No. _____

In the

Supreme Court of the United States

STEWART & JASPER ORCHARDS, a California corporation; ARROYO FARMS, LLC, a California limited liability company; and KING PISTACHIO GROVE, a California limited partnership,

Petitioners,

v.

SALLY JEWELL, Secretary of the Interior, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Endangered Species Act requires the United States Fish and Wildlife Service to suggest a "reasonable and prudent alternative" to any federal agency action that is likely to jeopardize the continued existence of a protected species or adversely modify its critical habitat. By regulation, the Service has interpreted "reasonable and prudent alternative" to be something that is, among other things, "economically . . . feasible." The questions presented are:

1. Is the Service obligated to demonstrate how a reasonable and prudent alternative is economically feasible; if so, can it ignore the devastating impacts on the human community caused by the alternative's implementation, as the Ninth Circuit held below in conflict with the Fourth Circuit?

2. To what extent (if any) is the Service's interpretation of its own regulation defining "reasonable and prudent alternative"—an interpretation that dispenses with the obligation to explain or provide evidence of the alternative's economic feasibility—entitled to deference?

3. Does the decision of this Court in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)—which interpreted the Endangered Species Act prior to Congress's addition of the "reasonable and prudent alternative" framework—still require federal agencies to protect species and their habitat "whatever the cost"?

LIST OF ALL PARTIES

Below, the United States Court of Appeals for the Ninth Circuit issued a single judgment adjudicating seven appeals from the final judgment entered by the United States District Court for the Eastern District of California. Accordingly, pursuant to Rule 12.6, the following parties are parties entitled to file documents in this Court with respect to this Petition.

Parties to No. 11-15871

Appellants: Natural Resources Defense Council; The Bay Institute.

Appellees: San Luis & Delta-Mendota Water Authority; Westlands Water District; Stewart & Jasper Orchards; Arroyo Farms, LLC; King Pistachio Grove; State Water Contractors; Metropolitan Water District of Southern California; Coalition for a Sustainable Delta; Kern County Water Agency; California Department of Water Resources; Family Farm Alliance.

Parties to No. 11-16617

Appellant: State Water Contractors.

Appellees: Sally Jewell, as Secretary of the U.S. Department of the Interior; U.S. Fish & Wildlife Service; Daniel M. Ashe, as Director of the U.S. Fish & Wildlife Service; Ren Lohoefener, as Regional Director of the U.S. Fish & Wildlife Service, Pacific Southwest Region, U.S. Department of the Interior; U.S. Bureau of Reclamation; Michael L. Connor, as Commissioner of the U.S. Bureau of Reclamation, U.S. Department of the Interior; David Murillo, as Director of the U.S. Bureau of Reclamation, Mid–Pacific Region, U.S. Department of the Interior; U.S. Department of

Justice; U.S. Environmental Protection Agency; Gina McCarthy, as Administrator of the U.S. Environmental Protection Agency; U.S. Department of Transportation; Anthony Foxx, as Secretary of the U.S. Department of Transportation; Maritime Administration; Paul N. Jaenichen, Sr., as Acting Deputy Maritime Administrator; U.S. Department of Homeland Security; Jeh Johnson, as Secretary of Homeland Security; Federal Emergency Management Agency; William Craig Fugate, as Administrator of the Federal Emergency Management Agency; United States Army Corps of Engineers; Thomas P. Bostick, Commanding General and Chief of Engineers, U.S. Department of the Interior; Natural Resources Defense Council; The Bay Institute.

Parties to No. 11-16621

Appellant: Metropolitan Water District of Southern California.

Appellees: Sally Jewell, as Secretary of the U.S. Department of the Interior; U.S. Department of the Interior; U.S. Fish & Wildlife Service; Daniel M. Ashe, as Director of the U.S. Fish and Wildlife Service; Ren Lohoefener, as Regional Director of the U.S. Fish & Wildlife Service, Pacific Southwest Region, U.S. Department of the Interior; U.S. Bureau of Reclamation; Michael L. Connor, as Commissioner of the U.S. Bureau of Reclamation, U.S. Department of the Interior; David Murillo, as Director of the U.S. Bureau of Reclamation, Mid–Pacific Region, U.S. Department of the Interior; U.S. Department of Justice; U.S. Environmental Protection Agency; Gina McCarthy, as Administrator of the U.S. Environmental Protection Agency; U.S. Department of Transportation; Anthony Foxx, as Secretary of the U.S. Department of

Transportation; Maritime Administration; Paul N. Jaenichen, Sr., as Acting Deputy Maritime Administrator; U.S. Department of Homeland Security; Jeh Johnson, as Secretary of Homeland Security; Federal Emergency Management Agency; William Craig Fugate, as Administrator of the Federal Emergency Management Agency; U.S. Army Corps of Engineers; Thomas P. Bostick, Commanding General and Chief of Engineers, U.S. Army Corps of Engineers; Natural Resources Defense Council; The Bay Institute.

Parties to No. 11-16623

Appellants: Sally Jewell, as Secretary of the U.S. Department of the Interior; U.S. Fish & Wildlife Service; Daniel M. Ashe, as Director of the U.S. Fish & Wildlife Service; Ren Lohoefener, as Regional Director of the U.S. Fish & Wildlife Service, Pacific Southwest Region, U.S. Department of the Interior; U.S. Bureau of Reclamation; Michael L. Connor, as Commissioner of the U.S. Bureau of Reclamation, U.S. Department of the Interior; David Murillo, as Director of the U.S. Bureau of Reclamation, Mid-Pacific Region, U.S. Department of the Interior; Mark Cowin, Director, California Department of Water Resources; U.S. Department of Justice; U.S. Environmental Protection Agency; Gina McCarthy, as Administrator of the U.S. Environmental Protection Agency; U.S. Department of Transportation; Anthony Foxx, as Secretary of the U.S. Department of Transportation; Maritime Administration; Paul N. Jaenichen, Sr., as Acting Maritime Administrator; U.S. Department of Homeland Security; Jeh Johnson, as Secretary of Homeland Security; Federal Emergency Management Agency; William Craig Fugate, as Administrator of the Federal Emergency Management Agency; U.S. Army

Corps of Engineers; Thomas P. Bostick, Commanding General and Chief of Engineers; U.S. Department of the Interior.

Appellees: San Luis & Delta-Mendota Water Authority; Westlands Water District; Stewart & Jasper Orchards; Arroyo Farms, LLC; King Pistachio Grove; State Water Contractors; Metropolitan Water District of Southern California; Coalition for a Sustainable Delta; Kern County Water Agency; California Department of Water Resources; Family Farm Alliance.

Parties to No. 11-16624

Appellants: San Luis & Delta-Mendota Water Authority; Westlands Water District.

