No. 13-1244

In the Supreme Court of the United States

DRAKES BAY OYSTER COMPANY, ET AL., PETITIONERS

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a challenge to the Secretary of the Interior's decision not to exercise his particularized authority, under an ad hoc statutory provision, Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, § 124, 123 Stat. 2932, to grant petitioners a permit to engage in a private commercial operation to cultivate oysters on lands owned by the United States in Point Reyes National Seashore. The questions presented are:

1. Whether the court of appeals, which considered and rejected on the merits all of petitioners' arguments meaningfully erred in its description of the scope of its review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

2. Whether the Secretary committed prejudicial error under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, when he both prepared an Environmental Impact Statement (EIS) under NEPA and considered petitioners' objections to that EIS before making his decision.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-51) is not yet reported, but is available at 2014 WL 114699. The opinion of the district court (Pet. App. 104-152) is reported at 921 F. Supp. 2d 972.

JURISDICTION

The original judgment of the court of appeals was entered on September 3, 2013. The court of appeals denied rehearing and issued an amended opinion on January 14, 2014 (Pet. App. 1-51). The petition for a writ of certiorari was filed on April 11, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1962, in an effort to "preserve, for purposes of public recreation, benefit, and inspiration, a portion

of the diminishing seashore of the United States that remains undeveloped," Congress designated an exceptionally biodiverse portion of Marin County, California as Point Reyes National Seashore. Pet. App. 5 (quoting Point Reyes National Seashore Act, Pub. L. No. 87-657, 76 Stat. 538). That area includes a series of estuarial bays, known as Drakes Estero, in which a commercial oyster facility had been operating since the 1950s. *Id.* at 5-7. In 1972, the United States purchased the five acres of land belonging to that facility. *Id.* at 7. Under the purchase agreement, the owner of the facility retained a 40-year right of occupancy and use to process and sell oysters. *Ibid.* The purchase agreement provided that, at the end of that 40-year term, the Secretary of the Interior "may" issue a special-use permit that would allow additional operations. *Ibid.*[1]

In 1976, Congress designated certain portions of Point Reyes National Seashore as "wilderness" areas under the Wilderness Act, 16 U.S.C. 1131 *et seq.* Act of Oct. 18, 1976, Pub. L. No. 94-544, 90 Stat. 2515 (1976 Point Reyes Wilderness Act). Pursuant to the Wilderness Act, which protects "the benefits of an enduring resource of wilderness" for "present and future generations," 16 U.S.C. 1131(a), a wilderness area may not contain, *inter alia*, any "commercial enterprise." 16 U.S.C. 1133(c). Congress also designated other portions of Point Reyes National Sea-

[1] The purchase agreement addressed only the upland property itself and did not reserve to the oyster facility the right to cultivate oysters in the estero itself. C.A. E.R. 583-601. In 2008, the National Park Service issued a temporary permit, set to expire on the same date as the 40-year reserved rights, that authorized the in-water oyster-cultivation operations. *Id.* at 200-226.

shore, including Drakes Estero, as "potential wilderness additions," specifying that they would be converted to wilderness areas when the Secretary certified that all uses "prohibited by the Wilderness Act ha[d] ceased." Act of Oct. 20, 1976, Pub. L. No. 94-567, § 3, 90 Stat. 2692. In designating Drakes Estero as a potential wilderness area, rather than an actual wilderness area, Congress "took into account the Department of the Interior's position that commercial oyster farming operations taking place in Drakes Estero," as well as certain rights in the estero that were reserved to the State of California, "rendered the area 'inconsistent with wilderness.'" Pet. App. 6 (quoting H.R. Rep. No. 1680, 94th Cong., 2d Sess. 6 (1976)).

