provisions embrace state regulatory discretion and flexibility.

Regrettably, the decision below puts the Service in the position of supervising state wildlife policy to a degree not envisioned by the ESA by requiring it to second-guess states' conservation commitments and evaluate state legislators' "negative . . . attitudes." *FWS*, 801 F. Supp. 3d at 1203. Rather than considering the adequacy of regulatory mechanisms in the context of a biological-threat analysis, the district court treated its concerns over state policy and wildlife-management choices as sufficient. Thus, the court ordered the species' status to be reassessed even as it acknowledged that the Service "accurately represented the current condition of the gray wolf in the" Western United States by concluding that the population "remains large and [that] the occupied range . . . continue[s] to expand despite current levels of human-caused mortality." *Id.* at 1197. This reasoning replaces the ESA's focus on biological status with political and policy judgments of state wildlife management.

B. The Administrative Procedure Act requires deference to the Service's scientific and predictive determinations

The district court further erred by failing to apply the deferential review the Administrative Procedure Act (APA) requires. The Supreme Court recently reaffirmed that "under the Administrative Procedure Act's deferential arbitrary-and-capricious standard, . . . a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained." *Seven County Infrastructure Coal. v. Eagle County, Colo.*, 605 U.S. 168, 179–80 (2025). The reviewing court is at its "most deferential" when an agency makes "speculative assessments or predictive or scientific judgments, and decides what qualifies as significant or feasible or the like." *Id.* at 182. While *Seven County* arose in the National Environmental Policy Act context, these principles apply across the board as "[b]lack-letter administrative law." *Id.*

The opinion below fails to afford the Service the deference the APA requires by treating mere uncertainty as sufficient to overturn the

agency's conclusion.[16] The district court's discussion of connectivity is one particularly telling example. As the Service emphasized, connectivity is vital to the wolves' long-term survival. *FWS*, 801 F. Supp. 3d at 1198. The district court faulted the agency for not disproving the possibility that connectivity might diminish over the next century. *Id.* at 1198–99. But the Service adequately explained that "wolves in the Western United States currently have high levels of genetic diversity and connectivity" and that, partly due to dispersal and recolonization, connectivity has persisted even when the populations were much smaller than the Service expects at any point in the future. *Id.* at 1166, 1170. Whether current dispersal and genetic exchange are sufficient and how future connectivity and population changes may affect viability are paradigmatic predictive and scientific judgments.

These are precisely the sort of "scientific determination[s]" where

[16] *See, e.g.*, *FWS*, 801 F. Supp. 3d at 1186 (disagreeing with the "Service's determination that the gray wolf in the West Coast area is not likely to be in danger of extinction in the foreseeable future" based on a different opinion of the evidence in the record); *id.* at 1190–91 (disagreeing with why the Service dismissed a report refuting Montana's wolf survey model); *id.* at 1191 (disagreeing with how the Service applied conservative downward population adjustments because the population models are inherently inaccurate).

reviewing courts should be the "most deferential" to an agency's technical expertise. *Ctr. for Biological Diversity v. Zeldin*, ___ F.4th ____, 2026 WL 850257, *31 (D.C. Cir. Mar. 27, 2026) (Henderson, J., concurring in part and dissenting in part) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)). Instead, the opinion below continues the trend of creating an "ESA review [that] become[s] a procedural morass divorced from the text" by ignoring the Service's scientific judgment. *Id.* at *40. Under the APA, the question is not whether the agency had removed all possible doubt about its conclusions, but whether the agency reasonably explained its conclusions based on the record.

The errors contained in the opinion below have significant practical consequences that will continue to hinder species recovery under the ESA. The Act's cooperative framework depends on incentives. States, private landowners, and other stakeholders are more likely to invest in and sustain conservation efforts when success results in prompt and sustained delisting. But that incentive structure breaks down when the goalposts keep moving. If recovery merely invites continued litigation that leads to federal control based on judicial second-guessing, those

incentives disappear and the politicization of species that concerned the district court becomes more likely, not less. The decision below does more than misinterpret the Act; it undermines the mechanism Congress chose to promote recovery in the first place.

The proper approach is straightforward. The ESA requires the Service to evaluate the best available science, consider state conservation efforts, and determine whether a species is endangered or threatened based on its biological status. It did so. Courts, in turn, must review that determination deferentially, asking only whether the agency's decision is reasonable and supported by the record. The decision below rejected the Service's conclusion not because it is unsupported but because the court disagrees with its implications and speculates about future risks caused by state management. That is not a permissible basis for setting aside agency action under the ESA or the APA. The judgment should be reversed.

