No. 10-454

NOV 4- 2010

In The
Supreme Court of the United States

ARIZONA CATTLE GROWERS' ASSOCIATION,

Petitioner,

vs.

KEN L. SALAZAR, *et al.*,

Respondents.

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

BRIEF OF THE NEW MEXICO CATTLE GROWERS' ASSOCIATION, COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH, WESTERN LEGACY ALLIANCE, NEW MEXICO WOOL GROWERS, INC., AND NEW MEXICO FEDERAL LANDS COUNCIL AS *AMICI CURIAE* SUPPORTING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF *AMICI*[1]

The New Mexico Cattle Growers' Association is a non-profit organization representing approximately 2,000 members of New Mexico's livestock industry. Its purpose is to promote and protect the interests of its livestock producing members. Many, if not most, of the Association's livestock producer members hold permits or leases to utilize federal lands, including those administered by the Bureau of Land Management ("BLM") and United States Forest Service ("USFS"), for livestock grazing. A large number, if not the majority, of ranches in the State of New Mexico include federal or public lands essential to their operations.

The Coalition of Arizona/New Mexico Counties for Stable Economic Growth is a non-profit corporation made up of county governments, businesses, organizations and individuals in Eastern Arizona and Western New Mexico. Its mission is to maintain and increase the economic base from federal lands, which are prevalent in each of its member counties, and to

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[1] Pursuant to Supreme Court Rule 37.6, *amici* confirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The parties were notified ten days prior to the due date of this brief of the intention to file. The brief is filed with the consent of the parties. *See* S.Ct.R. 37.3(a).

protect private property rights of persons and industries dependent on federal lands.

Western Legacy Alliance ("WLA") was organized to preserve the working landscapes and lifestyles of the American West by supporting and promoting sustainable land-use solutions to ensure social and economic benefits for local communities and the nation. WLA's goals include to (1) preserve traditional land uses in the American West, (2) promote the participation and education of youth in agricultural and resource fields, (3) advocate for sustainable and responsible access to federal and state lands, (4) identify and respond to challenges that threaten working landscapes and the lifestyles of people that use them, (5) protect homes, small businesses and other private property against government seizure or unreasonable government interference, and (6) work with land managers today to guarantee more choices and healthier landscapes for the land management of tomorrow. The WLA is not a publically-owned company nor is it owned or managed by any parent organizations.

The New Mexico Wool Growers, Inc. is a non-profit corporation which works for the mutual protection and benefit of its members engaged in the wool growing and sheep and goat raising industry. The New Mexico Federal Lands Council is a non-profit organization with approximately 3,500 members who are engaged in the livestock industry. Most of its members graze livestock on federal lands and deal

with federal land management agencies on a routine basis.

Most of the ranchers who graze their livestock on the National Forests and BLM lands are economically dependent upon the use of those public lands for their livelihood. In many cases, their ranch consists of a small amount of deeded property surrounded by vast tracts of federally owned lands, which make up the remainder of the ranch. The deeded property of the typical ranch is insufficient to support the ranchers' herds for an extended period of time. If a rancher cannot access his federally owned grazing allotment, he must either lease other pasture (if any is available), purchase alternate forage such as hay, which is extremely expensive, or sell his herd. Any of these options, even for a single grazing season, can force a ranch into bankruptcy. The longer access to an allotment is denied, the more severe the consequences to the individual rancher and to the ranching community dependent upon the federally owned lands. Because this Court's decision in this case has the potential to disrupt or ruin the family businesses of numerous livestock ranches throughout the American West, the *amici* seek to ensure that its members' position in this matter is brought to the Court's attention for consideration.