Appellees: Sally Jewell, as Secretary of the U.S. Department of the Interior; U.S. Department of the Interior; U.S. Fish & Wildlife Service; Daniel M. Ashe, as Director of the U.S. Fish & Wildlife Service; Ren Lohoefener, as Regional Director of the U.S. Fish & Wildlife Service, Pacific Southwest Region, U.S. Department of the Interior; U.S. Bureau of Reclamation; Michael L. Connor, as Commissioner of the U.S. Bureau of Reclamation, U.S. Department of the Interior; David Murillo, as Director of the U.S. Bureau of Reclamation, Mid–Pacific Region, U.S. Department of the Interior; U.S. Department of Justice; U.S. Environmental Protection Agency; Gina McCarthy, as Administrator of the U.S. Environmental Protection Agency; U.S. Department of Transportation; Anthony Foxx, as Secretary of the U.S. Department of Transportation; Maritime Administration; Paul N. Jaenichen, Sr., as Acting Deputy Maritime Administrator; U.S. Department of Homeland

Security; Jeh Johnson, as Secretary of Homeland Security; Federal Emergency Management Agency; William Craig Fugate, as Administrator of the Federal Emergency Management Agency; U.S. Army Corps of Engineers; Thomas P. Bostick, Commanding General and Chief of Engineers, U.S. Army Corps of Engineers; Natural Resources Defense Council; The Bay Institute.

Parties to No. 11-16660

Appellant: State Water Contractors.

Appellees: Sally Jewell, as Secretary of the U.S. Department of the Interior; U.S. Department of Justice; Daniel M. Ashe, as Director of the U.S. Fish and Wildlife Service; U.S. Fish and Wildlife Service; Mark Cowin, as Director of California Department of Water Resources; California Department of Water Resources.

Parties to No. 11-16662

Appellant: Metropolitan Water District of Southern California.

Appellees: U.S. Fish & Wildlife Service; Sally Jewell, as Secretary of the U.S. Department of the Interior; Daniel M. Ashe, as Director of the U.S. Fish & Wildlife Service; U.S. Bureau of Reclamation; J. William McDonald; California Department of Water Resources; Mark Cowin, as Director of the California Department of Water Resources.

CORPORATE DISCLOSURE STATEMENT

Stewart & Jasper Orchards, Arroyo Farms, LLC, and King Pistachio Grove hereby state that they have no parent corporations and that no publicly held company owns 10% or more of the stock of any of them.

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U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook, Final* (March 1998) G-1

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Auer v. Robbins, 519 U.S. 452 (1997) 22

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Chalenor v. Univ. of North Dakota, 291 F.3d 1042 (8th Cir. 2002) 23

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Consolidated Delta Smelt Cases, 717 F. Supp. 2d 1021 (E.D. Cal. 2010) 7-8, 21, 32-33

Decker v. Northwest Environmental Defense Ctr., 133 S. Ct. 1326 (2013) 24-25

Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) 31

Dow AgroSciences LLC v. National Marine Fisheries Service, 707 F.3d 462 (4th Cir. 2013) 4, 19-21

Fla. Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 13

In re Delta Smelt Consolidated Cases, 663 F. Supp. 2d 922 (E.D. Cal. 2009) 9

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Massachusetts v. EPA, 549 U.S. 497 (2007) 15

Mercy Catholic Med. Ctr. v. Thompson,
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Montejo v. Louisiana, 556 U.S. 778 (2009) 33

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Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) 30

Rapanos v. United States,
547 U.S. 715 (2006) 15, 30-31

Rodriguez v. United States,
480 U.S. 522 (1987) 30

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) 9

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 10, 22

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 15

Stewart & Jasper Orchards v. Salazar,
132 S. Ct. 498 (2011) 9

Taylor v. Vermont Dep't of Educ.,
313 F.3d 768 (2d Cir. 2002) 23

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Tennessee Valley Authority v. Hill,
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United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1986) 15

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42 U.S.C. § 7602(g) 15

Central Valley Project Improvement Act,
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106 Stat. 4600 (Oct. 30, 1992) 11

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58 Fed. Reg. 12,854 (Mar. 5, 1993) 5

59 Fed. Reg. 65,256 (Dec. 19, 1994) 5

75 Fed. Reg. 17,667 (Apr. 7, 2010) 5

TABLE OF AUTHORITIES—Continued

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Anthony, Richard A., *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1 (1996) 26

Breyer, Stephen, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992) 29

Brown, Gov. Edmund G., Jr., A Proclamation of a Continued State of Emergency (Apr. 25, 2014) 2

Brown, Gov. Edmund G., Jr., A Proclamation of a State of Emergency (Jan. 17, 2014) 2

Brudney, James J. & Ditslear, Corey, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 Judicature 220 (2006) 31

Cal. Natural Res. Ag., Questions and Answers about Water Diversions and Delta Smelt Protections (Feb. 12, 2013), *available at* http://resources.ca.gov/smelt_and_water_supply.html 3

Committee on Environment & Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980 (Congressional Research Service eds., 1982) . . . 29

des Rosiers, Jared, Note, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 Notre Dame L. Rev. 825 (1991) 29

TABLE OF AUTHORITIES—Continued

Page

Doremus, Holly, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 Wash. U. L.Q. 1029 (1997) 31-32

Dworkin, Ronald, Law's Empire (1986) 29

Eskridge, William N., Jr., & Ferejohn, John, *Super-Statutes*, 50 Duke L.J. 1215 (2001) 30

Eskridge, William N., Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990) 29

H.R. Conf. Rep. No. 95-1804 (1978) 18

H.R. Rep. No. 93-412 (1973) 32

Hanson, Victor Davis, *California's Water Wars*, City Journal (Summer 2011), *available at* http://www.city-journal.org/2011/21_3_california-water.html 8

Howitt, Richard, *et al.*, Center for Watershed Sciences, University of California, Davis, Economic Analysis of the 2014 Drought for California Agriculture (July 15, 2014) (revised July 23, 2014), *available at* https://watershed.ucdavis.edu/files/biblio/DroughtReport_23July2014_0.pdf 2-3

Jacobs, Becky L., *Foreward*, 80 Tenn. L. Rev. 495 (2013) 28-29

TABLE OF AUTHORITIES—Continued

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Johnston, Jason Scott, *Desperately Seeking Numbers: Global Warming, Species Loss, and the Use and Abuse of Quantification in Climate Change Policy Analysis*, 155 U. Pa. L. Rev. 1901 (2007) 32

Law, David S. & Zaring, David, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 Wm. & Mary L. Rev. 1653 (2010) 31

Moore, Kevin W., *Seized By Nature: Suggestions on How to Better Protect Animals and Property Rights Under the Endangered Species Act*, 12 Great Plains Nat. Resources J. 149 (2008) . . 32

Plater, Zygmunt J.B., *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 Envtl. L. 1 (2002) 27-28

Ruhl, J.B., *The Endangered Species Act's Fall From Grace in the Supreme Court*, 36 Harv. Envtl. L. Rev. 487 (2012) 30

Seasholes, Brian, *Fulfilling the Promise of the Endangered Species Act: The Case for an Endangered Species Reserve Program*, Reason Foundation Policy Study (Sept. 2014), *available at* http://reason.org/news/show/endangered-species-act-promise 32

Stephenson, Matthew C. & Pogoriler, Miri, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) 24

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Webster's 3d New Int'l Dictionary (1993) 14

PETITION FOR WRIT OF CERTIORARI

Stewart & Jasper Orchards, Arroyo Farms, LLC, and King Pistachio Grove (collectively Stewart & Jasper Orchards) respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 747 F.3d 581 (9th Cir. 2014), and is included in Appendix (App.) A. The opinion of the district court is reported at 760 F. Supp. 2d 855 (E.D. Cal. 2010), and is included in App. B. The order of the Court of Appeals denying the petitions for rehearing *en banc* is not published and is included in App. C.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 2014. Three timely petitions for rehearing *en banc* were then filed. Those petitions were denied on July 23, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The pertinent provisions of the Endangered Species Act and its implementing regulations involved in this case are 16 U.S.C. § 1536(a)(2), 16 U.S.C. § 1536(b), and 50 C.F.R. § 402.02. Their text is set out at Apps. D, E, & F.