II. The District Court Misinterprets "Range" For Purposes of the Listing Process

Assuming for the sake of argument that the meaning of "range" is an open question following *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), the best reading of "significant portion of its range" is a

species' current, not historical, range. *See* 16 U.S.C. § 1532(6), (20). The context for this phrase is the determination of whether an entire species, rather than a subpopulation, "is in danger of extinction" or "is likely to become" endangered.[17] *Id.* The text rightly focuses on present and future risk rather than past distribution. *Id*. An analysis focused on a species' historical territory would collapse into a backwards-looking inquiry under which an abundant species could be listed because it has been extirpated from areas no longer suitable for it.

Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001), does not require that result. Instead, it held that the Service must address lost range in its listing analysis, not that lost historical range remains a significant portion of a species' range. *Id.* at 1141–45. Even if a species' "geographic and/or historic range may be significantly reduced," a species may not be threatened on a "significant portion of its range" unless a portion of its current range is so biologically important "that threats to

[17] As discussed below, the ESA does provide for the listing of subpopulations to address local threats. But it does so through the "distinct population segment" provision, 16 U.S.C. § 1532(16), not "significant portion of its range." *See* Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996).

the species in that area can have the effect of threatening the viability of the species as a whole." *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1279–80 (D.N.M. 2005) (vacated pursuant to settlement).

The district court's contrary interpretation threatens to turn this inquiry into a counting exercise that this Court has rejected. "[I]t simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing." *Defenders of Wildlife*, 258 F.3d at 1143. This is because "[a] species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat," or, alternatively, "a species with exceptionally small historical range may quickly become endangered after the loss of even a very small percentage of suitable habitat." *Id.* What matters is whether the species is threatened with extinction, not whether its range has been reduced compared to an arbitrary historical baseline.

American bison, our national mammal, illustrate this point. Historical records suggest bison once ranged from Alaska to Mexico and

from Nevada to the Appalachian Mountains,[18] with Daniel Boone encountering them in Kentucky in the 1760s.[19] Yet that enormous loss of historical range does not by itself indicate that bison are in danger of extinction, especially given that about 500,000 bison now live in the United States.[20]

The opinion below also blurs the distinction between "range" and the ESA's distinct population segment (DPS) framework. Congress amended the ESA in 1978 to authorize listing of "any distinct population segment of any species of vertebrate fish or wildlife," giving the Service a more precise tool to address localized threats to discrete and significant populations. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2, 92 Stat. 3751 (1978). Notably, the phrase "significant portion of its range" was already in the ESA, as it was included in the original

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[18] U.S. Nat'l Park Serv., *Bison Bellows: Back Home on the Range* (last visited on Apr. 17, 2026), https://www.nps.gov/articles/bison-bellows-1-7-16.htm.

[19] Ky. Hist. Soc'y, *Daniel Boone's First Steps in Kentucky* (last visited Apr. 17, 2026), https://history.ky.gov/markers/daniel-boones-first-steps-in-kentucky.

[20] The Nature Conservancy, *American Bison (Buffalo)* (May 21, 2023), https://www.nature.org/en-us/get-involved/how-to-help/animals-we-protect/american-bison/.

1973 Act. *See* Endangered Species Act of 1973, Pub. L. No. 93-205, § 3, 87 Stat. 884 (1973). The coexistence of these provisions shows that concerns about a species in one discrete area do not require listing the entire species by stretching the word "range" to include all historical habitat. Instead, the DPS provision gives the Service a more targeted mechanism for addressing localized biological risk.

The best reading of "significant portion of its range" limits "range" to a species' current range. That reading is consistent with the ESA's focus on present extinction risk, preserves the distinction between biological significance and geographic breadth, and respects Congress's creation of the DPS framework to address localized threats. The district court's contrary interpretation expands the statute beyond its text, turns listing into a measure of geographic completeness, and undermines the Act's structure. This Court should reject that misinterpretation.

Conclusion

Because the ESA requires biologically grounded, science-based determinations, the decision below cannot stand. By substituting policy concerns for expert judgment, applying unprecedented skepticism of state wildlife management, and misdefining "range" to include

unoccupied historical habitat, the decision below departs from the ESA's text, structure, and purpose. The Act is designed to promote recovery through cooperative federalism and agency expertise. The decision below undermines them.

For these reasons, this Court should reverse the decision below.

Dated: April 17, 2026

Respectfully submitted,

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Dated: April 17, 2026

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Certificate of Service

I hereby certify that on April 17, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: April 17, 2026

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