SUMMARY OF ARGUMENT

Amici Curiae urge the grant of Petitioners' petition for writ of certiorari, and the reversal of the decision of the Ninth Circuit Court of Appeals. Utilization of the "baseline" approach to the consideration of economic impacts of critical habitat designation ("CHD"), as endorsed by the Ninth Circuit, will result in significant impacts to economies in areas surrounding those designated areas. Conversely, the approach endorsed by the Tenth Circuit takes into account all economic impacts of a critical habitat designation, including those that can be attributed co-extensively to the listing process pursuant to the Endangered Species Act ("ESA"). This more thorough approach can result in the lessening of economic impacts of CHD to local and state economies, as well as to private citizens. Currently, because of the differing approaches taken by the Ninth and Tenth Circuits in this area, the ESA will be administered differently across circuit boundaries, resulting in uncertainty for federal agencies, state and local governments, and private landowners.

ARGUMENT

I. THE DESIGNATION OF CRITICAL HABITAT PURSUANT TO THE ENDANGERED SPECIES ACT

Section 4(b)(2) of the Endangered Species Act ("ESA") requires that the United States Fish and Wildlife Service ("FWS") designate critical habitat

only "after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The FWS construction of its obligations – first in designating critical habitat, and secondly in performing its economic analyses for the critical habitat determination ("CHD") process – so distorts the process that it no longer comports with the statute it seeks to interpret. The result is that the FWS' interpretation renders economic consideration under the ESA devoid of any meaning and misinterprets the law. Because Circuit courts have now interpreted that economic consideration obligation in conflicting ways, *compare Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1174 (9th Cir. 2010) (upholding use of "baseline" approach) *with New Mexico Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1282 (10th Cir. 2001) (directing use of "coextensive" approach and setting aside of FWS reliance on baseline approach), the FWS will continue to circumvent Congressional intentions in the CHD process.

When enacted in 1973, the ESA did not define "critical habitat" or include a statutory provision for CHD or economic analyses. Pub. L. No. 93-205, 87 Stat. 884, 885-86 (codified as amended at 16 U.S.C. § 1533). Amendments to the ESA in 1978 codified and defined the CHD process and also included an economic analyses provision. Pub. L. No. 95-632, §§ 2, 11, 92 Stat. 3751, 3766 (codified as amended at 16 U.S.C. §§ 1532(5), 1533(b)(2)). As defined under the ESA, "critical habitat" refers to geographic areas which are

essential to the conservation of the species at issue, and which may require special management considerations or protection. *See* 16 U.S.C. § 1532(5)(A)(I); *see also Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (W.D. Wash. 1991). Thus, even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention. *See id.* Indeed, this interpretation of "critical habitat" is consistent with the common usage of the words: to be "critical," something must be "crucial, decisive . . . indispensable, vital." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 296 (11th ed. 2003). Therefore, to be "critical," critical habitat must be "beneficial" and, in fact, "essential" to the conservation and recovery of the species. 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. § 424.12(a)(1)(ii).

In the 1978 amendments, Congress clarified that the Secretary was required, "to the maximum extent prudent," to specify critical habitat "[a]t the time [the species] is proposed [for listing]." Pub. L. No. 95-632 (November 10, 1978) (codified as amended at 16 U.S.C. § 1533(a)(3)). However, Congress separated the listing process from the CHD process in 1982, because economic considerations were being used to stall the listing of new species. *See* Hearings before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine Fisheries, 97th Cong., 2d Sess. 157-60 (1982). The solution adopted by Congress permitted

the Secretary to defer the CHD upon finding that critical habitat is not "determinable" at the time the Secretary proposes to list the species under the ESA or at the time of his final listing decision. *See* 16 U.S.C. § 1533(b)(6)(C). However, in no event was the Secretary to delay the designation of critical habitat for more than twelve months after publication of the final listing rule. *See id.*

Although this was supposed to be a narrow exception, to be used only when critical habitat was not "determinable" or when it was not "prudent" to designate critical habitat at the time of publication of the final listing rule,[2] Congress effectively separated

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[2] The House Committee on Merchant Marine and Fisheries expressly emphasized the narrow nature of the exception:

> By inclusion of the word "determinable" the Committee recognizes that, because of the combination of biological studies and the economic analysis required under Section 4(b)(4) of the Act . . . it may be difficult to determine the most appropriate critical habitat within the time frame contained in the legislation for the listing of species. The Committee feels strongly, however, that, where the biology relating to the status of the species is clear, it should not be denied the protection of the Act because of the inability of the Secretary to complete the work necessary to designate critical habitat. . . . *The Committee expects the agencies to make the strongest attempt possible to determine critical habitat within the time period for listing*, but stresses that the listing of species is not to be delayed in any instance past the time period allocated for such listing[.]