INTRODUCTION

California is suffering from a severe drought that threatens the state's domestic and agricultural water supply, as well as its economy. *See* Gov. Edmund G. Brown, Jr., A Proclamation of a State of Emergency (Jan. 17, 2014) (noting that "the state's water supplies have dipped to alarming levels," "drinking water supplies are at risk in many California communities; fewer crops can be cultivated and farmers' long-term investments are put at risk; low-income communities heavily dependent on agricultural employment will suffer heightened unemployment and economic hardship," and "conditions of extreme peril to the safety of persons and property exist in California due to water shortage and drought conditions"); Gov. Edmund G. Brown, Jr., A Proclamation of a Continued State of Emergency (Apr. 25, 2014) (noting that the state's "water supplies continue to be severely depleted"). *See also* Richard Howitt, *et al.*, Center for Watershed Sciences, University of California, Davis, Economic Analysis of the 2014 Drought for California Agriculture ii (July 15, 2014) (revised July 23, 2014) ("The total statewide economic cost of the 2014 drought

is $2.2 billion, with a total loss of 17,100 seasonal and part-time jobs.”).[1]

The drought’s impacts have been greatly exacerbated by water delivery restrictions imposed to protect the Delta smelt, a fish listed as threatened under the Endangered Species Act. *See, e.g.*, Cal. Natural Res. Ag., Questions and Answers about Water Diversions and Delta Smelt Protections 2 (Feb. 12, 2013)[2] (estimating that 700,000 acre-feet of water was lost just in the winter of 2012-2013, owing to Endangered Species Act protections for the smelt—enough water to supply 1.4 million households for one year).

In upholding these restrictions, the United States Court of Appeals for the Ninth Circuit ruled below that neither the Endangered Species Act nor the Administrative Procedure Act requires that species protections be economically feasible, or that the economic impacts of proposed species mitigation measures be considered. The Ninth Circuit relied on *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153 (1978), which holds that the Endangered Species Act makes species protection the highest of federal priorities, whatever the cost, *id.* at 174.

The Ninth Circuit’s decision threatens the water supply for millions of domestic and agricultural users. It upends basic administrative law by absolving an agency of any duty to explain or support its legally mandated determinations, so long as the legal

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[1] *Available at* https://watershed.ucdavis.edu/files/biblio/DroughtReport_23July2014_0.pdf.

[2] *Available at* http://resources.ca.gov/smelt_and_water_supply.html.

obligation derives from a "definitional" provision. It authorizes the federal agencies charged with administering the Endangered Species Act to impose draconian limitations on productive activity in the name of species preservation without any regard for economic consequences. In so holding, the Ninth Circuit's decision expressly conflicts with a decision of the Court of Appeals for the Fourth Circuit, *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013), and further exposes a longstanding Circuit split over whether and how to apply judicial deference to an agency's interpretation of its own regulations. Finally, the decision underscores the need for this Court to overrule *TVA v. Hill* in light of subsequent amendments to the Endangered Species Act specifically designed to limit that decision's impact.

STATEMENT OF THE CASE

A. Legal and Factual Background

Stewart & Jasper Orchards own and operate almond, pistachio, and walnut orchards in California's San Joaquin Valley, an area that contains "some of the most productive farmland in the world." Appendix (App.) at A-17. As members of local water districts, they rely on contractual water deliveries from the federal Central Valley Project and California State Water Project (collectively, the "water projects") as their main source of irrigation water.

The Central Valley Project is the nation's largest federal water management project. App. at A-18. It comprises several dams and reservoirs, as well as hundreds of miles of canals. *Id.* The State Water Project is the country's largest state-built water

project, providing water to millions of Californians and comprising over twenty dams and reservoirs and hundreds of miles of aqueducts. *Id.* at A-18 - A-19. The water projects operate large pumping plants, located at the southern end of the Sacramento-San Joaquin Delta, that draw fresh water from the Delta and deposit it in reservoirs for storage and delivery to municipal and agricultural users in the San Joaquin Valley and Southern California. App. at A-19.

In addition to water, the projects' pumps draw in a variety of aquatic species. *Id.* Among them is the Delta smelt, a small fish native to the Delta. *Id.* at A-21. In 1993, the United States Fish and Wildlife Service (the agency responsible for administering the Act with respect to the smelt and most other species) listed the smelt as "threatened" under the Endangered Species Act.[3] 58 Fed. Reg. 12,854 (Mar. 5, 1993). In 1994, the Service designated a large area of the Delta and the eastern portion of San Francisco Bay as occupied critical habitat for the smelt. *See* 59 Fed. Reg. 65,256 (Dec. 19, 1994). *Cf.* 16 U.S.C. § 1532(5)(A)(i) (defining occupied critical habitat as those areas containing the physical or biological features essential to the species's conservation and that may require special management consideration or protection).

As a consequence of listing, the Act and its implementing regulations provide species such as the smelt a number of protections. The Act prohibits any

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[3] In 2010, the Service determined that reclassification of the smelt as an endangered species was warranted but precluded by other higher priority actions. *See* 75 Fed. Reg. 17,667 (Apr. 7, 2010). *Cf.* 16 U.S.C. § 1533(b)(3)(B)(iii) (authorizing such warranted-but-precluded determinations).

person, including a federal agency, to "take" a listed species without prior authorization. *See* 16 U.S.C. § 1538(a)(1)(B) (generally prohibiting the take of endangered species); 50 C.F.R. § 17.31 (extending the take prohibition to threatened species). Further, the Act prohibits federal agencies from undertaking any action that is likely to jeopardize the continued existence of a listed species or adversely modify or destroy its critical habitat. *See* 16 U.S.C. § 1536(a)(2). To avoid such "jeopardy," the Act and its regulations also require that a federal agency, contemplating any action that may affect a listed species or its critical habitat, first consult with the Service. *See id.* § 1536(a)(2), (b); 50 C.F.R. § 402.14(a).

The usual outcome of this consultation process is a "biological opinion," which explains how the proposed federal action will affect the listed species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If the Service determines that the contemplated action will jeopardize the species or cause adverse modification of its critical habitat, then the Service must identify "reasonable and prudent alternatives" to the proposed action that would avoid such jeopardy or adverse modification. *Id.*

By regulation, the Service has defined a "reasonable and prudent alternative" to comprise several characteristics. The alternative must be consistent with the original proposal's intended purpose, as well as within the consulting agency's legal authority and jurisdiction. It must be economically and technologically feasible, and avoid the likelihood of jeopardizing listed species or adversely modifying their critical habitat. *See* 50 C.F.R. § 402.02 (defining,

among other things, "[r]easonable and prudent alternatives") [hereinafter "Section 402.02"].

