

This Amicus Brief Is No Friend of Prairie Dogs

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The libertarian Cato Institute, known for its irreverent, sometimes funny, U.S. Supreme Court briefs, has just aimed its provocative writing at prairie dogs. They can only bark back. The Cato Institute filed an amicus brief to bolster the case of more than 200 Utah property owners who are challenging the federal government’s regulations protecting the Utah prairie dog under the Endangered Species Act. The animals, numbering about 40,000, are found most often in southwest Utah where, according to the petitioners, they wreak havoc by burrowing and digging holes on private property, public parks, airports, golf courses and cemeteries.

The case is titled *People for the Ethical Treatment of Property Owners v. United States Fish and Wildlife Service*, and if the high court grants review, it could be a major test of the scope of the constitutionally granted power of Congress to regulate interstate commerce. It could also turn into one of a series of cases in which the Trump administration takes a different position from its predecessor.

The petitioners, represented by the Pacific Legal Foundation, argue that the Utah prairie dog is “a species that is not involved in commerce and only found in Utah,” so is beyond the reach of Congress.

The Cato brief puts it more bluntly. “In no commerce clause case has this court considered anything so worthless,” wrote counsel of record Ilya Shapiro.

He went on to invoke Supreme Court precedents that involved the commerce power. “The Utah prairie dog is not a marketable commodity. [*Wickard v. Filburn*] ... They carry no firearms into school zones. [*United States v. Lopez*] ... Finally, they have neither purchased health insurance nor plan to do so in future. [*National Federation of Independent Business v. Sebelius*].” Shapiro also asserted, “They produce nothing of importance except the annoyance of the surrounding population—and they make terrible pets.”

Others beg to differ. Bryce Canyon, a national park, puts on a Utah Prairie Dog Day every year and extols the rodents as a “keystone species” that improves soil quality, provides prey and

“maintains meadow ecosystems.” Michael Harris of Friends of Animals, which is an intervenor in the case, wrote in a lower court brief that the Utah prairie dog is a “highly social, intelligent species.”

Jonathan Wood of the Pacific Legal Foundation, who is counsel of record for the property owners, has a different view. He has seen Utah prairie dogs in action and says, “It is hard to imagine what happens when they overrun a neighborhood.” And Wood embraced the Cato brief. “You can tell they had fun writing it.”

The government’s current position in the case is “up in the air,” Wood said. The U.S. Court of Appeals for the Tenth Circuit upheld the prairie dog regulation. But in a [July 27 filing](#) at the appeals court, the Justice Department said a pending review of the regulation “may effectively moot” the matter—though it is possible the high court could still take up the case, according to Wood. Harris, the lawyer for Friends of Animals, said he is optimistic that the government will continue to defend the regulation, or at least the underlying interpretation of the commerce clause, which has wide implications.

In [upholding the regulation](#), the Tenth Circuit invoked *Gonzales v. Raich*, the 2005 Supreme Court decision that allowed federal regulation of medical marijuana. The panel wrote, “Congress had a rational basis to believe that regulation of the take of the Utah prairie dog ... is an essential part of the ESA’s broader regulatory scheme which, in the aggregate, substantially affects interstate commerce.” That broader scheme, the court said, was the Endangered Species Act’s “protections of endangered and threatened species.”

The Cato brief accepts that regulating medical marijuana might support a valid federal regulatory scheme. But prairie dogs? “Exempting citizens of Utah from federal prosecution if they take the Utah prairie dog would undermine what federal program, exactly?” Shapiro wrote.

Shapiro did have at least one nice thing to say about the prairie dogs. “Amici wish the adorable little critters no ill will and hope that state wildlife authorities handle the population responsibly. ... But the protection of cuteness is not a congressional power enumerated in Article I, Section 8.”