No. 23-2944

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILDEARTH GUARDIANS and WESTERN WATERSHEDS PROJECT,
Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF AGRICULTURE ANIMAL AND PLANT HEALTH INSPECTION SERVICE WILDLIFE SERVICES, U.S. FOREST SERVICE, and BUREAU OF LAND MANAGEMENT,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
No. 3:21-cv-00508-LRH-CLB
Hon. Larry R. Hicks

CONSERVATION ORGANIZATIONS' *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' OPENING BRIEF AND REVERSAL

Andrew Hursh
WILDERNESS WATCH
PO Box 9175
Missoula, Montana 59807
Tel: 406-542-2048 Ext. 6
andrewhursh@wildernesswatch.org
Counsel for Amici

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici are all nonprofit organizations. None of amici organizations has a parent corporation, and no publicly held corporation owns a 10-percent or greater ownership interest in any amici organization.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are a collection of non-profit conservation and wildlife advocacy organizations from around the country with a keen interest in the outcome of this case given its implications for administration of the National Wilderness Preservation System. Amici organizations have a long collective history engaged in public policy advocacy, agency oversight, public education, research, and litigation to promote sound stewardship of federal public lands. Amici wish to ensure that this Court is well-informed of the background and essential legal context underpinning this controversy and the importance of its consequence.

An essential component of amici organizations' work includes efforts to ensure that Congress's express directive for stewardship under the Wilderness Act is reflected in administrative and other activity on the ground. The same deleterious human pressures that led to the Act's passage—roads and other development, overuse, decimation of fish and wildlife habitat and populations, hubris in altering natural processes, and more—persist today.

This case involves a double-pronged affront to Wilderness administration as Congress provided in the law. The central tragedy is the wanton killing of wildlife populations within these areas set aside to be some of their most secure habitat, but compounding the injury is that it occurs at the federal government's own hands to

subsidize private commercial enterprise—something the Wilderness system was expressly designed to prohibit and stand in contrast against.

In the brief that follows, amici will detail important context relevant to this Court's consideration of the issues presented and conclude with a substantive assessment of this case and the imperative for this Court to establish clarity under the law.

STATEMENT OF AUTHORSHIP AND REQUEST FOR CONSENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored any portion of this brief, in whole or in part. No person or entity other than amici and amici's counsel has or is expected to contribute money intended to fund the preparation or submission of this brief.

Counsel for all parties consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Defendant-Appellee federal agency here, Wildlife Services, is a small arm of the Department of Agriculture and operates under a vague and nearly century-old statutory authority. A large part of the agency's activity includes the systematic killing of wildlife—particularly predator species in their natural habitats. This practice serves as a commercial subsidy to a tiny subset of the nation's livestock ranchers and perpetuates an antiquated paradigm of zealous eradication of native species to cow nature into economic submission.

The present controversy arises because Wildlife Services recently authorized its predator-killing activities *within* special areas that have been set aside under federal law expressly for the protection of natural ecosystems. Such areas were established through Congressional enactments (principally the Wilderness Act and area-specific enabling statutes) that occurred subsequent to and provided greater specificity than Wildlife Services' general enabling law. Wildlife Services' decision to kill wildlife at the request of ranchers, inside the very areas in which Congress mandated protection of untrammeled natural ecosystems, thus stands in stark violation of later-enacted federal laws that abrogated the agency's authority in such areas.

Congress's passage of the Wilderness Act and statutory designations of areas to be managed under its terms have been landmark achievements in federal

environmental legislation with overwhelming public support. And Congress did not create this national system of public lands with strict environmental protections in a vacuum. The National Wilderness Preservation System was a direct response to acute long-standing threats facing the environmental health of our public estate and the often catastrophic effects of human impact on natural ecosystems and the wildlife and other species that depend on them.

Today, the National Wilderness Preservation System and the strict statutory obligations that the Wilderness Act places on administering federal lands agencies work to protect only less than three percent of the land area in the lower 48 states. This constitutes a small but incredibly important set of landscapes wherein fragile natural ecosystems and the wildlife that depend on them are assured some of the highest protection from human disturbance and harm afforded under federal law. Congress was moved to create this system, in which federal agencies have a statutory duty to protect the "earth and its community of life" in a manner that leaves them "untrammeled by man," because of past deleterious practices on the American landscape that put naturally functioning ecosystems at risk of disappearing altogether.