As part of the consultation process, the Service is authorized to permit the legal "take" of listed species, through what is commonly called an incidental take statement. *See* 16 U.S.C. § 1536(b)(4). *Cf. id.* § 1536(*o*)(2) ("[A]ny taking that is in compliance with the terms and conditions specified in [an incidental take statement] shall not be considered to be a prohibited taking of the species concerned.").

Because the operation of the projects' pumps affects the smelt and its habitat, the United States Bureau of Reclamation sought a biological opinion from the Service for the long-term coordinated operation of the water projects. App. at A-24. In December, 2008, the Service issued its smelt biological opinion,[4] which concludes that the water projects' operation is likely to jeopardize the continued existence of the smelt and adversely modify its critical habitat. *Id.* at A-25 - A-26. Based on these determinations, the biological opinion includes a "reasonable and prudent alternative." This alternative comprises several "actions" that, among other things, require the water projects at various times of the year to decrease substantially the amount of water that otherwise the projects would pump out of the Delta for storage and delivery. *Id.* at A-27 - A-28.

The water projects have complied with these actions, with disastrous consequences. *See Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021,

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[4] The 2008 biological opinion is the latest and most draconian in a series of opinions that have governed the water projects. *See Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322, 333 & n.7 (E.D. Cal. 2007) (observing that prior biological opinions were issued in 1993, 1995, and 2004).

1052 (E.D. Cal. 2010) ("The record evidence has established a variety of adverse impacts to humans and the human environment from reduced [water deliveries], including irretrievable resource losses (permanent crops, fallowed lands, destruction of family and entity farming business) . . . ."); *id.* at 1054 ("[F]armers have fallowed hundreds of thousands of acres of fields."); *id.* at 1055 ("It is undisputed that farm employees and their families have faced devastating losses due to reductions in the available water supply."); Victor Davis Hanson, *California's Water Wars*, City Journal (Summer 2011)[5] (detailing layoffs of thousand of farmworkers, idling of hundreds of thousands of acres of farmland, and foregoing $350 million in annual agricultural revenue).

B. The Litigation Below

1. The District Court

In 2009, Stewart & Jasper Orchards filed suit to challenge the biological opinion, contending that its restrictions on the water projects' operation exceed the Service's delegated Commerce Clause authority, as well as violate the Endangered Species Act and Administrative Procedure Act. Five other actions were filed by water districts and other interested parties challenging various aspects of the biological opinion, as well as the Bureau of Reclamation's conditional acceptance of the biological opinion's pumping restrictions. App. at A-29.

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[5] *Available at* http://www.city-journal.org/2011/21_3_california-water.html.

Following consolidation of these actions, the district court issued a decision partially invalidating the biological opinion.[6] Among other points, the court ruled that the Service had violated the Endangered Species Act and Administrative Procedure Act by failing to explain how the agency's proposed "reasonable and prudent alternative" (which includes the significant pumping restrictions) is economically feasible under the Service's consultation regulations. *See* App. at B-216 - B-219.

2. The Ninth Circuit

The Service and the Bureau, as well as the environmental intervenors, appealed the district court's judgment.[7] In a 2-1 panel decision, the Ninth Circuit reversed in part the district court's judgment and upheld the biological opinion in its entirety.[8] App. at A-33.

In its opinion, the Ninth Circuit acknowledged "the enormous practical implications of this decision,"

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[6] The district court entered a separate judgment against Stewart & Jasper Orchards on their Commerce Clause claim. *See In re Delta Smelt Consolidated Cases*, 663 F. Supp. 2d 922 (E.D. Cal. 2009). The Ninth Circuit affirmed that judgment, *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011), and this Court denied certiorari, *Stewart & Jasper Orchards v. Salazar*, 132 S. Ct. 498 (2011).

[7] Several plaintiffs cross-appealed. This Petition does not concern the issues raised in those cross-appeals.

[8] The Ninth Circuit affirmed the district court's judgment holding that the Bureau of Reclamation had violated the National Environmental Policy Act by failing to conduct any analysis under that Act prior to accepting the smelt biological opinion's reasonable and prudent alternative. App. at A-33.

App. at A-15, given that the biological opinion's pumping restriction "represents the ultimate limit on the amount of water available to sustain California's millions of urban and agricultural users," *id.* at A-45. The court conceded that the biological opinion, "at more than 400 pages, is a big bit of a mess," *id.* at A-41, "a jumble of disjointed facts and analyses," *id.* at A-42, "a ponderous, chaotic document, overwhelming in size, and without the kinds of signposts and roadmaps that even trained, intelligent readers need in order to follow the agency's reasoning," *id.* at A-43. Nevertheless, the Ninth Circuit felt constrained by this Court's decision in *TVA v. Hill*, as well as its own misunderstanding of the principles of agency deference and judicial review of agency decision-making, to uphold the biological opinion.

The Ninth Circuit concluded, contrary to the district court, that the biological opinion's "reasonable and prudent alternative" is consistent with the Endangered Species Act and Administrative Procedure Act. App. at A-102 - A-111. The Ninth Circuit agreed with the Service that Section 402.02 does not categorically require a discussion of a proposed alternative's economic feasibility. *Id.* at A-105. Relying on the Service's *Endangered Species Consultation Handbook* (to which the court deferred under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)), App. at A-104, the court concluded that such a discussion is necessary only if the Service affirmatively determines that a proposed alternative is *not* economically feasible, *id.* at A-106. Otherwise, reasoned the court, the Service has no general explanatory obligation, because the requirement that a "reasonable and prudent alternative" be economically feasible derives from a "definitional section" of the

Service's consultation regulations—namely, Section 402.02. App. at A-105. Moreover, asserted the court, the Service is only required to explain "'important aspect[s] of the problem.'" *Id.* at A-107 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Because the consultation provisions of the Endangered Species Act itself do not discuss economic feasibility, the court concluded that such feasibility is not an important aspect of the "problem" of formulating a "reasonable and prudent alternative." *Id.* at A-107 - A-108.

The Ninth Circuit went on to hold that, in any event, the challenged "reasonable and prudent alternative" *is* economically feasible. But the court reached that conclusion only by adopting a very narrow understanding of economic feasibility. In the court's view, an alternative is economically feasible so long as the implementing agency has the money to put it into effect. *See* App. at A-110 - A-111. The Ninth Circuit's authority for that conclusion was this Court's decision in *TVA v. Hill*.[9] To require the Service to consider the economic feasibility in the broad sense, *i.e.*, the economic impacts of the alternative's implementation, would make the Service "responsible for balancing the life of the delta smelt against the impact of restrictions on [the water projects'] operations." App. at A-109. Such balancing, reasoned the Ninth Circuit, would be inconsistent with the Endangered Species Act,

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[9] The Ninth Circuit also cited the Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4600 (Oct. 30, 1992). App. at A-109. But that Act merely directs that the Central Valley Project be operated "to meet all obligations under . . . the Federal Endangered Species Act," without otherwise defining what those obligations entail. *See* Pub. L. No. 102-575, § 3406(b), 106 Stat. at 4714.

which "reflects 'a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies,'" *id.* (quoting *TVA*, 437 U.S. at 185), and which requires the Service "to halt and reverse the trend toward species extinction, *whatever the cost*," App. at A-109 - A-110 (quoting *TVA*, 437 U.S. at 184) (emphasis added by Ninth Circuit). The court thus relied on *TVA* to interpret "reasonable and prudent alternative," despite Congress's addition of that language *in response to TVA* to limit its impact. *See infra* at 18, 29 n.16.