2. Petitioners are the successors-in-interest to the owner of the oyster business who conveyed the business's land to the United States in 1972. Pet. App. 7. In 2004, petitioners agreed to purchase the oyster farm, and in 2005, they closed on that purchase. *Ibid.* The purchase documents specifically informed petitioners that the right to operate the farm in the National Seashore would expire in 2012. *Ibid.* In addition, the Department of the Interior reached out to petitioners to ensure that before they "'closed escrow on the purchase,'" they were "aware of the [Department's] legal position" regarding the designation by Congress as potential wilderness of federally owned submerged lands and associated waters of Drakes Estero on which oysters are cultivated. *Ibid.* The Department sent petitioners a copy of a legal memorandum expressing the view that the Department was "mandated by the Wilderness Act, the Point Reyes Wilderness Act and its Management Policies to con-

vert potential wilderness, i.e., the [oyster-cultivation] tract and the adjoining Estero, to wilderness status as soon as the non conforming use can be eliminated." *Id.* at 8. In a separate communication with petitioners two months later, the Department "reiterated its guidance" regarding petitioners' purchase and specifically informed petitioners that "'based on our legal review, no new permits will be issued'" after 2012. *Ibid.*

In 2009, Congress enacted the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904 (Appropriations Act), which included a special provision addressing oyster cultivation in Drakes Estero. Specifically, Section 124 of the appropriations statute provided that, "notwithstanding any other provision of law," at any time before petitioners' time-limited rights expired in 2012, "the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization" that would allow petitioners to continue their operations for an additional ten years. 123 Stat. 2932. Section 124 additionally specified that that "[n]othing in this section shall be construed to have any application to any location other than Point Reyes National Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore." *Ibid.* Congress enacted Section 124 after considering, but ultimately not adopting, a proposal that would have mandated that the Secretary grant petitioners a permit. Pet. App. 8.

In 2010, petitioners requested that the Secretary exercise his authority under Section 124 to grant them a permit. Pet. App. 10. As part of the Secretary's

consideration of whether to do so, the Department prepared an Environmental Impact Statement (EIS) detailing the potential effects on the environment of issuing or not issuing the requested permit. *Id.* at 10 & n.2. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, generally requires preparation of an EIS—which will inform, but not dictate the result of, an agency's decisional process—whenever a federal agency proposes a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C); 40 C.F.R. Pts. 1502, 1508; see *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983). Although the Secretary believed that Section 124's "notwithstanding any other provision of law" clause rendered NEPA inapplicable in this case, he nevertheless "determined that it is helpful to generally follow the procedures of NEPA" and thus elected to do so in this circumstance. Pet. App. 10 n.2; see *id.* at 10.

The Department's final EIS generally concluded that removing the oyster company's equipment from Drakes Estero would have "short-term minor adverse impacts" on the environment (for example, by temporarily disturbing sediment at the bottom of the estero), but would have "long-term beneficial impacts" for plant life, native shellfish, fish, harbor seals, wilderness, and some visitors. See C.A. Supp. E.R. 50-75 (Final EIS li-lxxvi). The final EIS responded to comments that the National Academy of Sciences had offered, as provided in a House Conference Report, on an earlier draft EIS. Pet. App. 11; see H.R. Rep. No. 331, 112th Cong., 1st Sess. 1057 (2012). Petitioners both commented on the draft EIS and sent the

Secretary a "scientific critique" of the final EIS in advance of the Secretary's decision about whether to issue a permit. Pet. App. 10-11, 33-34.

The Secretary ultimately decided to allow the existing oyster-cultivation rights to expire on their own terms without issuing a permit. Pet. App. 153-166; see *id.* at 12-13. The Secretary "explained that his decision was 'based on matters of law and policy,' including the 'explicit terms of the 1972 conveyance from [the previous owner] to the United States' and 'the policies of [the National Park Service] concerning commercial use within a unit of the National Park System and nonconforming uses within potential or designated wilderness, as well as specific wilderness legislation for Point Reyes National Seashore.'" *Id.* at 12. The Secretary emphasized in particular that "his decision was 'based on the incompatibility of commercial activities in wilderness.'" *Ibid.* The Secretary stated that he had found the draft EIS and final EIS "'helpful,'" but specifically noted petitioners' scientific critique of the final EIS; explained that he had not relied on EIS data "'that was asserted to be flawed'"; and further explained that neither the draft nor the final EIS had been "'material to the legal and policy factors that provide[d] the central basis' for his decision." *Id.* at 12, 34.