(Continued on following page)

the listing process and the CHD process into two separate tracks and analyses. The listing process was to be free of economic analysis, thus, allowing the listing decision to be primarily focused upon biological impacts. H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess., at 20, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2807, 2861. However, the CHD process was left intact, including the required economic analysis of ESA impacts. 16 U.S.C. § 1533. The reason for that economic analysis is clear: to prevent "needless economic dislocation," by the FWS when discharging its duties under the ESA. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

In practice, it is clear that Congress and the FWS differ on the importance of the CHD process. The FWS believes that CHD is an ineffective and inefficient means of securing conservation of the species. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1999). Congress, however, believes that habitat protection, and the accompanying economic balancing are vital processes that the agency must comply with. S.Rep. No. 874, 95th Cong., 2d Sess., at 1 (1978); 16 U.S.C. Sec. 1533(b)(2). This comports with this Court's interpretation that one of the ESA's overall goals and objectives is to prevent "needless economic dislocation." *Bennett v. Spear*, 520 U.S. at 177-78. Also, this comports with the Tenth Circuit's

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H.R. Rep. No. 567, 97th Cong., 2d Sess., at 19-20, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2807, 2819-20 (emphasis added).

holding that the CHD is mandatory and cannot be considered last among the agency's priorities. *See Forest Guardians*, 174 F.3d at 1186.

The Tenth Circuit acknowledged the FWS policy regarding CHD in its *New Mexico Cattle Growers'* opinion:

> The root of the problem lies in the FWS's long held policy position that CHDs are unhelpful, duplicative, and unnecessary. Between April 1996 and July 1999, more than 250 species had been listed pursuant to the ESA, yet CHDs had been made for only two. Further, while we held that making a CHD is mandatory once a species is listed, the FWS has typically put off doing so until forced to do so by court order.

248 F.3d at 1283 (citations omitted). Essentially, the FWS policy has been to avoid designating critical habitat for as long as possible, and then once forced to perform a CHD by court order, to designate a large swath of critical habitat area without true consideration of economic impacts.

The FWS consideration of economic impacts when making a CHD is required by the ESA. *See* 16 U.S.C. § 1533(b)(2) (the FWS must first "take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."). The purpose of this analysis is to balance the beneficial impact to the species with the detrimental environmental, economic and other impacts, so that the FWS may consider excluding

critical habitat areas when the negative impacts outweigh the positive benefits. *See id.* The FWS's interpretation of its obligation to perform the economic analysis during the CHD process, endorsed by the Ninth Circuit in this case, effectively attributes all economic costs to the listing process, and thereby, escapes analysis when designating critical habitat. This interpretation renders the economic analysis hollow, which is clearly at odds with the ESA.

This is especially true where the FWS's interpretation deprives the Petitioner and other interested parties, including the *amici curiae*, of the only opportunity to announce their economic concerns, and have those concerns addressed in a meaningful manner. In this case, during the CHD for the Mexican spotted owl, the FWS conveniently did not account for economic impacts of the CHD that are also attributable to the listing decision, thereby skipping any meaningful economic analysis during the CHD. Such an interpretation of a statute is unreasonable and cannot stand because it renders the required economic analysis meaningless, which is clearly out of harmony with the ESA and is arbitrary and capricious. *See Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936). It also impedes the ESA's goal of preventing "needless economic dislocation." *Bennett*, 520 U.S. at 177-178.

