No. 11-782

In the
Supreme Court of the United States

MARINA POINT DEVELOPMENT CO., *et al.*,

Petitioners,

v.

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mrh@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTION PRESENTED

Is an award of attorneys fees "appropriate" under the Endangered Species Act when a case is mooted on appeal and the district court's judgment in favor of Plaintiffs "would have to have been reversed, even if the claim had not become moot?'

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Federal Statutes

Federal Regulations

Rules of Court

IDENTITY AND INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37, Amicus respectfully submits this brief in support of Petitioners, Marina Point Development Company, *et al.* (Marina Point).[1]

Pacific Legal Foundation (PLF) was founded almost forty years ago and is widely recognized as the Nation's largest and most experienced nonprofit legal foundation defending private property rights, economic liberty, and limited government in court.

As a public interest foundation, PLF has an institutional interest in the rule-of-law and balanced environmental regulation. PLF has litigated numerous cases involving statutory abuse, including the Endangered Species Act. But PLF's interest in this case is unique. This case involves a challenge to an award of attorney's fees under the Endangered Species Act when the case became moot on appeal because of the delisting of the bald eagle as a protected species. PLF litigated the case compelling the delisting of the bald eagle in the contiguous states.

On July 6, 1999, the Service published a proposed rule to delist the bald eagle throughout the lower 48

---

[1] In accordance with Rule 37, all parties have been given timely notice of Amicus intent to participate in this case and all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

Also, under Rule 37.6. Amici 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, their members, or their counsel have made a monetary contribution to the brief's preparation or submission.

states because the population had recovered. *See* 64 Fed. Reg. 36454. However, the Service took no action on that proposed rule until PLF filed a complaint for declaratory relief in 2005. In 2006, the District Court of Minnesota ordered the Service to issue a final rule on the delisting proposal. *See Contoski v. Scarlett*, No. 05-2528, 2006 U.S. Dist. LEXIS 56345 (D. Minn. Aug. 10, 2006). On July 9, 2007, during the appeal of the present case, the Service issued its final rule removing the bald eagle from the list of protected species. *See* 72 Fed. Reg. 37346.

INTRODUCTION AND STATEMENT OF THE CASE

The pertinent facts are simply stated. In 1989, Marina Point acquired a 12.5 acre parcel known as Cluster Pines located on the north shore of Big Bear Lake and the east shore of Grout Bay in the San Bernardino Mountains. Appendix at 14. From the 1950's until 2001 the area included a tavern, recreational vehicle park, campground and commercial marina. *Id*. Marina Point intended to develop the property for residential condominiums and acquired all necessary permits. *Id*. Grading work began off and on between 2002 and 2003. *Id.* at 15-16 In 2004, Respondent, Center for Biological Diversity, *et al.* (CBD), filed suit claiming violations of the Clean Water Act and the Endangered Species Act, including potential habitat disruption of the protected bald eagle from impending construction activities. *Id.* at 16. In 2006, the district court issued a permanent injunction against Marina Point and awarded attorney's fees to CBD as a "prevailing party." *Id.* at 16-17. Marina Point appealed the ruling to the Ninth Circuit in 2007. *Id.* at 17. Ultimately, the Clean Water Act claim was

dismissed for lack of jurisdiction and the Endangered Species Act claim became moot during the course of the appeal because the bald eagle was removed from the list of protected species. *Id.* at 27-28. Although the merits of the claims were never litigated, a split panel of the Ninth Circuit upheld the award of attorney's fees and costs exceeding $1.1 million. A petition for writ of certiorari to this Court followed.

It is not unusual for cases to become moot during appeal. But this case is distinct for three reasons: (1) CBD knew that the project it sought to enjoin could cause no meaningful harm to the bald eagle when it brought its suit; (2) although Marina Point was deprived of the opportunity to litigate the merits of CBD's claims, because the case became moot on appeal, the Ninth Circuit panel ruled, nevertheless, that the evidence in the record could not support the injunction had the court ruled on the merits; and (3) two of the three panelists recognized the need for review by this Court.

SUMMARY OF THE ARGUMENT

Under the Endangered Species Act, and other statutes, federal courts may award attorney's fees and costs "whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). As Petitioners demonstrate, there is a widespread conflict among the circuits as to the "appropriateness" of such an award when the case becomes moot on appeal before adjudication of the merits. This is clearly a question of national importance that this Court has left open, until now.

In addition to the conflict and the importance of the question presented, Amicus offers two additional compelling reasons for granting the petition in this case. The decision below is fundamentally unjust because it awards Respondents with more than $1.1 million in fees and costs on a demonstrably meritless claim. And, such an award undermines the purpose of the Act—to protect and recover at-risk species.