Subsequently, several parties petitioned for rehearing *en banc*. On July 23, 2014, the Ninth Circuit panel denied the petitions without opinion.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE ADMINISTRATIVE PROCEDURE ACT EXCUSES AN AGENCY'S FAILURE TO EXPLAIN ITS DECISION-MAKING, IF THE LEGAL OBLIGATION IN QUESTION DERIVES FROM A "DEFINITIONAL" PROVISION

The Ninth Circuit held that Section 402.02 does not require the Service to provide any explanation as to how a proposed "reasonable and prudent alternative" is economically feasible. App. at A-105. The court reasoned that the economic feasibility requirement comes from a "definitional section," which merely "defin[es] what constitutes a[ ] [reasonable and

prudent alternative—it does] not set[ ] out hoops that the [Service] must jump through." *Id.* The court buttressed its conclusion by noting that the requirement of economic feasibility comes from a regulation, not from the Endangered Species Act itself. App. at A-107 - A-108. The Ninth Circuit's holding raises an important issue of federal law meriting this Court's review.

It is a fundamental principle of administrative law that agency decisions must be adequately explained to enable judicial review. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("[An] agency must examine the relevant data and articulate a satisfactory explanation for its action . . . ."). That required explanation includes the demonstration of a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). If an agency had no obligation to explain its decision-making, then it would be impossible for a court to determine whether the agency's explanation appropriately draws that required rational connection. *Cf. Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (requiring remand to the agency "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it"). Similarly, without an explanatory obligation, a court could not possibly determine whether, as required by the Administrative Procedure Act's arbitrary-and-capricious standard of review, an agency considered every "important aspect" of the problem before it. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. *Cf.* 5 U.S.C. § 706(2)(A) (authorizing judicial review of agency action to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

The Ninth Circuit's decision absolves an agency's failure to comply with these basic principles so long as the legal mandate in question derives from a "definitional" section. App. at A-105 ("Nothing in § 402.02 obligates the [Service] to address [economic feasibility] when it proposes [reasonable and prudent alternatives]. Section 402.02 is a definitional section . . . ."). Yet a definition defines what a thing *is*. *See* Webster's 3d New Int'l Dictionary 592 (1993) (defining "definition" to mean, *inter alia*, "a word or phrase expressing the essential nature of a person or thing"). If that "thing" does not satisfy the elements of its definition, then it is not what it purports to be. Here, the Service's regulation defines a "reasonable and prudent alternative" to be, *inter alia*, something "economically . . . feasible." *See* 50 C.F.R. § 402.02. If a purported alternative is not economically feasible, then necessarily it is not a "reasonable and prudent alternative." If it is not a "reasonable and prudent alternative," then, even by the Ninth Circuit's own reasoning, the Service failed to consider an important part of the problem. *Cf.* App. at A-107 - A-108 (observing that the Service must consider and explain the important aspects of the problem of formulating a "reasonable and prudent" alternative).

But contrary to the Ninth Circuit's view, it is irrelevant that the requirement of economic feasibility derives immediately from a regulation as opposed to the statute itself. *Id.* After all, Section 402.02 purports to define the *statutory* term "reasonable and prudent alternative." *See* 51 Fed. Reg. 19,926, 19,937 (June 3, 1986) (preamble to rule defining, *inter alia*, "reasonable and prudent alternative") ("The Service recognizes that economic and technological feasability are factors to be used in developing reasonable and

prudent alternatives . . . ."). Hence, the interpretation of the regulatory text "economic . . . feasability" is necessarily an interpretation of the statutory text "reasonable and prudent alternative." Moreover, agencies must comply with their own regulations as much as with the statutes that authorize those regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (holding illegal an agency's "failure to exercise its own discretion, contrary to existing valid regulations").

The Ninth Circuit's undermining of these basic principles threatens havoc to environmental law, many of the most controversial aspects of which concern agency interpretations of "definitional" provisions. For example, the Court has been called upon to resolve disputes concerning agency interpretations of:

- "navigable waters," as *defined* in the Clean Water Act, 33 U.S.C. § 1362(7), *see Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1986);
- "take," as *defined* in the Endangered Species Act, 16 U.S.C. § 1532(19), *see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995);
- "air pollutant," as *defined* in the Clean Air Act, 42 U.S.C. § 7602(g), *see Massachusetts v. EPA*, 549 U.S. 497 (2007).

Each of these cases generated considerable controversy and debate over the propriety of the agency interpretation at issue. Yet, under the Ninth Circuit's rule, an agency would have absolutely no obligation to

explain why, in any given action, it had reached a particular result in interpreting these key "definitional" sections.

Accordingly, the Ninth Circuit's decision raises an important issue of federal law meriting this Court's review.

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE ECONOMIC FEASIBILITY OF A "REASONABLE AND PRUDENT ALTERNATIVE" DEPENDS, AT LEAST IN PART, ON THE ECONOMIC CONSEQUENCES OF THE ALTERNATIVE'S IMPLEMENTATION

The Ninth Circuit held below that a proposed "reasonable and prudent alternative" satisfies the regulatory requirement of economic feasibility so long as the alternative *itself* is economically feasible, *i.e.*, the consulting agency has the economic resources to implement the alternative. In other words, economic feasibility does not depend at all on the economic impacts of the alternative's implementation. App. at A-107 - A-110. The Ninth Circuit's interpretation raises an important issue of federal law, and conflicts with a decision of the Fourth Circuit.

A. Authorizing the Imposition of "Reasonable and Prudent Alternatives" Without Any Consideration for Economic Impact Raises an Important Issue of Federal Law

Below, the Ninth Circuit acknowledged that the smelt biological opinion's "reasonable and prudent alternative" has considerable negative consequences for California's water supply. *See* App. at A-13 - A-15. Nevertheless, the court concluded that the Service can force a significant change in a state's water policy and its economy without any thought for the consequences of that change. That is an important issue of federal law.

A biological opinion's "reasonable and prudent alternative" is more than a polite suggestion. The draconian penalties that the Endangered Species Act imposes on unpermitted take of species, *see* 16 U.S.C. § 1540(a)-(b), essentially coerce consulting agencies and non-federal project-participants to accept a "reasonable and prudent alternative" to enjoy the protections of an incidental take statement. *See Bennett v. Spear*, 520 U.S. 154, 169-70 (1997) ("[W]hile the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the action agency . . . .") (quoting 51 Fed. Reg. at 19,928). Thus, through the consultation process, the Service has enormous leverage and influence over species-affecting projects. But under the Ninth Circuit's decision, the Service has absolutely *no obligation* to consider at all the economic consequences of its modifications to a proposed project. Rather, the Service need only consider whether the

alternative would avoid jeopardizing the species's existence. In other words, the Service's purported duty is to protect the species, "*whatever the cost*." App. at A-110 (quoting *TVA*, 437 U.S. at 184) (emphasis added by Ninth Circuit).