Among the threats that the National Wilderness Preservation System was established in direct reaction to was the decimation of wildlife populations and their natural habitat. And much of this historical wildlife destruction was,

unfortunately, intentional. American settlers in their westward expansion worked hard to systematically rid the landscape of "undesirable" animals through bounty hunting, aggressive extermination campaigns, poisoning, and other practices that often resulted in the decimation of non-target species as well. These efforts were aimed particularly intensely at predator species like wolves, bears, mountain lions, and coyotes. But through the twentieth century, Americans gained a better scientific understanding of the essential natural role that predator species play in functioning ecosystems, and Americans' shifting values became reflected in the conservation obligations enacted into federal law. Nowhere are those values and obligations more directed at natural ecosystem preservation and the restraint of human impact than in the National Wilderness Preservation System, in which the law demands that the preservation of "wilderness character"—i.e., the protection of "untrammeled" nature—be the paramount criteria governing administering agencies' management.

Wildlife Services' 2020 decision to authorize predator killing operations within statutorily designated Wilderness areas stands in clear contravention of the Wilderness Act and the obligations it places on the federal government. When the Plaintiffs-Appellants in this case sued the agency over its Wilderness Act violations, the federal district court in Nevada found for the agency in an erroneous order that this Court should now reverse. The district court's order cited to a 2002

decision in which a panel of this Court misinterpreted a "special provision" in the Wilderness Act that provides a narrow carve-out for limited continued livestock grazing.

That 2002 decision, *Forest Guardians v. Animal Plant and Health Inspection Service*,[1] contradicted well-established canons of statutory construction by finding that the narrow exception could be widened by implication such that additional unenumerated activity (like killing wildlife) was permitted unless specifically and expressly prohibited. Such an approach turns the Wilderness Act—with its clearly articulated environmental protection mandate—on its head, interpreting narrow exceptions in a manner far broader than the statutory text and thereby swallowing the overarching and express directives at the heart of the law.

This court has made clear that the Wilderness Act provides a "mandate to protect the forests, waters and creatures of the wilderness in their natural, untrammeled state," and killing those creatures to subsidize the bottom line of private grazing enterprise absolutely contravenes that statutory obligation. The preceding quoted text is from this Court's *en banc* opinion in *Wilderness Society v. U.S. Fish and Wildlife Service*,[2] a case subsequent to *Forest Guardians* in which this Court made abundantly clear how the Wilderness Act's ban on "commercial

[1] 309 F.3d 1141 (9th Cir. 2002) (per curiam).
[2] 353 F.3d 1051 (9th Cir. 2003) (en banc).

enterprise" must be enforced. Notably, the panel opinion that this Court overturned *en banc* in *Wilderness Society* had cited and relied upon *Forest Guardians* before being overturned by the *en banc* panel, which declined to adopt such logic.

By citing the backwards logic of *Forest Guardians* and failing to apply this Court's later, more controlling reasoning and discussion on the Wilderness Act's protective mandate and commercial prohibitions, the district court below erred. If affirmed, the flawed reasoning the district court deployed would put the entire National Wilderness Preservation System and the wildlife that critically depend upon it at risk of intentional human damage—predator slaughter in the same destructive historical mold that Congress's enactment of the Wilderness Act stood in direct reaction to and opposition against.

To respect and enforce Congress's clearly established statutory provisions for the protection of areas designated and administered in the National Wilderness Preservation System, this Court should reverse the district court decision on appeal here and should hold that Wildlife Services' predator-killing actions in federally designated Wilderness violate the law.

ARGUMENT

I. Background: Federal Environmental Law, the National Wilderness Preservation System, and Wildlife

The United States Congress has enacted a rich assembly of laws aimed at environmental protection, including those mandating conservation of natural ecosystems on federal public lands. In numerous federal statutes, Congress has expressed its intent across many spheres of management.

For example, on our public estate, the federal government must make such efforts as to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values,"[3] to "preserve and protect certain public lands in their natural condition,"[4] to "provide for diversity of plant and animal communities,"[5] and to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[6] Congress tasks the federal government to "encourage productive

---

[3] 43 U.S.C. § 1701(a)(8) (a declaration of policy in the Federal Lands Policy and Management Act).
[4] *Id.*; *see also* 16 U.S.C. § 1131(a) (Wilderness Act declaration of policy).
[5] 16 U.S.C. § 1604(g)(3)(B) (requirement of regulations under the National Forest Management Act).
[6] 16 U.S.C. § 1531(b) (congressional declaration of purposes and policy under the Endangered Species Act).