ARGUMENT

Court Rules state that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. Rule No. 10. Petitioners have documented two compelling reasons for granting the petition in this case. First, there is a widespread conflict among the circuit courts as to how to handle cases that become moot on appeal. Virtually every circuit has a different approach or rationale that cannot be reconciled with the other circuits. These approaches run the gamut from either prohibiting or mandating attorney's fees in such cases to case-by-case determinations based on "public interest," "special circumstances" or "good faith." *See* Petition at 11-16. *See also Diffenderfer v. Gomez-Colon*, 587 F.3d 445 (1st Cir. 2009) (authorizing an award of attorney's fees where the case altered the parties' legal relationship before becoming moot); *Kirk v. N.Y. State Dep't of Edu.*, 644 F.3d 134, 138-39 & n.4 (2d Cir. 2011) (prohibiting attorney's fees where the mootness left the plaintiff "empty handed" by failing to achieve the requested relief); *County of Morris v. Nationalist Movement*, 273 F.3d 527 (3d Cir. 2001) (allowing attorney's fees even if the plaintiff accomplishes nothing); *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 49-51 (4th Cir. 1994) (determining plaintiff is not a prevailing party for fee

purposes when the case is dismissed as moot and the judgment is vacated); *Foreman v. Dallas County*, 193 F.3d 314, 321 (5th Cir. 1999) (disallowing attorney's fees of plaintiff ultimately left "empty handed"); *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010) (requiring a "contextual and case-specific inquiry" to determine the propriety of attorney's fees); *Pakovich v. Verizon Limited Plan*, Nos. 10-1889 & 10-3083, 2011 U.S. App. LEXIS 15014, at *15 (7th Cir. July 22, 2011) (requiring a consideration of whether the party acted in "good faith" or engaged in harassment); *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1487 (10th Cir. 2001) (applying "some measure of success" standard to fee awards.); *Loggerhead Turtle v. County Council*, 307 F.3d 1318, 1321 (11th Cir. 2002) (relying on a "catalyst theory" if the case is mooted); and, *Sierra Club v. Environmental Protection Agency*, 322 F.3d 718, 727 (D.C. Cir. 2003) (also adopting a "catalyst theory" when some relief is obtained even when the case is moot).

Moreover, as Petitioners observe, members of this Court and legal scholars have called for this Court to address this conflict. *See* Petition at 16-17.

The Second compelling reason Petitioners document for granting the petition in this case is that it raises an important and recurring federal question. Petitioners observe there are 16 or more federal statutes, like the Endangered Species Act, that authorize an award of attorney's fees whenever the court determines such award is "appropriate." Petition at 18. This is not an isolated case. Therefore, Petitioners argue, this Court should determine how that term is to be applied in cases such as this.

Amicus addresses two other compelling reasons for granting the petition in this case: the decision below works an extreme injustice and encourages lawsuits that do not advance the purpose of the Act.

I

THE DECISION BELOW IS FUNDAMENTALLY UNJUST

The award of attorney's fees in this case exceeds $1.1 million. But Marina Point never had an opportunity to litigate on appeal the merits of the claims on which the award was based and Respondent CBD did not obtain any permanent relief.

Although a majority of the appellate panel ultimately upheld the fee award on rehearing, based on Ninth Circuit precedent, the panel was clearly troubled by the judgment. In its initial decision, the panel underscored the unfairness of a fee award based on the ESA claim finding expressly that:

> [W[e have carefully reviewed the record and we are satisfied that the evidence cannot support a determination that Marina Point caused, or would have caused, a take of a bald eagle. The Statute defines 'take' as 'to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.' There is no claim that Marina Point harmed bald eagles. It is claimed that Marina Point harassed, or would harass, them. Harass means 'an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral

> patterns . . . . However, taking all of the evidence together, there is no basis for a finding that there was some sort of rational causal connection between Marina Point's activities and any disruption of the behavioral patterns of the bald eagle.

Appendix at 64-65 (citations omitted; footnote omitted).

The panel therefore concluded:

> That being so, the district court's judgment in favor of [CBD] would have to have been reversed, even if the claim had not become moot. Because of that, it cannot be said that [CBD] ultimately prevailed on the merits.

Id. at 65.

Judge Rymer took this a step further. Although the Judge concurred in the amended decision upholding the fee award, feeling "bound" by *UFO Chuaing of Haw., Inc. v. Smith*, 508 F.3d 1189 (9th Cir. 2007), Judge Rymer "question[ed] the wisdom of case law compelling us to uphold an award of attorney's fees on the [CBD's] claim under the Endangered Species Act (ESA) that became moot on appeal." *Id.* at 35-36.

Judge Rymer's discomfort with the decision stems in part from the fact that CBD obtained no permanent relief and in fact "ends the day with no benefit" because the injunction CBD obtained below was "dissolved" and "otherwise undone" by the court on appeal. *Id.* at 36.