The Ninth Circuit's decision, however, ignores that Section 402.02 explains what constitutes a *reasonable* and *prudent* alternative. How can an alternative be both reasonable and prudent if no thought has been given to the potentially disastrous economic consequences of its implementation? Congress added the "reasonable and prudent alternative" framework, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752-53 (Nov. 10, 1978), specifically to avoid situations where endangered species protection might otherwise threaten such undesirable outcomes. *See* H.R. Conf. Rep. No. 95-1804, at 18-19 (1978) (observing that "[m]any . . . conflicts between the Endangered Species Act and Federal actions can be resolved by full and good faith consultation," in part owing to various "provisions designed to expedite and improve the consultation process," among them that a biological opinion "outline any reasonable and prudent alternatives to the action"). The Ninth Circuit's decision is a warrant for the Service to do precisely what this Court has stated the agency may not do: "zealously but unintelligently pursu[e] [its] environmental objectives" through "uneconomic . . . jeopardy determinations." *Bennett*, 520 U.S. at 177.

B. The Ninth Circuit's Decision Conflicts with the Fourth Circuit's Decision That the Service Must Adequately Demonstrate Whether a "Reasonable and Prudent Alternative" Is Economically Feasible

In *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013), pesticide manufacturers challenged a biological opinion governing the Environmental Protection Agency's re-registration of various pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act. Among other things, the industry parties objected to the biological opinion's imposition of a "reasonable and prudent alternative" that would have required, in applying these pesticides, uniform buffers of 500 feet to 1,000 feet surrounding all salmon-bearing waters. *See id*. at 469-70. The industry parties argued that the alternative was illegal for several reasons, among them that the Fisheries Service[10] had failed to explain how the buffer zones were economically feasible under Section 402.02. *See id*. at 474.

The Fourth Circuit agreed, holding that, in proposing a "reasonable and prudent alternative," "the [Fisheries] Service must consider several factors, including 'economic feasibility.'" *Id*. at 474 (quoting 50 C.F.R. § 402.02). In rejecting the Fisheries Service's argument that an alternative need only be economically "possible," the Fourth Circuit explained that such an interpretation would make the economic

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[10] The Fisheries Service, rather than the Fish and Wildlife Service, administers the Endangered Species Act with respect to marine and anadromous species, including the salmon populations at issue in *Dow AgroSciences*.

feasibility requirement a dead letter. *See id*. at 474-75. That error would be all the more significant, reasoned the Fourth Circuit, given that the challenged buffer zones would substantially limit the areas that could be sprayed with pesticides. *See id*. at 475.

The Ninth Circuit attempted to distinguish *Dow AgroSciences* on the ground that the Fourth Circuit did not require the Fisheries Service to address, "as a procedural matter," economic feasibility. App. at A-107 n.42. Instead, reasoned the Ninth Circuit, *Dow AgroSciences* was only concerned about whether the agency "had imposed an especially onerous requirement without any thought for whether it was feasible." *Id*.

These are distinctions without a difference. Whether one describes the obligation as procedural or substantive, the fact remains that the Fourth Circuit held the Fisheries Service's actions to be illegal precisely because the agency failed to consider, and thus necessarily failed to explain, its alternative's economic feasibility, as required by the regulation. *See Dow AgroSciences*, 707 F.3d at 474-75. In contrast, the Ninth Circuit below held that the Fish and Wildlife Service has no general obligation to consider, much less explain, that feasibility. App. at A-105 ("Nothing . . . obligates the [Service] to address [economic feasibility] when it proposes [reasonable and prudent alternatives."]; *id.* at A-106 ("We fail to see anywhere that the [Service] has required itself to provide an explanation of [economic feasibility] when it lays out a[ ] [reasonable and prudent alternative].").

Similarly, the Fourth Circuit held, contrary to the Ninth Circuit, that the economic impact of a proposed alternative's implementation is relevant to whether the

alternative is economically feasible. As the Fourth Circuit noted, the proposed buffer zones constituted a "broad prohibition" on where pesticides may be used. *See Dow AgroSciences*, 707 F.3d at 475. The prohibition's scope, however, has absolutely nothing to do with whether the Environmental Protection Agency, as the consulting agency, could require those buffer zones as a condition to pesticide registration—the action under consultation. Obviously, in a narrow sense the buffer zones were economically feasible; imposing such buffer zones would not be expensive for the agency or the pesticide user, because their imposition would simply mean *refraining* from otherwise productive activity. Yet such buffer zones would clearly have a negative economic impact because they would put all the acreage within the buffer zones out of production. And that is *exactly* what the smelt biological opinion's alternative has done to the San Joaquin Valley, *viz.*, put hundreds of thousands of acres out of production because of the unavailability of water. *See Consolidated Delta Smelt Cases*, 717 F. Supp. 2d at 1054. But the Ninth Circuit held that such economic impacts are irrelevant to whether an alternative is reasonable and prudent. App. at A-108 - A-110.

Accordingly, review in this Court is merited to resolve this important conflict between these Circuits regarding Section 402.02.

III

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AND TO WHAT EXTENT AN AGENCY'S INTERPRETATION OF ITS OWN REGULATIONS IS ENTITLED TO DEFERENCE

Below, the Service defended its view of what the "reasonable and prudent alternative" process requires by relying on the controversial principle that an agency's interpretation of its own regulations is entitled to substantial deference. Brief for the Federal Defendant-Appellants at 69-70. Specifically, the Service directed the Ninth Circuit's attention to the agency's Endangered Species *Consultation Handbook*, *see* App. G, which, the Service contended, provides that economic feasability need only be addressed if the Service determines that a proposed alternative is *not* economically feasible. App. at A-106. Citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the Service urged the Ninth Circuit to give its interpretation "substantial deference," making it "controlling unless 'plainly erroneous or inconsistent with the regulation.'" Brief for the Federal Defendant-Appellants at 69 (citation omitted). Obliging the Service under the less generous deference articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Ninth Circuit held, as noted above, that the Service can decide when and under what circumstances the agency must support with evidence its determination of a "reasonable and prudent alternative." App. at A-105 - A-110.

The degree of deference owing the Service's interpretation of Section 402.02, and agency

interpretations of regulations generally, is an important federal question meriting review in this Court, for two reasons.

First, a split among the Circuits exists over the appropriate level of judicial deference owed to an agency's interpretation of its own regulation, particularly where the interpretation itself does not bind the regulated public, or where the regulation otherwise lacks the force of law, such as with agency manuals and opinion letters. The Third and Ninth Circuits apply *Skidmore* deference in these circumstances. *See, e.g.*, *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 155 (3d Cir. 2004) ("As for the persuasiveness of agency interpretive guidelines, we continue to rely on the framework laid out in *Skidmore* . . . ."); App. at A-104 (same). In contrast, the Second, Fourth, and Eighth Circuits apply the substantially more generous *Auer* deference. *See, e.g.*, *United States v. Deaton*, 332 F.3d 698, 713 (4th Cir. 2003) ("We are therefore bound to defer to the [agency] manual's interpretation of the regulation . . . ."); *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 780 (2d Cir. 2002) ("An agency's consistent interpretation of its regulations [in a policy letter] is to be given controlling weight unless plainly erroneous or inconsistent with the regulation."); *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042, 1046-47 (8th Cir. 2002) ("*Auer* . . . requires that we give deference to an agency's interpretation of its own regulations, if the regulations are ambiguous. . . . [C]ontrolling deference is due [the agency's policy interpretation, its clarification memorandum, and its transmittal letter].") (internal citations omitted).