and enjoyable harmony between man and his environment,"[7] to "promote efforts which will prevent or eliminate damage to the environment and biosphere,"[8] to "enrich the understanding of the ecological systems and natural resources important to the Nation,"[9] and to create "regulations and plans for the protection of public land areas of critical environmental concern"[10] and prevent damage to "fish and wildlife resources or other natural systems or processes."[11]

Of particular importance to this case and a milestone of statutory achievement in ecosystem protection, Congress created a National Wilderness Preservation System (NWPS), overlaid upon federal land categories such as National Forests and National Parks and delineating areas with strict environmental protections. Within the NWPS, Congress established a mandate to leave the "earth and its community of life . . . untrammeled by man," to administer lands "so as to preserve [] natural conditions," and to protect such rare wild

---

[7] 42 U.S.C. § 1431 (congressional declaration of purpose under the National Environmental Policy Act).
[8] *Id.*
[9] *Id.*
[10] 43 U.S.C. § 1701(a)(11) (a purpose declared under the Federal Lands Policy and Management Act).
[11] 43 U.S.C. § 1702(a) (defining the purpose of the "areas of critical environmental concern" prioritized in § 43 U.S.C. § 1701(a)(11)).

landscapes that will not be "occupied and modified" by people's increasing impacts.[12]

Congress did not enact these statutory provisions in a vacuum. American history is rife with regrettable environmental degradation, from the Dust Bowl[13] to the extinction of the passenger pigeon[14] and near extinction of the bald eagle,[15] from burning rivers[16] to oil spills,[17] from deforestation[18] to desertification[19] and the

---

[12] 16 U.S.C. § 1131(a), (c).
[13] *See, e.g.*, 16 U.S.C. § 590a (a legislative response to the Dust Bowl declaring soil erosion "a menace to the national welfare" and enacting provisions to "protect natural resources" and "protect public health [and] public lands.")
[14] *The Passenger Pigeon*, SMITHSONIAN INST., https://www.si.edu/spotlight/passenger-pigeon (last visited Dec. 8, 2023) ("The one valuable result of the extinction of the passenger pigeon was that it aroused public interest in the need for strong conservation laws.").
[15] *See Bald Eagle*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/species/bald-eagle-haliaeetus-leucocephalus (last visited Dec. 8, 2023).
[16] *Introduction to the Clean Water Act*, U.S. ENVT'L PROT. AGENCY, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2571 (last visited Dec. 8, 2023) ("The 1969 Cuyahoga River fire mobilized public concern across the nation and helped spur an avalanche of water pollution control activities resulting in the Clean Water Act [and other laws].").
[17] *See, e.g.*, 33 U.S.C. §§ 2701 *et seq*. (Oil Pollution Act).
[18] *See, e.g.,* Tom Tidwell (then-U.S. Forest Service Chief), *Speech to the World Conservation Congress* (Sept. 4, 2016), https://www.fs.usda.gov/speeches/state-forests-and-forestry-united-states-1 ("Deforestation threatened our timber supplies … our water supplies … our rich forest resources … our habitat for native wildlife. In response, we set aside protected areas like the national forests and grasslands. Even more important, we created sound structures of governance for managing forests sustainably on both public land and private land.").

disastrous impacts of invasive and noxious weeds.[20] Congress's clear intention in enacting its many environmental and public lands laws has been to provide popularly demanded course-correction from prior deleterious practices and to elevate conservation, wildlife protection, and ecosystem preservation as significant priorities for the national public.

In the National Wilderness Preservation System, Congress's express requirement is to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness" to stand "in contrast with those areas where man and his works dominate the landscape."[21] And today, the NWPS and the system of environmental laws built since the mid-twentieth century are more important than ever. World wildlife populations have declined by *two-thirds* in recent decades.[22] A state like Nevada—at the heart of this

---

[19] Gregory P. Asner et al., Grazing Systems, Ecosystem Responses, and Global Change, 29 ANN. REV. ENV'T & RES. 261 (2004), https://doi.org/10.1146/annurev.energy.29.062403.102142.

[20] *Weeds and Invasives*, U.S. Bureau Land Mgmt., https://www.blm.gov/programs/weeds-and-invasives (last visited Dec. 8, 2023) ("One of the BLM's highest priorities is to promote ecosystem health and one of the greatest obstacles to achieving this goal is the rapid expansion of weeds across public lands.").

[21] 16 U.S.C. § 1131.