In contesting the wisdom of a rule that authorizes an award of attorney's fees in a case like this, Judge Rymer raised a cogent question which bears on this petition. "In these circumstances," Judge Rymer

asked, "why isn't a case that is moot for one purpose moot for all purposes?" "[I]f the ESA claim is moot, as it now is, thereby preventing appellate review of its merit, why shouldn't the claim be moot as to *both* the judgment *and* its collateral consequences—an award of attorney's fees?" *Id.* at 37. *See Alioto v. Williams*, 450 U.S. 1012, 1012-14 (1981) (Rehnquist J., dissenting from denial of petition for writ of certiorari).

According to Judge Rymer, this Court left the question open in *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). In that case, as here, this Court was asked whether a plaintiff was a "prevailing party" when the district court's judgment became moot on appeal. The question was not definitively answered. But now, Judge Rymer suggests "Perhaps it is time, and this is the case, for the question to be answered afresh." Appendix at 37.

Judge Kleinfeld also questioned the wisdom of awarding attorney's fees in a case where the claims become moot on appeal, depriving the appellant review on the merits. But for his part, Judge Kleinfeld argued that the majority opinion in this case was inconsistent with this Court's decisions in *Lewis* and *Sole v. Wyner*, 551 U.S. 74 (2007), that should be read to vacate attorney's fees in this case "because there is no longer a valid judgment in favor of [CBD]." Appendix at 39.

When the lower court acknowledges the unfairness of its own decision imposing ruinous attorney's fees and costs on a party, and when the underlying claim cannot stand, this Court has ample reason to grant review.

II

THE DECISION BELOW ENCOURAGES ABUSE OF THE ESA

CBD had no basis for its Endangered Species Act claim. CBD knew that the bald eagle had recovered and was marked for delisting long before it brought its suit. Therefore, Marina Point's project was not likely to harm the species. Indeed, as noted above, in its initial opinion, the Ninth Circuit panel found that "there was no basis for a finding that there was some sort of rational causal connection between Marina Point's activities and any disruption of the behavioral patterns of the bald eagle." *Id.* at 64-65. In effect, therefore, CBD was awarded more than $1.1 million for a meritless claim.

On July 6, 1999, the U.S. Fish and Wildlife Service issued a proposed rule to delist the bald eagle throughout the 48 contiguous states due to recovery. *See* 64 Fed Reg. 36454. Subsequently, CBD petitioned the Service to exclude some populations from the proposed delisting. *See* 72 Fed. Reg. 37346. CBD therefore knew the bald eagle had recovered and that final delisting could occur at any time. But more importantly, for the purpose of this case, the Service had determined that Marina Point's project "site was not a suitable bald eagle habitat," and that a consultation under the ESA was not required. Appendix at 46. Nevertheless, CBD filed suit to stop Marina Point's condominium project claiming the project would harass bald eagles in violation of the Act.

Unfortunately, meritless challenges to disfavored building projects under the ESA have become common practice even when no species are at risk. Contrary to

the intent of Congress, the ESA has become a general land use tool to thwart productive activity. In consequence of this abuse, the U.S. House of Representatives, Natural Resources Committee, has begun hearings on *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts.* [2]

According to the committee chairman, "The purpose of the ESA is to recover species" but "one of the greatest obstacles to the success of the ESA is the way in which it has been a tool for excessive litigation. Instead of focusing on recovering endangered species, there are groups that use the ESA as a way to bring lawsuits against the government and block job-creating projects. . . . These lawsuits direct valuable resources away from real recovery efforts."[3]

During the December 6, 2011, hearing, this case was cited as an example of ESA abuse. Brandon Middlelton, Attorney with Pacific Legal Foundation, testified:

> This suit provided no benefit to any species but imposed enormous costs on a private company without any proof of violation. Common sense dictates that the property owner should not have to pay for a statutory violation it did not commit, but the Endangered Species Act's attorney's fees

---

[2] *See* http://naturalresources.house.gov/ Calendar/EventSingle.aspx?EventID=270315 (last visited Jan. 12, 2012).

[3] *See* http://naturalresources.house.gov/Uploaded Files/Hastings OpeningStatement12.06.11.pdf (last visited Jan. 12, 2012)

provision has enabled precisely this result. Surely this is not what Congress intended.[4]

Deterring suits that do not advance the purpose of the Act provides an independent basis for granting review in this case.

CONCLUSION

In addition to resolving a widespread conflict among the circuits, and clarifying an imporant federal question as to the "appropiateness" of awarding attorney's fees and costs when a case becomes moot on appeal, this Court should grant the petition for writ of certiorari to rectify a fundamental injustice and to deter abuse of the Endangered Species Act.

DATED: January, 2012.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mrh@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

[4] *See* http://naturalresources.house.gov/UploadedFiles/MiddletonTestimony12.06.11.pdf (last visited Jan. 12, 2012).