In order to determine what the "economic impact" of a CHD will be, the FWS adopted an incremental baseline approach (hereinafter referred to as "the baseline approach"). *See New Mexico Cattle*

Growers' Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1280 (10th Cir. 2001). In *New Mexico Cattle Growers' Ass'n*, the Tenth Circuit analyzed whether the baseline approach adopted by the FWS met the requirements of the ESA. *See id.* After extensive analysis of the ESA's commands and the approach utilized by the FWS, the Tenth Circuit held that "the baseline approach to economic analysis is not in accord with the language or intent of the ESA." *Id.* at 1285. As the Tenth Circuit explained:

> The baseline approach utilized by the FWS is premised on the idea that the listing of the species (which will occur prior to or simultaneously with the CHD) will have economic impacts that are not to be considered. The primary statutory rationale for this position comes from 16 U.S.C. § 1533(b)(1)(A), which states that listing determinations be made "solely on the basis of the best scientific and commercial data available." Thus, the baseline approach moves any economic impact that can be attributed to listing below the baseline and, when making the CHD, takes into account only those economic impacts rising above the baseline.

248 F.3d at 1280. In that case, New Mexico Cattle Growers successfully argued that all of the economic impacts of the CHD should be taken into account, regardless of whether those impacts are caused co-extensively by any other agency action (such as listing), and even if those impacts would remain in the absence of the CHD. *See id.* at 1283. Therefore,

the co-extensive approach endorsed by the Tenth Circuit allows an agency, "in considering the impact of a CHD (whose purpose is ensuring the survival and recovery of the species), to also consider the economic impact of *listing* the species as endangered (whose sole purpose is ensuring the survival of the species)." *Home Builders Association of Northern California*, No. CIV. S-05-0629 WBS-GGH, 2007 WL 201248, at *5 (E.D. Cal. Jan. 24, 2007); *see also New Mexico Cattle Growers' Ass'n*, 248 F.3d at 1283-1285.

The Tenth Circuit's conclusion has been criticized for permitting an agency to consider the economic impact of listing the species in contravention of the ESA's intent. The Tenth Circuit acknowledged this issue when it made its decision in *New Mexico Cattle Growers' Association*. *See* 248 F.3d at 1284 ("It is true that the ESA clearly bars economic considerations from having a seat at the table when the listing determination is being made."). The Tenth Circuit rationalized its decision by holding that the consideration of economic concerns "at a point subsequent to listing" did not inject economic considerations into the listing process – the listing determination would have already been made by the time that the economic factors were considered. *See id.* at 1285. The Tenth Circuit noted that should the consideration of economic factors preclude a designation of critical habitat, the species would remain subject to many protections, because it would have already been listed without consideration of those economic concerns. *See id.* The Eastern District of California concluded that

this approach was not in contravention of the ESA "as long as the recovery goals of the ESA [were] given economic consideration." *See* 2007 WL 201248 at *6.

The second criticism that courts have made of the Tenth Circuit's decision, including the Arizona district court and the Ninth Circuit, is that the Ninth Circuit had subsequently held that the FWS's definition of "adverse modification" was too narrow. *See Arizona Cattle Growers' Ass'n*, 606 F.3d 1160, 1173 (9th Cir. 2010). The Ninth Circuit stated that the Tenth Circuit had relied upon this "faulty premise," and that, therefore, the FWS could employ the baseline approach in analyzing CHD. *See id.* The regulatory provisions at issue, codified at 50 C.F.R. § 402.02, defined the terms "adverse modification," which is applied in the context of CHD, and "jeopardy," which is applied in the context of listing. The language of the "adverse modification standard" was problematic, because it stated that adverse modification was action "that appreciably diminishes the value of critical habitat for both the survival *and* recovery of a listed species." *See* 50 C.F.R. § 402.02 (emphasis added). Furthermore, the jeopardy standard stated that it included action reasonably expected "to reduce appreciably the likelihood of both the survival and recovery of a listed species." *See id.* Therefore, the adverse modification standard was subsumed in the jeopardy standard. Because the same considerations would be made at the listing stage (where economic considerations could not be taken into account) and at the CHD stage (where the ESA required those same concerns

to be taken into consideration), the Tenth Circuit determined that any economic analysis done while using the baseline approach – which failed to consider any economic impacts of listing – would be "virtually meaningless." *See New Mexico Cattle Growers' Ass'n*, 248 F.3d at 1285.