[22] Gloria Dickie, *Global wildlife populations have sunk 69% since 1970 - WWF report*, REUTERS, Oct. 12, 2022, https://www.reuters.com/business/environment/global-wildlife-populations-have-sunk-69-since-1970-wwf-report-2022-10-12/ (last visited Dec. 8, 2023).

lawsuit—was once home to robust ecosystems containing the full suite of western flora and fauna, including the wolf, grizzly bear, wolverine, and lynx. Now, those species are extirpated, and another 50 species in the state are threatened or endangered.[23]

Past destruction of native wildlife like the predator species just named was, unfortunately, intentional. From the seventeenth century onward, American settlers waged systematic campaigns to destroy entire species, to subjugate and reshape the natural environments they encountered.[24] Early examples include the Massachusetts Bay Colony offering, in 1630, a one-cent bounty for every wolf killed.[25] William Penn, who would later lend his name to the state of Pennsylvania, hired one of the first dedicated government wolf hunters under the employ of the colony in 1705.[26] Later, the widespread use of the toxic chemical strychnine to poison and exterminate whole predator populations became common through the

---

[23] *Listed species with spatial current range believed to or known to occur in Nevada*, U.S. FISH & WILDLIFE SERV., https://ecos.fws.gov/ecp/report/species-listings-by-state?stateAbbrev=NV&stateName=Nevada&statusCategory=Listed (last visited Dec. 11, 2023); Nev. Stat. § 527.260 (1969) ("Nevada has experienced the extermination or extirpation of some of its native species of flora. Serious losses have occurred and are occurring in other species of flora with important economic, educational, historical, political, recreational, scientific and aesthetic values.").

[24] George Cameron Coggins & Parthenia Blessing Evans, *Predators' Rights and American Wildlife Law*, 24 ARIZ. L. REV. 821, 826-30 (1982).

[25] *Id.*

[26] *Id.*

nineteenth century.[27] By the turn of the twentieth century, Americans had so thoroughly decimated wildlife populations and extirpated whole species, particularly east of the Mississippi but increasingly in the West, that popular movements towards environmental conservation began to take root.

The disastrous effects of anti-predator attitudes and practices have long served as important ecological lessons and catalysts for change in public values and in law. No less than a dozen species that were primary targets of predator "control" management have ended up listed for protection under the Endangered Species Act.[28] And efforts to restore their essential presence in damaged ecosystems, such as those to restore wolves in Yellowstone National Park, have been vital correctives key to informing our scientific and managerial understanding of predators as integral parts of healthy natural ecosystems.[29]

Thus, in the latter half of the twentieth century, Congress's creation of a suite of environmental laws and establishment of protected areas on federal public lands operated in direct and intentional opposition to such past practices as the

---

[27] *Id.*

[28] Jamison E. Colburn, *Habitat and Humanity: Public Lands Law in the Age of Ecology*, 39 ARIZ. ST. L.J. 145, 163 n.79 (2007).

[29] *See, e.g.*, Christine Peterson, *25 years after returning to Yellowstone, wolves have helped stabilize the ecosystem*, NAT. GEOGRAPHIC, July 10, 2020, https://www.nationalgeographic.com/animals/article/yellowstone-wolves-reintroduction-helped-stabilize-ecosystem (last visited Dec. 11, 2023).

wanton killing of predators and the destruction and reconfiguration of fragile natural ecosystems to suit human whims. Core to this legislative work was the creation of the NWPS, with its statutory mandate to preserve certain special Wilderness areas in which only the "primeval character and influence" of nature, rather than exploitation for people's short-term interests, shapes the landscape.[30] Today, the NWPS comprises less than 3% of the land in the lower 48 states—a miniscule but essential territory for native wildlife species, predators and prey alike, to carry out their natural and dynamic lives with protection against disturbance.

II. A Federal Agency That Kills Wildlife

Considering the above historical and legislative context driving environmental conservation on federal public lands today, one might be surprised to learn of an obscure federal agency that continues to operate under the antiquated predator-destruction paradigm. Wildlife Services, an arm of the U.S. Department of Agriculture, kills hundreds of thousands of native wild animals every year.[31] Wildlife Services officers fly into remote areas and shoot wolves and coyotes from

---

[30] 16 U.S.C. § 1131(c).