3. Petitioners filed suit in district court, asserting that the Secretary's decision violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 13. The district court denied petitioners' request for a preliminary injunction. *Id.* at 104-152. The district court reasoned that Section 124 "afforded the Secretary discretion to make his Decision without sufficient meaningful standards for the Court to re-

view," and it accordingly concluded that the decision was unreviewable under 5 U.S.C. 701(a)(2), which provides that the APA does not apply to agency action "committed to agency discretion by law." Pet. App. 131; see *id.* at 129-136. The district court additionally reasoned that, even if the decision was reviewable, petitioners were unlikely to prevail on the merits and could not satisfy the prerequisites for obtaining preliminary injunctive relief. *Id.* at 136-151.

The court of appeals affirmed, concluding both that petitioners were unlikely to prevail on the merits and that the equities did not favor a preliminary injunction. Pet. App. 1-37; see *id.* at 103-104 (granting injunction pending appeal). As a threshold matter, the court of appeals "disagree[d] in part" with the district court's conclusion that the Secretary's decision was unreviewable. *Id.* at 14. Relying on its previous decision in *Ness Investment Corp.* v. *United States Department of Agriculture*, 512 F.2d 706 (9th Cir. 1975), which petitioners themselves had cited in their opening brief, the court of appeals concluded that it could review whether the Secretary's decision "violated any legal mandate contained in Section 124 or elsewhere," including NEPA. Pet. App. 14-16; see Pet. C.A. Br. 21-23. The court of appeals did, however, "agree with the district court" that it could not "review the Secretary's ultimate discretionary decision whether to issue a new permit." Pet. App. 14-15.

Reviewing the Secretary's decision to that extent, the court of appeals concluded that the Secretary's "decision did not violate any statutory mandate." Pet. App. 21. The court rejected petitioners' argument that Section 124 had effectively required the Secretary to issue a permit, *id.* at 21-22, as well as petition-

ers' argument that the Secretary had misinterpreted Section 124 and other federal laws, *id.* at 22-28. The court of appeals also concluded that, although the Secretary had been incorrect in his belief that Section 124's "notwithstanding" clause rendered NEPA wholly inapplicable, the Secretary's decision not to issue a new permit had not violated NEPA. *Id.* at 16, 28-34. The court was "skeptical that the decision to allow the permit to expire" qualified as the type of action for which NEPA requires an EIS, *id.* at 30; characterized the Secretary's decision as "essentially an environmental conservation effort," a type of action that had "not triggered NEPA in the past," *ibid.*; and reasoned that the "relatively minor harms" identified in the final EIS "do not by themselves 'significantly affect' the environment in such a way as to implicate NEPA," *id.* at 31-32 (quoting 42 U.S.C. 4332(2)(C) (brackets omitted)). But the court "[u]ltimately" concluded that it "need not resolve whether NEPA compliance was required because, even if it was, the Secretary conducted an adequate NEPA review process and any claimed deficiencies are without consequence." *Id.* at 32.

The court of appeals observed that the "government produced a lengthy EIS, which the Secretary considered and found 'helpful.'" Pet. App. 32. Although the Secretary had acknowledged in litigation that NEPA compliance had been "less than perfect," the court recognized that "[r]elief is available under the APA only for 'prejudicial error'" and reasoned that petitioners were "unlikely to succeed in showing that the [NEPA] errors were prejudicial." *Ibid.* (quoting 5 U.S.C. 706 and citing *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644,

659 (2007)). The court considered petitioners' claims that "the final EIS was based on flawed science and that the absence of [a] thirty-day comment period [on the final EIS] denied [them] an opportunity to fully air [their] critique, specifically with regard to conclusions regarding the 'soundscape' of the estero." *Id.* at 33. The court found, however, that "[n]othing in the record suggests that [petitioners were] prejudiced by any shortcomings in the final soundscape data." *Ibid.* The court observed that petitioners "sent the Secretary [their] scientific critique before he issued his decision" and that the Secretary "specifically referenced that communication and stated that he did not rely on the 'data that was asserted to be flawed.'" *Id.* at 33-34. The court also reasoned that NEPA's requirement of a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" did not require that the Secretary definitively resolve all controversies about the data. *Id.* at 34 (quoting *Seattle Audobon Soc'y* v. *Espy*, 998 F.2d 699, 703 (9th Cir. 1993)).