However, the district court in this litigation, as well as the courts to which it cited in determining not to follow the Tenth Circuit, argued that the Tenth Circuit's reasoning was invalidated by this Court's decision in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, 1071 (9th Cir. 2004). *See Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp.2d 1013, 1032 (D. Ariz. 2008). In *Gifford Pinchot*, this Court determined that the adverse modification standard definition offended the "ESA because the ESA was enacted not merely to forestall the extinction of species, but to allow a species to recover to a point where it may be delisted." *See* 378 F.3d at 1070. Under the definition contained in 50 C.F.R. § 402.02, critical habitat could be diminished to the point where recovery might be impacted, but as long as survival was not impacted, the action was permitted. *See id.* The Arizona district court held that the baseline approach of assessing economic impacts associated with the designation of critical habitat was in compliance with the ESA's commands, and in doing so, declined to follow the Tenth Circuit on this issue. *See Arizona Cattle Growers' Ass'n*, 534 F. Supp.2d at 1034. On appeal, the Ninth Circuit affirmed the district court's decision, holding that the baseline

approach was the "more logical" approach. *See Arizona Cattle Growers' Ass'n*, 606 F.3d at 1173.

These contradictory holdings in the Ninth and Tenth Circuits present a clear circuit split which will result in federal agencies being required to administer the ESA differently in different portions of the United States. Problematic in any circumstances, this is especially troublesome because these are neighboring circuits, where critical habitat is often designated across circuit lines. *Amici* believe that the inconsistency of the ESA administration in the American West could be detrimental to the economics of many Western industries.

II. ECONOMIC EFFECTS OF THE DESIGNATION OF CRITICAL HABITAT

The economic effects that can occur due to the designation of critical habitat, apart from those attributable to the listing of a species, should not be underestimated. This is particularly true when the FWS designates critical habitat in vast areas, oftentimes encompassing areas that are not currently being used by the species at issue. Far from being limited to the Southwest, where the Mexican spotted owl critical habitat is located, the issues presented in this litigation are present throughout the United States. Because there are now conflicting interpretations of how the FWS should engage in economic analysis of critical habitat, the administration of the

ESA will not be executed uniformly throughout the United States.

Many examples of CHD since the Tenth Circuit's decision in *New Mexico Cattle Growers* demonstrate the importance of the utilization of the "co-extensive" approach rather than the "baseline" approach. In several instances, the FWS and the National Marine Fisheries Service ("NMFS") have significantly reduced the size of critical habitat areas after conducting an economic analysis such as that endorsed by the Tenth Circuit. *See e.g.* 75 Fed. Reg. 59900 (September 28, 2010) (designation of critical habitat for the black abalone); *see also* 74 Fed. Reg. 52300 (October 9, 2009) (designation of critical habitat for the green sturgeon); 74 Fed. Reg. 29300 (June 19, 2009) (designation of critical habitat for the Atlantic salmon); 70 Fed. Reg. 52630 (September 2, 2005) (designation of critical habitat for the Pacific salmon and steelhead (Northwest)); 70 Fed. Reg. 52488 (September 2, 2005) (designation of critical habitat for the Pacific salmon and steelhead (California)); 68 Fed. Reg. 46684 (August 6, 2003) (designation of critical habitat for vernal pool crustaceans and plants); 68 Fed. Reg. 39624 (July 2, 2003) (designation of critical habitat for Hawaiian plant species); *and* 68 Fed. Reg. 13370 (March 19, 2003) (designation of critical habitat for the Gulf sturgeon).