[31] *Program Data Reports*, ANIMAL AND PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/pdr/?file=PDR-G_Report&p=2022:INDEX:.

aircraft.[32] They pump poisonous gas into dens to exterminate whole packs.[33] They leave "cyanide bombs" on the landscape that detonate to kill target animals—and occasionally kill or injure pet dogs and the children walking them.[34] They trap and snare and shoot badgers, mountain lions, bears, bobcats, and foxes.[35] The agency's practices regularly result in the unintentional killing of thousands of animals they aren't even targeting, including eagles, bighorn sheep, and bears and including animals federally protected under the Endangered Species Act.[36]

To understand Wildlife Services' incongruous place in federal environmental activity, one must skip backward in time to before the important and relevant era of environmental lawmaking described above. Rewind over 90 years, and Wildlife Services finds its statutory authority in a vague statute from 1931—

---

[32] *See id.*; *see also* Tom Knudsen, *The killing agency: Wildlife Services' brutal methods leave a trail of animal death*, SACRAMENTO BEE, Oct. 18, 2014, https://www.sacbee.com/news/investigations/wildlife-investigation/article2574599.html (last visited Dec. 11, 2023); Ben Goldfarb, *Wildlife Services and its Eternal War on Predators*, HIGH COUNTRY NEWS, Jan. 25, 2016, https://www.hcn.org/issues/48.1/wildlife-services-forever-war-on-predators (last visited Dec. 11, 2023).

[33] *Id.*

[34] Christopher Ketchum, *The Rogue Agency*, HARPER'S MAGAZINE, May 2016, https://harpers.org/archive/2016/03/the-rogue-agency/ (last visited Dec. 11, 2023).

[35] *Program Data Reports*, *supra* note 29.

[36] *Id.*; Dina Fine Maron, *U.S. government agency accidentally killed almost 3,000 animals in 2021*, NAT. GEOGRAPHIC, Apr. 12, 2022, https://www.nationalgeographic.com/animals/article/us-government-agency-accidentally-killed-almost-3000-animals-in-2021 (last visited Dec. 11, 2023).

the Animal Damage Control Act—which generally authorized federal efforts to combat "injurious" animals, among them the "eradication and control of predatory and other wild animals."[37] This notion—toward the zealous eradication of predators and other undesired animals—was already showing its outmodedness even in 1931. The American Society of Mammologists and similar scientific organizations had at that time already begun pushing back on the unconscionable tactics deployed by what was then called the "Biological Survey."[38] For example, Dr. Joseph Grinnell, then president of the American Ornithologists' Union, estimated in 1931 that squirrel poisoning efforts in California had killed some 50 million birds and mammals *beyond* the target squirrels. He wrote:

> the pity of it is that these campaigns of destruction are carried on in cooperation with the Biological Survey, a governmental organization which we were led to believe, upon the best of grounds, was consecrated to the practice and encouragement of real conservation and nothing else.[39]

---

[37] Animal Damage Control Act, Pub. L. No. 71-776, 46 Stat. 1468 (1931); Coggins & Evans, *supra* note 22, at 835-36.

[38] *See* Coggins & Evans, *supra* note 22, at 835. What began as the "Division of Biological Survey" within the Department of Agriculture in 1886 morphed into a "Predator and Rodent Control" branch in 1915, was shuffled into the Fish and Wildlife Service in the Department of the Interior in 1939, and then back to the Department of Agriculture in the "Wildlife Services Division" as Animal Damage Control (ADC) in 1985. In 1997, the agency was renamed from ADC to Wildlife Services. *History of Wildlife Services*, U.S. DEP'T OF AGRICULTURE, https://storymaps.arcgis.com/stories/70584a170f6745efbdaacb9fe3c6c65d (last visited Dec. 11, 2023).

[39] *Notes and News*, THE AUK, Vol. 8, No. 3 (July 1931), at 477.

One can only imagine how disheartened scientists and early conservationists like Dr. Grinnell would be to see the agency's wanton killing of wildlife persisting a hundred years later, even after Americans had achieved so much progress in environmental protection through their national legislature. Today, Wildlife Services operates in stark contradiction to our essential paradigm shifts in federal environmental law; the agency continues its practice of predator destruction seemingly undeterred by the fact that its antiquated source of authority has long been overridden by much more recent statutory obligations for federal lands agencies and ample contradictory Congressional intent.

