No. 10-454

In the
Supreme Court of the United States

ARIZONA CATTLE GROWERS' ASSOCIATION,
Petitioner,

v.

KEN L. SALAZAR, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE ASSOCIATION OF CALIFORNIA WATER AGENCIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Association of California Water Agencies ("ACWA") respectfully submits this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. ACWA is a non-profit public benefit corporation organized and existing under the laws of the state of California since 1910. Since its inception, ACWA has grown to be the largest coalition of public water agencies in the nation. Currently, ACWA is comprised of approximately 450 water agencies, including municipal water districts, irrigation districts, county water districts, California water districts and many special purpose agencies. ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the state, monitors litigation and has determined that this case involves issues of significance to ACWA's member agencies.

ACWA's members provide water to more than 25 million Californians and to millions of acres of farmland – about 90% of the total water delivered in California. The outcome of this case will impact ACWA's members and its water users because a

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *Amicus Curiae* to file this brief. No counsel for a 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 *Amicus Curiae* or their counsel made a monetary contribution to its preparation or submission.

significant portion of ACWA's members' water supply development and project infrastructure, including the Central Valley Project ("CVP"), is subject to federal regulatory authority. Critical habitat designations for listed and threatened species under the Endangered Species Act will necessarily impact ACWA's members' water supply projects and infrastructure maintenance, potentially threatening ACWA's members' ability to provide a reliable water supply to millions of Californians.

SUMMARY OF ARGUMENT

ACWA agrees with Petitioners that review by this Court is appropriate in light of the inter-circuit split of authority between the Tenth Circuit's decision in *N.M. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), and the Ninth Circuit's decision in this case. ACWA also agrees with Petitioners that the United States Fish and Wildlife Service ("FWS" or "Service") applied an impermissible "baseline approach" that did not account for the economic impacts of FWS' critical habitat designation that were also attributable to the Service's listing decision.

ACWA submits this brief to expand upon Congress's intent that *all* economic impacts be carefully considered by FWS when designating critical habitat for listed species, and to explain how the Ninth Circuit's erroneous ruling could have grave economic consequences in California.

ARGUMENT

I. Congress Intended That the FWS Conduct a Full Analysis of *All* the Economic Impacts of a Critical Habitat Designation.

Soon after its passage, the Endangered Species Act's ("ESA") potential to significantly hamper economic development became apparent. *See* Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 144 (2004). The most notable controversy involved the $100 million Tellico Dam project in Tennessee. Upholding the Sixth Circuit's injunction against the dam, this Court held that Section 7 of the ESA imposes an affirmative command on federal agencies that "admits of no exception." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978).

Congress responded in 1978 with two ESA amendments that allow biological considerations to be balanced against economic factors in certain circumstances. First, Congress added a provision creating an Endangered Species Committee, dubbed the "God Squad," with the power to grant exemptions from Section 7 for certain projects if "the benefits of [the] action clearly outweigh" the costs of protecting the species. 16 U.S.C. §1536(h)(1)(A)(ii) (1988). Second, and relevant here, Congress added a provision known as section 4(b)(2) introducing economic considerations into the critical habitat designation process. 16 U.S.C. § 1533(b)(2) (1988).

In the more than 30 years since their enactment, "neither of these provisions has played a particularly significant role in the administration of the ESA." Sinden, *supra*, at 147. In particular,

> the provision requiring economic analyses of critical habitat designations . . . both because FWS has failed to designate critical habitat for most species and because its approach to performing the few economic analyses it has done has virtually assured a finding that the critical habitat designation will impose no significant economic costs.

Id. FWS' approach can best be explained by its long-standing reluctance towards the critical habitat process. As the Service itself has often explained,

> [i]n 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources.

70 Fed. Reg. 68,294, 68,295 (proposed Nov. 9, 2005) (to be codified at 50 C.F.R. pt. 17).

Congress, of course, did not intend the doing of a "useless thing"[2] when it instructed the Service to set aside those lands "essential for the conservation of the species," "after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. §§ 1532(5)(A)(ii), 1533(b)(2) (1988).

It took the Tenth Circuit to force FWS to conduct a realistic and meaningful assessment of economic considerations, which it did in *N.M. Cattle Growers' Ass'n*, 248 F.3d 1277. *New Mexico Cattle Growers* invalidated FWS' "baseline approach" to the economic analysis of critical habitat designations, under which the agency considered only the economic impacts of the critical habitat designation itself, over and above any impacts attributable to the listing of the species. The Tenth Circuit held that Congress must have intended for the economic analysis to consider not just those economic impacts that would not occur "but for" the critical habitat designation, but rather all impacts reasonably attributable to the habitat designation, even if they were attributable co-extensively to other causes, such as the listing. *Id.* at 1283. The court held that the Service must consider all impacts, "regardless of whether those impacts are [attributable] co-extensively" to other causes and therefore held that "the baseline approach to economic analysis is not in accord with the language or intent of the ESA." *Id.* at 1285.

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[2] *Nelson v. N. Pac. Ry. Co.*, 188 U.S. 108, 127-128 (1903) ("we are not to suppose Congress" intended "a vain and useless thing").

II. The Ninth Circuit Improperly Rejected the Tenth Circuit's Holding.

In this case, the Ninth Circuit rejected the Tenth Circuit's holding and approved the baseline approach, creating a direct conflict between these circuits.