Second, the principle of judicial deference to an agency's interpretation of its own regulations—whether it be according to *Auer*, *Skidmore*, or any other theory—raises serious constitutional concerns worthy of this Court's review. As Justice Scalia recently observed, there is no doctrinal basis for such deference: arguments about the relevance of an agency's intent when it drafted the regulation, or of its alleged special expertise, have been persuasively debunked. *See, e.g.*, *Decker v. Northwest Environmental Defense Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., dissenting) (observing that the Court's cases "have not put forward a persuasive justification for *Auer* deference," and that the traditional arguments for it lack merit); *see also id.* at 1338 (Roberts, C.J., and Alito, J., concurring) (agreeing that Justice Scalia "raises serious questions about the principle set forth in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945), and *Auer*" and that "[i]t may be appropriate to reconsider that principle in an appropriate case"); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1454-66 (2011) (critiquing the arguments for *Auer* deference).

Further, and perhaps more importantly, judicial deference to an agency's interpretation of its own regulations means giving the agency power both to write a law *and* to interpret it. That concession runs afoul of the separation-of-powers principle, which provides that "the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting). Justice Scalia explained this point in *Decker* by comparing the deference given to an agency's interpretation of a statute under *Chevron, U.S.A., Inc. v. Natural*

Resources Defense Council, 467 U.S. 837 (1984), to the deference afforded an agency's interpretation of its own regulations. "Congress cannot enlarge its own power through *Chevron*—whatever it leaves vague in the statute will be worked out *by someone else*. *Chevron* represents a presumption about who, as between the Executive and the Judiciary, that someone else will be." *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting). Under *Chevron*, "Congress's incentive is to speak as clearly as possible on the matters it regards as important," but such an incentive does not serve to enlarge Congress's lawmaking power. *Id.* In contrast, deferring to an agency's interpretation of its own regulations leads to agency aggrandizement of power, for "the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect." *Id.* Hence, *Auer* deference creates a perverse incentive for an agency to "issue vague regulations" to "maximiz[e] agency power." *Id.* (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting)). Of course, the same concerns are present when *any* level of deference is afforded to an agency's interpretation of its own regulations—be it under *Auer*, *Skidmore*, or another theory.

The scope and application of the doctrine of judicial deference to an agency's interpretation of its own regulations is a recurring issue that has generated significant concern and criticism among members of this Court as well as the academy. *See, e.g.*, *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., and Alito, J., concurring) ("The issue is a basic one going to the heart of administrative law. Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular

basis."); Richard A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 11 (1996) ("Interpretation of a regulation, like informal agency interpretation of statute, should be addressed with judicial neutrality."). Given these concerns and criticisms, as well as the confusion among the Circuits, now is an opportune time for the Court to reconsider the propriety of judicial deference to an agency's interpretation of its own regulations.

IV

CERTIORARI SHOULD BE GRANTED TO OVERRULE *TVA V. HILL*'S HOLDING THAT THE ENDANGERED SPECIES ACT REQUIRES FEDERAL AGENCIES TO MAKE SPECIES PRESERVATION THE "HIGHEST OF PRIORITIES," AND TO PROTECT SPECIES AND THEIR HABITAT "WHATEVER THE COST"

To support its determination that the economic impacts of limiting the water supply for millions of Californians are irrelevant to whether such cutbacks constitute a "reasonable and prudent alternative" under the Endangered Species Act, the Ninth Circuit relied heavily on this Court's decision in *TVA*. The Ninth Circuit emphasized that the Service "is not responsible for balancing the life of the delta smelt against the impact of restrictions on [water deliveries]." App. at A-109. Rather, that balance, reasoned the court, "has already been struck by Congress" in the Endangered Species Act. *Id.* The court went on to quote *TVA* for the proposition that the Act "reflects 'a conscious decision by Congress to give endangered species priority over the "primary

missions" of federal agencies.'" *Id.* The Service's "duty is to opine on the viability of the smelt and 'to halt and reverse the trend toward species extinction, *whatever the cost*.' " App. at A-109 - A-110 (quoting *TVA*, 437 U.S. at 184) (emphasis added by Ninth Circuit).

Although recognizing the "enormous practical implications" of its decision affecting "water [supply] to more than 20,000,000 agricultural and domestic consumers in central and southern California," App. at A-15, A-13, the Ninth Circuit nevertheless concluded that it and the Service must ignore these consequences because of *TVA*. The smelt has "been 'afforded the highest of priorities,'" "even if it means 'the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds.' " App. at A-16 (quoting *TVA*, 437 U.S. at 174). The Ninth Circuit concluded that the Act, as interpreted by *TVA*, prohibits the "balanc[ing of] the smelt's interests against the interests of the citizens of California." App. at A-16.

In *TVA*, the Court ruled that the almost constructed Tellico Dam, the completion of which (it was thought)[11] would eradicate the endangered snail darter (a small freshwater fish), could not proceed. 437 U.S. at 195. The Court relied principally on the Act's prohibition to any federal agency to take action that would jeopardize the continued existence of a

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[11] Subsequent to the Court's decision, "several small relict populations" of snail darter were discovered in other streams. *See* Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 Envtl. L. 1, 8 n.22 (2002). In 1984, the Service downlisted the fish to threatened status and rescinded its critical habitat. *See* 49 Fed. Reg. 27,510 (July 5, 1984).

listed species or adversely modify its critical habitat. The Court sought support from various excerpts of legislative history to buttress its conclusion that Congress wanted endangered species protected, "whatever the cost." *Id*. at 176-81. The Court rejected the government's argument that Congress's continued appropriation of funds for the dam following the Act's passage constituted an exemption *sub silentio* for the dam's construction. *Id*. at 189-93. Further, the Court held that the Act substantially limits the federal judiciary's traditional equitable discretion; hence, the usual balancing of interests that takes place when determining whether to issue an injunction does not apply in cases under the Endangered Species Act. *Id*. at 194-95. The Court therefore concluded that the Act unavoidably blocked Tellico Dam's completion.[12]

TVA incited an uproar, beginning with the dissenting opinion of Justice Powell,[13] and from there extending to the national press,[14] the academy,[15] and

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[12] In 1979, Congress exempted the dam's completion from further Endangered Species Act review. *See* Energy and Water Development Appropriation Act, Pub. L. No. 96-69, 93 Stat. 437, 449-50 (Sept. 25, 1979).

[13] *See TVA*, 437 U.S. at 196, 210 (Powell, J., dissenting) (contending that the majority's construction of the Act failed to accord with "some modicum of common sense and the public weal," and concluding that "[t]here will be little sentiment to leave this dam standing before an empty reservoir, serving no purpose other than a conversation piece for incredulous tourists").

[14] Plater, *supra* note 11, at 16 ("The Court's stark decision had received front-page coverage all around the country.").

[15] Becky L. Jacobs, *Foreward*, 80 Tenn. L. Rev. 495, 498 (2013) ("[S]ome thirty years later, *TVA v. Hill* continues to generate

(continued...)

ultimately to Congress.[16] Subsequent decisions of this

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[15] (...continued)
controversy and excitement among scholars as well as the wider public at large."); Ronald Dworkin, Law's Empire 20-23, 313-47 (1986) (using *TVA* as a prime example of how *not* to interpret statutes); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 862 & n.39 (1992) (citing *TVA* as an example of the use of "vague or conflicting legislative history"); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 643-44 (1990) (criticizing *TVA*'s use of legislative history).