Why does the agency's killing persist? It operates in large part to heap additional subsidy upon a few private commercial operators running livestock on federal public lands. Livestock grazing on public lands is already a heavily subsidized industry serving a very small subset (less than 3%) of the United States' livestock operators. The practice occurs at a huge economic loss to the federal government and at a steep cost in terms of climate change impact and other environmental effects.[40] Even though public lands grazing is offered at steeply discounted fee rates that more than account for the variable natural environmental

[40] J. Boone Kauffman et al., *Livestock Use on Public Lands in the Western USA Exacerbates Climate Change: Implications for Climate Change Mitigation and Adaptation*, 69 ENVT'L MGMT. 1137 (2022).

conditions including the presence and needs of wildlife (market costs for grazing on private lands are typically over 15 times greater),[41] livestock ranchers complain that it would be insufficiently profitable for them if the animals they graze out on the open range had to face such public landscapes as the natural systems they are. To improve their bottom lines, ranchers rely on Wildlife Services' additional program of decimating native wildlife populations to reshape the natural environment to be supposedly more suited to their narrow business purposes. As a retired Wildlife Services agent told a reporter in 2016, "Ranchers call us up, and the system kicks in, guns blazing."[42]

The conflict between Wildlife Services' activities and the government's many conservation-oriented statutory land management obligations is exemplified at its worst by a decision the agency made in 2020—the subject of the underlying controversy here. In 2020, Wildlife Services authorized, in Nevada, its program of "predator damage management" (of which killing animals is a primary tool)

---

[41] *See Public Land Livestock Fees Hit Rock-Bottom*, PUBLIC EMPLOYEES FOR ENVT'L RESPONSIBILITY, Feb. 21, 2019, https://peer.org/public-land-livestock-fees-hit-rock-bottom/ (last visited Dec. 11, 2023); Grazing Fees: Overview and Issues, CONGRESSIONAL RESEARCH SERVICE, March 4, 2019, https://crsreports.congress.gov/product/pdf/RS/RS21232/31; Glaser, Romaniello, and Moskowitz, *Costs and Consequences: The Real Price of Livestock Grazing on America's Public Lands*, CENTER FOR BIOLOGICAL DIVERSITY, January 2015, https://www.biologicaldiversity.org/programs/public_lands/grazing/pdfs/CostsAndConsequences_01-2015.pdf.

[42] Ketchum, *supra* note 32.

throughout the very areas established under federal statutes to receive heightened environmental protection: Wilderness Areas, Wilderness Study Areas, and Areas of Critical Environmental Concern.[43] In designated Wilderness areas, places set aside by Congress expressly to leave natural functioning ecosystems undisturbed, to kill and control predator animals stands in utterly irreconcilable contradiction with the law. Furthermore, doing so at the behest of private businesses compounds the legal violation; Congress made explicitly clear that commercial enterprise is prohibited in areas designated for protection under the Wilderness Act.[44]

The Plaintiffs in this case raised these issues before the federal district court in Nevada on the docket below. But by deciding the issue in Wildlife Services' favor, the district court misinterpreted the law in a manner that poses severe threat to the imperative protections that the Wilderness Act confers to native wildlife nationwide. The district court relied upon a terse and erroneous *per curiam* opinion this Court issued in 2002, failing to heed subsequent, more fulsomely reasoned, and more controlling orders of this Court interpreting the Wilderness Act.

---

[43] *See* 3-ER-257, 3-ER-277 (Final Environmental Assessment (EA) describing preferred action).

[44] *See* 16 U.S.C. § 1133(c) ("Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter[.]").

The present appeal raises for this Court the question of whether Wildlife Services' predator-killing activities are lawful in statutorily protected Wilderness areas. They are not. This Court has made clear the law's "mandate to protect the forests, waters *and creatures* of the wilderness in their natural, untrammeled state."[45] Allowing the federal government to despoil Wilderness ecosystems and slaughter important wildlife species just to make heavily-discounted public lands grazing more profitable cannot be squared with Congress's statutory text and cannot be squared with this Court's precedent.

III. The Need for this Court to Clarify and Enforce the Law

In 1999, conservation group plaintiffs sued Wildlife Services over its actions to kill mountain lions in the Santa Teresa Wilderness in Arizona. The agency was killing the mountain lions at the request of a rancher who claimed it would protect his cattle. The plaintiffs asserted violations of the Wilderness Act and NEPA. After the district court granted summary judgment to the government, the case—*Forest Guardians v. Animal Plant Health Inspection Service*—reached this Court on appeal in 2002. In a terse *per curiam* order, a panel of this Court affirmed the district court. The order's reasoning was that livestock grazing "implicitly

---

[45] *Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1063 (9th Cir. 2003) (en banc) (citing 16 U.S.C. § 1131(a)) (emphasis added).

includes" the killing of predators and that predator killing was thus authorized unless "expressly prohibit[ed]."[46]

