

**No. 160, Original**

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In the  
**Supreme Court of the United States**

STATE OF UTAH,

*Plaintiff,*

v.

UNITED STATES OF AMERICA,

*Defendant.*

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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**BRIEF OF AMICUS CURIAE  
SUTHERLAND INSTITUTE IN  
SUPPORT OF PLAINTIFF STATE OF  
UTAH'S OF MOTION FOR LEAVE TO  
FILE BILL OF COMPLAINT**

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## **INTEREST OF AMICUS<sup>1</sup>**

Amicus Sutherland Institute is a Utah nonprofit, nonpartisan public policy organization with a substantial interest in the Constitution's protection of freedom secured by the integrity of its system of divided and defined powers. This case addresses the threat to the integrity of that system in the consolidation of ownership and control of Utah lands by the national government. Vindicating Utah's constitutionally defined powers advances the Institute's mission of upholding constitutional limits on government power and its conviction that the State of Utah has an important role in providing an example of fidelity to the Constitutional system to other States and the national government.

## **SUMMARY OF THE ARGUMENT**

The Constitution's reservation of most powers to the States rather than the national government promotes accountability and responsiveness by ensuring that the decisions most likely to impact the day-to-day experiences of citizens will be made by elected representatives closest to them and with whom they can readily interact and hold accountable through their vote. Situating the bulk of government

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2, counsel for amicus notified all known parties of intention to file a brief of amicus curiae in this case. In accordance with Supreme Court Rule 37, this brief was not authored by counsel for any party in this action. No party or person not related to amicus made any kind of monetary contribution to the preparation or submission of this brief. All funding for this brief came from the amicus.

decision-making close to those affected also makes more likely that the unique context in which citizens live will be taken into consideration. This is particularly clear in the context of land use implicated by this case. The practice of federal control of large swaths of unappropriated land in the State of Utah undercuts these principles by ensuring that many land use decisions affecting the people of the State will be made by unelected and distant decision-makers.

Federalism principles also promote innovation and experimentation, allowing State and local governments to formulate and try out solutions to vexing problems and, where successful, used as an example by others. State and local governments are actively engaged in many of the tasks the national government has assumed in the unappropriated federal lands in Utah. They have developed innovative responses to land use concerns and are often very successful, sometimes experiencing better results than the national government. Utah is severely limited in attempting similar problem-solving and innovation because so much of its land is managed by the national government. This stifles experimentation and deprives the nation of potential examples of successful land use management.

## **ARGUMENT**

### **The Interests the Framers Intended to Protect Through Federalism Are Promoted by State Control of Unappropriated Lands Within the State.**

#### **A. The Principles of Federalism Promote Accountability and Responsiveness to Citizens' Interests, Needs, and Contexts.**

The constitutional design of providing “few and defined” powers to the federal government while reserving “numerous and indefinite” powers to the State governments promotes crucial protections of liberty and self-government. The Federalist No. 45. As this Court has noted, the “federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society” and “it makes government more responsive.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). As Professor Michael McConnell similarly explains, “decentralized decision making is better able to reflect the diversity of interests and preferences of individuals in different parts of the nation.” Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 UNIVERSITY OF CHICAGO LAW REVIEW 1484, 1493 (1987).

The accountability and responsiveness promoted by federalism also extend beyond needs and interests to the specific contexts in which the citizens live, including as particularly relevant here, their natural surroundings.

The powers “reserved to the States” (U.S. Constitution amendment 10) are intended to “extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” The Federalist No. 45. Thus, under the Constitution, the States exercise power over matters that impact the day-to-day lives of citizens. Such matters surely include the land uses implicated in this case which affect management of wild animals, use of forests, livestock grazing, hunting, recreation, mitigation of fire risk, property rights, and environmental protection. *See* Motion for Leave to File Bill of Complaint, 23-24, ¶¶46-47.

For the citizens of the various States, these matters implicate more than abstract policy considerations; they directly impact lives and livelihoods, the value and uses of property, the cleanliness and quality of one’s surrounding environment, family and personal activities, funding of schools and other public services, etc. These are precisely the type of matters that are wisely reserved to the decision-making of elected officials close to the people who will be affected by those decisions. Elected officials who are unresponsive to these citizens can be held accountable in the normal political process. Unelected officials managing lands at a distance (either geographically or culturally) have no similar incentive to ensure they take into consideration the needs of those who will be affected by their decisions.