In many of the above-cited examples, the excluded areas of critical habitat based on economic concerns was significant. In one instance, the NMFS excluded a total of 1191 stream miles and 402 square miles of

estuarine habitat within the CHD for Pacific salmon and steelhead in California because the benefits of including those areas within the CHD did not outweigh the economic detriments that CHD would result in for the surrounding communities. *See* 70 Fed. Reg. at 52529. In another example, the NMFS and FWS excluded a total of 54,030 acres in California and Oregon from CHD for vernal pool crustaceans and plants. *See* 68 Fed. Reg. at 46749, 46750. There, the NMFS noted that the economies of several California counties would be severely impacted if reductions to the proposed CHD area were not made, and that these economic effects would be particularly severe due to already high unemployment rates within those counties. *See id.* at 46745-46746.

These exclusions to CHD based on the "co-extensive" approach favored by the Tenth Circuit have not been limited to the western United States. In fact, the utilization of the "co-extensive" approach resulted in the exclusion of major shipping channels from CHD for the Gulf sturgeon. *See* 68 Fed. Reg. at 13402. This reduction lessened economic impacts of the Gulf sturgeon CHD in Florida, Alabama, Louisiana, and Mississippi. *See id.* at 13391-96. In a further example, the FWS significantly reduced the size of the CHD for Hawaiian plant species – a reduction that affected private land, state land, state trust land, and United States military bases. *See* 68 Fed. Reg. at 39681.

It is likely that few, if any, of these reductions in the size of CHDs would have occurred through using

the "baseline" approach endorsed by the Ninth Circuit. By relying on the "baseline" approach, the FWS' economic analyses are unjustifiably narrow and underestimate the economic impacts resulting from the proposed designation of critical habitat. The designation of critical habitat can have severe economic impacts, both locally and regionally, such as increasing the costs of development and agriculture, reducing the amount of land available for development and agriculture, and causing significant delays (or even abandonment) in the completion of projects. While the most obvious economic effects of CHD increase costs by making it more difficult to obtain necessary permits and reduce the size of individual projects, economic effects of CHD go far beyond these costs. Researchers have noted that the economic effects of CHD may not only occur where activities would be impacted by the presence of a federal nexus, where the activity in question is carried out with a federal permit or federal funding. *See* David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics, Agricultural and Resource Economics Update (August 1, 2003). This economic impact can be due to a "signaling" effect, where other agencies – including local and state agencies – take a more conservative approach to permitting when federal agencies in the same area are subject to CHD regulations. *See id.*

The list of activities which the FWS maintains may adversely affect the critical habitat may have significant historic, cultural, economic, social, or

health effects. The *amici* in this litigation are concerned about possible economic impacts that will, in turn, have significant social and cultural impacts on their way of life. Livestock grazing has occurred on public lands in the southwestern United States since 1598. *Summary of the Historical Encyclopedia of New Mexico, New Mexico Historical Association, Albuquerque, New Mexico* (1945). Thus, it is an entrenched component in the history, culture, economy, and society of the Southwest. The designation of critical habitat may lead to the disintegration of the history, culture, and economy of communities associated with or dependent on livestock grazing, with consequent social and health effects in both the local and regional contexts, notwithstanding the FWS's conclusory statements to the contrary. Those effects are indirect but foreseeable. *See* 40 C.F.R. § 1508.8(b) (stating that indirect effects are still reasonably foreseeable and include effects related to induced changes in land use patterns). All of these impacts are a result of the CHD, but could also be a consequence of the listing of the endangered species at issue. Therefore, under the baseline approach authorized by the Ninth Circuit, none of the economic impacts of listing would ever be considered, to the detriment of the *amici curiae* and the Petitioner. It is for this reason that the *amici curiae* urge this Court to grant Petitioner's petition for writ of certiorari.

CONCLUSION

Amici Curiae urge the Supreme Court to grant Petitioner's petition for writ of certiorari, and to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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