Among other problems, the *Forest Guardians* case did not address the fact that predator killing is a commercial enterprise to boost agricultural profits, contrary to the Wilderness Act's express provision prohibiting commercial enterprise. And the following year, an *en banc* panel of this Court gave that provision substantive judicial treatment through a controversy arising in Alaska. In *Wilderness Society*, this Court made abundantly clear that "regardless of the form of commercial activity," Congress expressed "the essential need to keep commerce out of [Wilderness]."[47] And this Court noted that the Wilderness Act states explicitly that its restrictions control "except as *specifically* provided for" in its few special provisions.[48]

The rule narrowing the scope of exceptions to what is "specifically provided for" simply cannot be squared with the logic in *Forest Guardians* that anything "implicit" in excepted activity is permissible without express prohibition. The *Forest Guardians* approach interpreted the law exactly backwards. In fact, the original three-judge panel of this Court in the *Wilderness Society* case had relied on

---

[46] *Forest Guardians v. Animal Plant Health Insp. Serv.*, 309 F.3d 1141, 1142-43 (9th Cir. 2002) (per curiam).
[47] *Wilderness Society*, 353 F.3d at 1061.
[48] *Id.* at 1062.

Forest Guardians before being overturned by this Court's *en banc* panel, which rejected that logic through its detailed clarity on the appropriate statutory interpretation.[49]

One narrow special provision in the Wilderness Act did grandfather in "the grazing of livestock" in certain areas where it predated designation.[50] But as this Court explained in *Wilderness Society*, "when Congress explicitly enumerates exceptions to a general scheme, exceptions not explicitly made should not be implied."[51]

The import in that basic rule of statutory construction can be well illustrated here through a simple analogy. Imagine the parents of a teenager recently afflicted by heavy alcohol drinking and related troubles. Among other countermeasures that include the obvious prohibition on drinking, the parents institute a strict 10:00 pm curfew. But in one circumstance, they grant an exception to the curfew to attend a rare concert that is coming to town; they had purchased tickets ages ago, before the teen's trouble began. Does the parents' narrow lifting of the curfew also constitute

---

[49] *Compare Wilderness Society v. U.S. Fish & Wildlife Serv*., 316 F. 3d 913, 923 (9th Cir. 2003) *with Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1063 (9th Cir. 2003) (en banc) (overruling the previous).
[50] 16 U.S.C. § 1133(d)(4).
[51] *Wilderness Society*, 353 F.3d at 1062 (quoting *Far West Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 951 F.2d 1093, 1097 (9th Cir. 1991)).

permission to get drunk at the concert, because (the kid says) concerts and drinking go hand-in-hand? Certainly not.

"Killing predators" is no more synonymous with "the grazing of livestock" than "getting drunk" is synonymous with "attending a concert." Instead, killing predators is a separate enterprise designed to make livestock grazing more profitable, just like getting drunk might be a commonly practiced activity toward making concert attendance more enjoyable. A narrow exception for the second activity does not smuggle in permission for the first—especially when the overarching scheme of regulation is expressly designed to prevent the ill consequences of the first activity. As this Court also explained in *Wilderness Society*, a practice that is "plainly destructive of [wilderness] preservation" cannot find a lawful basis in the Act outside the context of "specific and express exceptions."[52]

Furthermore, Wildlife Services does not itself even purport to root authority for its predator-killing activities in any provision of the Wilderness Act. Instead, the agency's decision derives from its 1931 Animal Damage Control Act

---

[52] *Wilderness Society*, 353 F.3d at 1062.

authorization.[53] This illustrates two problems fatal to application in Wilderness areas.

First, the later enactment of Congress forbidding the intentional trammeling of the "earth and its community of life" in designated Wilderness areas abrogates the agency's authority to kill animals within those areas (which is done with the specific intent of trammeling wildlife populations to benefit domestic grazing).[54] "[I]t is a commonplace of statutory construction that the specific governs the general."[55] And if "provisions in [] two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one."[56]

Second, through its *separate* decision and *independent* activities pursuant to the 1931 statute, Wildlife Services has made abundantly clear that it is doing something other than simply "the grazing of livestock." Wildlife Services does not graze livestock at all, nor are its practices of predator killing incorporated in the terms of grazing permits issued under the narrow "grazing of livestock" exception in some areas of Wilderness. Instead, Wildlife Services pursues a discrete,