Local decision-makers also typically live in or closer to the communities and among the neighbors who will be affected by their decisions. They are likely to experience the consequences of those decisions firsthand and to hear from those around them who are also impacted. Citizens are far less likely to ever interact with national officials who make policy decisions that impact them.

When decisions affecting land use are made at a level of government closer to those affected by the decisions, they are more likely to be tailored to the unique context of a particular area, including its culture, weather, geography and similar social and environmental considerations. Land use management decisions made at a national level, by contrast, will often be directed to a diverse and dissimilar range of contexts and thus may fit some better than others.

As the State of Utah points out, however, it is precisely these benefits of accountability, responsiveness, and tailoring to a specific context that are undercut when the federal government owns and controls vast amounts of unappropriated lands in a State: “Across vast expanses of Utah, it is federal officials from the Bureau of Land Management—not state or local officials elected by Utah citizens—who develop the plans that dictate how land may be used. . . . [Thus,] the federal government’s indefinite land-retention policies block Utah from facilitating accountable, locally driven stewardship of the public lands within its borders.” Motion at 23-24 ¶¶46-47 (emphasis added).

**B. The Principles of Federalism Promote Decentralized Problem-Solving Which Can Lead to Innovative Solutions to Problems That, In Turn, Assist Other States and Communities.**

Another practical advantage of federalism is that it “allows for more innovation and experimentation in government.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). As Professor McConnell explains, one reason “federalism has been thought to advance the public good is that state and local governmental units will have greater opportunity and incentive to pioneer useful changes. A consolidated national government has all the drawbacks of a monopoly: it stifles choice and lacks the goad of competition.” Michael W. McConnell, *Federalism: Evaluating The Founders' Design*, 54 UNIVERSITY OF CHICAGO LAW REVIEW 1484, 1498 (1987).

The intended promotion of accountability and responsiveness in the Constitution has the happy additional effect of allowing multiple sovereigns to develop solutions to specific needs. Sometimes, as noted above, these will be necessary because of a unique state or local context, but often these efforts can inform the search for solutions by other States, local governments, and even the national government in the specific responsibilities it is assigned by the Constitution.

The matters of land use that the national government must address in the large swaths of unappropriated federal land in Utah are the same

matters now being addressed by State and local governments in other States (and in other parts of Utah). These latter levels of government are pioneering a variety of approaches to land use different from those of the national government and are demonstrating success in their efforts.

For instance, States are active in innovative approaches to nature conservation such as through the creation of conservation funds, designating new State parks, establishing tax incentives for private conservation, and managing trust lands. Drew McConville, et al., *State Policy Leadership To Conserve Nature*, CENTER FOR AMERICAN PROGRESS (April 11, 2024), <https://www.americanprogress.org/article/state-policy-leadership-to-serve-nature/>.

While both federal and State governments manage trust lands, the State experience diverges from the national in important ways.

In its management of State lands, for example, the Texas General Land Office has amassed \$51 billion for support of public schools in the State. By comparison, the federal government generates far less revenue through its management of public lands despite having more employees and far more land. George P. Bush & David Winter, *States Get Much Better Results Managing Land Than the Feds — and Texas Leads the Way*, FORT WORTH STAR-TELEGRAM (March 30, 2023), <https://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article/273742665.html>. Other States have produced similar results in their management of State trust lands.

*National Association of State Trust Lands*,  
<https://www.statetrustland.org/>.

A detailed report examined management by federal agencies of over 300 million acres “managed for multiple uses, including timber harvesting, livestock grazing, energy development, and outdoor recreation.” States are managing 40 million acres of trust lands which they “lease ... for timber, grazing, and mineral development” and “manage for recreation.” The report found that “federal land agencies lose taxpayers nearly \$2 billion per year, on average.” By contrast, four comparison States had a net revenue of more than \$223 million from their management of trust lands. The discrepancy appears to derive from different approaches to management:

Unlike state trust agencies, federal land agencies are not required to generate revenues sufficient to cover their costs. Instead, Congress appropriates the bulk of federal land budgets. Federal land managers often have little or no incentive to generate more revenues or control their costs because the proceeds generally cannot be retained by the agency. As a result, the connection between revenues, beneficiaries, and long-term stewardship is unclear or missing on federal lands. Holly Fretwell & Shawn Regan, *Divided Lands: State Vs. Federal Land Management in the West*

9, 12 (Property and Environment Research Center 2015).