A. The Ninth Circuit Created An Inter-Circuit Split By Wrongly Holding that FWS' "Baseline Approach" Is Entitled to *Chevron* Deference.

The Ninth Circuit reviewed FWS' use of the "baseline approach" under the arbitrary and capricious standard, thus giving such action *Chevron* deference. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984). The Tenth Circuit, however, found that FWS' action was not entitled to *Chevron* deference due to a lack in formal rulemaking in determining the economic impacts of critical habitat designation. The Tenth Circuit's holding is correct.

The ESA mandates that FWS conduct an economic analysis when designating critical habitat, but it does not lay out the procedures for doing so, and it does not indicate which factors must be counted and which factors may be ignored.

In determining whether an agency action is contrary to law, reviewing courts must look to the statute "empowering administrative agencies to carry on governmental activities" because "the power of those agencies is circumscribed by the authority

granted." *Dimension Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 744 F.2d 1402, 1409 (10th Cir. 1984) (internal quotation marks and citation omitted). Reviewing courts will not accept interpretations of a statute that render provisions meaningless, or that otherwise presume that Congress intended that the agency carry out "a vain and useless thing." *Nelson*, 188 U.S. at 127; *see also Bennett v. Spear*, 520 U.S. 154, 173 (1997) (courts must give effect to "every clause and word of a statute" (internal quotation marks and citation omitted)).

In this case, the Ninth Circuit applied a highly deferential "arbitrary and capricious" standard of review, which was error. *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2009). Instead, the Ninth Circuit should have done what the Tenth Circuit did in *New Mexico Cattle Growers'* – i.e., determine Congress's intent using "traditional tools of statutory interpretation." *N.M. Cattle Growers' Ass'n*, 248 F.3d at 1281 (internal quotation marks and citation omitted). In rejecting the baseline approach, the Tenth Circuit explained that *Chevron* deference was not warranted "[b]ecause the statutory interpretation resulting in the baseline approach ha[d] never undergone the formal rulemaking process." *Id.* The Ninth Circuit erroneously rejected that holding, thus creating an inter-circuit conflict.

B. Listing of Species is Not a "Necessary Antecedent" to the FWS' Economic Analysis.

In the court below, Arizona Cattle Growers' argued that if the FWS designated critical habitat at the same time that it listed the species, as it is supposed to do – *see* 16 U.S.C. § 1533(a)(3)(i) – there would be no baseline to which to compare the critical habitat designation. The Ninth Circuit brushed this argument aside, concluding instead that "listing the species is a necessary antecedent to designating habitat." *Arizona Cattle Growers' Ass'n,* 606 F.3d at 1174. The Ninth Circuit's reasoning is flawed.

Under the ESA, FWS is required, "to the maximum extent prudent and determinable," to designate critical habitat *at the same time* that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(i). The legislative history makes clear that Congress intended this exception (the few times that it is not prudent and determinable) to be invoked only in exceptional circumstances. The House Report accompanying this provision stated:

> The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing will not be beneficial to the species.

H.R. Rep. No. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467.

If the statute is applied as Congress intended, critical habitat designations should be done at the time of listing, and such designations should include an assessment of all economic impacts. The "baseline approach," however, conflicts with such congressional intent.

III. The "Baseline Approach" Threatens ACWA's Members' Ability to Provide a Reliable Water Supply to Millions of Californians.

In *Bennett v. Spear*, 520 U.S. at 176-177, this Court observed that one of the ESA's objectives "(if not indeed the primary one) is to avoid needless environmental dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." The Ninth Circuit's adoption of the baseline approach represents a significant step backward to the pre-1978 amendment days and the years that followed when FWS refused to meaningfully assess economic impacts. "Needless economic dislocation" will occur in California if the Ninth Circuit approach is allowed to stand.

Without a meaningful assessment of all the economic impacts of critical habitat designations, as required by Congress, the rate of critical habitat designation will drastically increase. Such an outcome would impose stringent limitations on ACWA's members' project development and

infrastructure maintenance that is subject to federal regulation. As explained above, ACWA's members provide approximately 90% of the total water delivered in California. Nearly half of ACWA's members obtain this water from a source that is federally funded or from water bodies that require a federal permit, including the CVP, the Colorado River, and Lake Cachuma.

The CVP, which is one of the world's largest water storage and transport systems, maintains long-term contracts with more than 250 contractors in 29 out of 58 California counties, irrigates more than three million acres of farmland and provides drinking water to nearly two million customers. The increase in designation of critical habit will impose greater restrictions on the CVP and countless other federally funded or regulated projects. *See Conservation Council v. Babbitt,* 2 F. Supp. 2d 1280, 1288 (D.Haw. 1998) (observing that there are significant substantive and procedural protections that result from the designation of a critical habitat outside of the consultation requirements for listing a species).

These additional restrictions will frustrate and, in some cases, prohibit ACWA's members from providing water to millions of Californians and millions of acres of farm land. For example, FWS is proposing to designate critical habitat for the Santa Ana sucker in the Santa Ana River and the San Gabriel River in Southern California. Such designations will lead to restrictions on the development, management and reasonable beneficial use of good quality water at the lowest practical cost.

With the current drought conditions that California faces, these stringent limitations have the potential to catastrophically affect California's water supply system in the coming decades. As such, ACWA has an imperative interest in ensuring that FWS is required to evaluate comprehensively, and to weigh and balance fairly, *all* the economic impacts of designating critical habitat.

CONCLUSION

For all the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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