---

[53] *See* 3-ER-286-287 (Final EA description of statutory authority).
[54] 16 U.S.C. § 1131(c); *see also* 3-ER-700-703 (the agency's admission and descriptions of the trammeling and other wilderness character damage from its preferred action).
[55] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).
[56] *EC Term of Years Trust v. United States*, 550 U.S. 429 (2007) (quoting *Posadas v. National City Bank*, 296 U. S. 497, 503 (1936)).

additional program of further subsidizing agricultural profits by killing wildlife both on and off federal lands.[57]

In fact, nothing in Wildlife Services' 2019 decision for Nevada indicates that its predator damage management activities and predator killing authorized in Wilderness areas would even be limited to targeting specific animals that preyed on specific livestock that grazed *in the wilderness area*. Instead, under the 2020 plan's broad state-wide authorization, Wildlife Services will likely be acting inside federally protected wilderness areas (and impairing them) to kill wildlife at the behest of ranchers who complain about the impacts of the wildlife (which move in and out of such areas) on their grazing operations nearby. Wildlife Services' activity is itself a commercial enterprise—"relating to commerce" in both its purpose and effect.[58] The notion the agency could take its commercial enterprise operation into Wilderness areas (despite the express prohibition in the Wilderness Act) and damage the wilderness by killing its wildlife (despite the plain ecosystem

---

[57] *See* 3-ER-298 (Final EA discussion of differing jurisdictional authorities and the distinction between Wildlife Services and the public land management agencies with administrative authority over Wilderness areas, illustrating that Wildlife Services' activities are separate and discrete from the other agency's administration of grazing under the narrow exception at 16 U.S.C. § 1133(d)(4)).
[58] *See Wilderness Society*, 353 F.3d at 1061.

preservation mandate of the Act)[59] does nothing but injury to Congress's statutory scheme.

IV. Conclusion

The National Wilderness Preservation System is a precious, vital achievement in environmental legislation containing an express directive to preserve a rarity of designated natural areas with the utmost protection from deleterious human impact—to leave the natural ecosystems and the wildlife within them free to exist of their own will. The Wilderness system was enacted in direct reaction to extensive ecological damage from practices like the extermination of predators.

Wildlife Services' challenged decision-making here occupies a crossroads between archaic, destructive tactics and contemporary conservation law. And predator species sit in the crosshairs. This Court's decision in this appeal is imperative to clarifying and enforcing statutory protections that mandate wild, safe habitat for communities of wildlife.

This Court should reverse the district court decision on appeal here. This Court should clarify that *Forest Guardians*' language on predator damage

---

[59] *See* 3-ER-700-703 (the agency's admission in its Final EA of how the authorized action would damage all facets of wilderness character).

management in Wilderness was erroneous and was abrogated by the *en banc* decision in *Wilderness Society*. And this Court should hold that Wildlife Service's execution of predator-killing actions in federally designated Wilderness violates the statutory directives of the Wilderness Act—both the Act's wilderness character preservation mandate and its commercial enterprise prohibition.

Date: January 2, 2024

/s/ Andrew Hursh
Andrew Hursh
WILDERNESS WATCH
PO Box 9175
Missoula, Montana 59807
Tel: 406-542-2048 Ext. 6
andrewhursh@wildernesswatch.org
Counsel for Amici

APPENDIX

List of *Amici* Conservation Organizations

Wilderness Watch
P.O. Box 9175
Missoula, MT 59807

Heartwood Forest Council
P.O. Box 352
Paoli, IN 47454

Conservation Congress
1604 1st Ave. S.
Great Falls, MT 59401

Predator Defense
P.O. Box 5446
Eugene, OR 97405

Friends of the Clearwater
P.O. Box 9241
Moscow, ID 83843

Friends of the Bitterroot
P.O. Box 442
Hamilton, MT 59840

Swan View Coalition
3165 Foothill Road
Kalispell, MT 59901

Protect Our Woods
PO Box 352
Paoli, IN 47454

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(5)-(7) and Ninth Circuit Rule 32-1 as it contains 5,723 words, presented in 14-point Times New Roman font, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

Date: January 2, 2024

/s/ Andrew Hursh
Andrew Hursh
WILDERNESS WATCH
PO Box 9175
Missoula, Montana 59807
Tel: 406-542-2048 Ext. 6
andrewhursh@wildernesswatch.org
Counsel for Amici

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-2944

I am the attorney or self-represented party.

This brief contains 5,723 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Andrew Hursh **Date** Jan. 2, 2024
*(use "*s/[typed name]*" to sign electronically-filed documents)*