Another example of State land use efforts involves environmental protection. An article published by the Columbia Climate School noted a simple reality—federal agencies simply cannot do everything necessary to protect environmental quality. The author explains that in addition to the work of the federal Environmental Protection Agency, “most of the heavy lifting in American environmental protection is done by state and local governments. EPA sets policy, subsidizes state and local programs, oversees states, and conducts scientific research, but state and local governments do the day-to-day work of environmental protection.” Steve Cohen, *The State and Local Role in Protecting America’s Environment*, STATE OF THE PLANET (July 16, 2018), <https://news.climate.columbia.edu/2018/07/16/state-local-role-protecting-americas-environment/>.

Water quality, for instance, is an area where States play an important role. States are actively working to ensure adequate and clean water supplies using different approaches that provide important real-life tests of what might work best. *State Water Governance: Approaches From Six Western States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (November 2022), <https://documents.ncsl.org/wwwncsl/Environment/NCSL-Report-State-Water-Governance.pdf>. A 2001 article in *The American Prospect* responded to a notion that States cannot be trusted to protect environmental quality.

The author rejected this assertion, in part by pointing to a statement from the “National Academy of Public Administration . . . that state and local governments might be better at making decisions about chemical contaminants in drinking water, and about when, where, and how to clean up hazardous wastes.” Mary Graham, *Why States Can Do More*, THE AMERICAN PROSPECT (November 16, 2001), <https://prospect.org/environment/states-can/>. This is in large part because local geography and other local conditions are, as seems obvious, often determinative of what efforts will make a difference in ensuring a clean water supply.

States are also active in wildfire management efforts, doing many things (“such as home inspections, free prescriptions, and cost-share or free clearing and chipping or disposal of debris”) that would be difficult for the national government to do. Margaret A. Reams, et al., *Goals, Obstacles and Effective Strategies of Wildfire Mitigation Programs in the Wildland–Urban Interface* 7 FOREST POLICY AND ECONOMICS 818 (2005). State efforts appear to be successful. A comparison of federal and nonfederal wildlands in California found that “average annual fire probability was nearly always higher for points with federal ownership” possibly because of “greater fuel accumulation on federal lands” and less “active vegetation management.” Carlin Frances Starrs, et al., *The Impact of Land Ownership, Firefighting, and Reserve Status on Fire Probability in California*, 13 ENVIRONMENTAL RESEARCH LETTERS 034025 (2018). Disputes between

States and the federal governments over wildfire management are common. Casey J. Fleming, et al., *Conflict and Collaboration in Wildfire Management: The Role of Mission Alignment*, 75 PUBLIC ADMINISTRATION REVIEW 445 (2015). For example, in response to “major fires originating on federal land within the state,” in 2021 the New Mexico Legislature authorized local communities to mitigate fire risks. Otero County, “where over 75% of the land is owned by the United States,” proposed a plan to thin Forest Service lands. *United States v. Bd. of Cnty. Comm’rs of Cnty. of Otero*, 843 F.3d 1208, 1209-1210 (10th Cir. 2016). The Forest Service declined, leading to litigation resolved in favor of the federal government.

These examples provide important empirical vindication of the Constitution’s protection of State and local authority.

The comparisons between State and national efforts in these areas are not intended to suggest that the federal government has no role to play within its constitutionally prescribed responsibilities or that federalism only applies where States would do a better job than the national government. The dispositive issue is that the Constitution does not confer on the national government the power to indefinitely hold onto unappropriated land in a State. The realities noted in this subsection merely underscore the wisdom of the Constitutional design and demonstrate some of the practical negative effects that can be predicted if the national

government continues to exercise unenumerated authority over the unappropriated land in Utah.

### **CONCLUSION**

Amicus respectfully urges this Court to grant the State of Utah leave to file its bill of complaint. Respectfully submitted,

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