[16] Jared des Rosiers, Note, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 Notre Dame L. Rev. 825, 843 (1991) ("After the Supreme Court's rigid interpretation of the ESA in *TVA v. Hill*, Congress responded by amending the ESA."). The debate on the proposed legislative response to *TVA* reveals that many Congressmen believed that the Court had misread the Act. *See, e.g.*, Committee on Environment & Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980, at 822 (Congressional Research Service eds., 1982) (statement of Rep. Robert Leggett of California) ("We should be concerned about the conservation of endangered species, but I, for one, am not prepared to say that we should be concerned about them above all else."); *id.* at 919 (statement of Sen. Howard H. Baker, Jr., of Tennessee) ("I do not believe, however, that Congress intended that the protection or management of an endangered species should in all instances override other legitimate national goals or objectives with which they might conflict."); *id.* at 1068 (statement of Sen. William Scott of Virginia) ("People are more important than fish."); *id.* at 1006 (statement of Sen. Edwin Garn of Utah) ("Certainly, in 1973, there was a great environmental push. The Endangered Species Act passed the Senate extremely easily, with no dissenting votes. But, talking to many of my colleagues, I learn that they certainly would not have voted for it if they had known the implications and the extremes to which the act would be carried."); *id.* at 1102 (statement of Sen. Garn) ("In the case of TVA against Hill, the Supreme Court concluded that it had been Congress[' s] intent to provide endangered or threatened
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Court have backed away from *TVA*'s pro-species radicalism. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669-671 (2007) (limiting *TVA* to discretionary federal agency action); *Bennett*, 520 U.S. at 177-78 ("avoid[ing] needless economic dislocation" is no less important to the Act's administration than "species preservation"). *Cf. Nat'l Ass'n of Home Builders*, 551 U.S. at 674, 694 (Stevens, J., dissenting) (concluding that the majority opinion "whittles away at . . . [the] comprehensive effort to protect endangered species from the risk of extinction" and "turns its back on our decision in *Hill*"); J.B. Ruhl, *The Endangered Species Act's Fall From Grace in the Supreme Court*, 36 Harv. Envtl. L. Rev. 487, 490 (2012) ("*Hill* has become the extreme outlier in the Court's [Endangered Species Act] jurisprudence."). The Court's retreat is in part due to *TVA* having become a jurisprudential anachronism, evident in its "purposivist" approach to statutory interpretation,[17] as

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[16] (...continued)
wildlife and plants the highest possible degree of protection from Federal actions. All other national goals, the Court said, must fall in the face of a threat to an endangered species. [¶] That interpretation is, in my opinion, patent nonsense, and it is not the interpretation put upon the act by the Congress in passing it.").

[17] *See* William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1244 (2001) (observing that *TVA* "stands for the proposition that courts ought to apply statutes to carry out their purposes"). *Cf. Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (continued...)

well as its indiscriminate reliance on legislative history.[18]

In addition to these defects, *TVA*'s radical interpretation of the Act has hurt the environment and inhibited the development of a sound federal wildlife conservation strategy. There is a growing appreciation that *TVA*'s approach to species conservation is infeasible. *See* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 Wash. U. L.Q. 1029, 1134 (1997) ("It is plainly impossible to preserve every

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[17] (...continued)
(plurality opinion) ("And as for advancing 'the purpose of the Act': We have often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations.") (citing *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995)); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) ("'The Act must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter.").

[18] *See TVA*, 437 U.S. at 176-84 (citing House Reports, Senate Reports, and the Congressional Record, as well as statements from federal legislators, federal government officials, state government officials, representatives from non-governmental organizations, and private citizens). *Cf.* David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 Wm. & Mary L. Rev. 1653, 1655 (2010) (noting "the decline in the overall use of legislative history since the mid-1980s"); James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 Judicature 220, 220 (2006) ("The United States Supreme Court's reliance on legislative history to help explain and justify its decisions has declined sharply over the past two decades.").

individual creature, or even every identifiable group."); Jason Scott Johnston, *Desperately Seeking Numbers: Global Warming, Species Loss, and the Use and Abuse of Quantification in Climate Change Policy Analysis*, 155 U. Pa. L. Rev. 1901, 1916 (2007) (discussing one analysis concluding that protecting just eighteen species to the degree purportedly demanded by public opinion would cost nearly one percent of the nation's gross domestic product); Brian Seasholes, *Fulfilling the Promise of the Endangered Species Act: The Case for an Endangered Species Reserve Program*, Reason Foundation Policy Study 9-22 (Sept. 2014) (discussing how the Act hurt species).[19] *See also* H.R. Rep. No. 93-412, at 5 (1973) ("Clearly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our own civilization."). Moreover, *TVA*'s "whatever the cost" demand has proved remarkably ineffective. *See* Kevin W. Moore, *Seized By Nature: Suggestions on How to Better Protect Animals and Property Rights Under the Endangered Species Act*, 12 Great Plains Nat. Resources J. 149, 164 (2008) ("[M]ore than half of the threatened or endangered species that have been removed from the lists were removed, not because they have been restored or saved, but because they are now extinct.").

Yet *TVA*'s costs are painfully evident here: millions of prime farmland made a wasteland, thousands of laborers out of work, millions of dollars of income foregone. *See Consolidated Delta Smelt Cases*, 717 F. Supp. 2d at 1052 ("Any lost pumping capacity

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[19] *Available at* http://reason.org/news/show/endangered-species-act-promise.

directly attributable to the [biological opinion] will contribute to and exacerbate the currently catastrophic situation faced by Plaintiffs, whose farms, businesses, water service areas, and impacted cities and counties, are dependent, some exclusively, upon [the water projects'] deliveries.").

The Ninth Circuit's decision exacerbates *TVA*'s harm by substantially undercutting Congress' attempts to avoid the decision's impacts. As noted above, Congress added the "reasonable and prudent alternative" framework to the Act in the wake of *TVA*, as a way to temper that decision's radicalism and insensitivity to human and economic costs. *See supra* at 18, 29 n.16. For the Ninth Circuit to authorize the Service to ignore those same costs when formulating a so-called "reasonable and prudent alternative" effectively nullifies Congress's legislative judgment.

TVA was wrongly decided.[20] Subsequent legislation and decisions of this Court have rendered it an isolated relic of a jurisprudential era long passed. Nevertheless, the decision has been used to thwart productive activity across the country. No better example of this sad history exists than this case. The Ninth Circuit's ruling, which limits the water supply for millions of Californians and hurts an otherwise vibrant agricultural economy, continues *TVA*'s sorry

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[20] Reconsidering *TVA* would not frustrate any "reliance interests." *Cf. Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (presence of reliance interests one of the factors in applying *stare decisis*). The only relevant reliance interests would be those of protected species. But as nonrational creatures, individuals of listed species cannot plan their conduct at all, much less based on this Court's decisions.

legacy. Review should be granted to allow the Court to reconsider, and overrule, *TVA*.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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