Judge Watford dissented. Pet. App. 38-51. In his view, the Secretary's decision not to issue the permit had relied on an interpretation of the 1976 Point Reyes Wilderness Act that Congress had rejected by enacting Section 124, and was thus "arbitrary, capricious, or otherwise not in accordance with law." *Id.* at 38-49. Judge Watford also believed that the equities favored a preliminary injunction. *Id.* at 49-51.

ARGUMENT

Petitioners contend that the court of appeals applied an erroneously narrow scope of review under the APA (Pet. 14-27); incorrectly concluded that NEPA does not apply to the Secretary's decision (Pet. 27-32);

and misapplied the prejudicial-error doctrine in the context of their NEPA claim (Pet. 32-33). Those contentions, which largely rest on a misunderstanding of the court of appeals' decision, lack merit. The decision below does not conflict with any decision of this Court or any other court of appeals, and further review, in this interlocutory posture, of petitioners' challenge to the Secretary's discretionary decision under the unique terms of Section 124 is unwarranted.

1. a. The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704; see 5 U.S.C. 702 (allowing for review of certain claims "seeking relief other than money damages"); 5 U.S.C. 703 (specifying form and venue for APA actions). The scope of such review, as specified under 5 U.S.C. 706, includes authority for the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The APA separately specifies, in 5 U.S.C. 701(a)(2), that judicial review is not available "to the extent that * * * agency action is committed to agency discretion by law."

Petitioners' assertion (Pet. 12) that the court of appeals "held that it lacked jurisdiction over [their] APA claim" is mistaken. Although the government argued that the Secretary's decision was wholly unreviewable based on Section 701(a)(2), the court of appeals expressly rejected that argument. Pet. App. 14. The court instead concluded that the APA permits review of whether the Secretary's decision in this case "violated any legal mandate contained in Section 124 or elsewhere." *Ibid.* The court of appeals' conclusion on

that point substantially accords with the arguments that petitioners themselves had made about the scope of review applicable to their APA claim. See Pet. C.A. Br. 20-24; see also Pet. App. 15 (relying on *Ness Investment Corp.* v. *United States Department of Agriculture*, 512 F.2d 706 (9th Cir. 1975), and stating that the "parties agree that the *Ness* framework applies").

The court of appeals accordingly considered on the merits (and rejected) every objection that petitioners raised against the Secretary's decision. In their opening brief on appeal, petitioners asserted that the Secretary's decision "was based on four misinterpretations of law" and argued that the Secretary had misinterpreted or violated Section 124, the wilderness-designating statutes Congress passed in 1976, a related 1978 statute, and NEPA. Pet. C.A. Br. 25-31; see Pet. App. 20 (describing petitioners' arguments). Those are the sorts of arguments that the court of appeals held it could address, and the court of appeals in fact addressed (and rejected) all of them. Pet. App. 22-34; see *id.* at 34-35 (concluding that petitioners lacked standing to raise a separate argument challenging the Secretary's notice in the Federal Register of his intent to designate Drakes Estero as wilderness).[2] The court of appeals also specifically addres-

[2] In a footnote in their opening brief, petitioners asserted that the Secretary's decision was arbitrary and capricious because it contained inconsistent statements that were not adequately explained and did not "clarify or explain" how the Secretary identified the portions of the EIS on which he relied. Pet. C.A. Br. 26 n.7. To the extent that those arguments were adequately preserved, see, *e.g.*, *Estate of Saunders* v. *Commissioner*, 745 F.3d 953, 962 (9th Cir. 2014) ("Arguments raised only in footnotes * * * are generally deemed waived."), the court of appeals effectively addressed them. First, it concluded that, in context, the

sed and rejected the various arguments made by the dissenting judge. *Id.* at 17-18 & n.5, 25 n.8.

b. Notwithstanding that the court of appeals addressed on the merits all of petitioners' arguments, petitioners nevertheless contend (Pet. 14-27) that this Court should grant certiorari to determine whether the court of appeals applied the proper scope of review under the APA. That contention is misguided.

The court of appeals stated that it could not "review the Secretary's ultimate discretionary decision whether to issue a new permit" and similarly suggested that it could not "review an alleged abuse of discretion regarding 'the making of an informed judgment by the agency.'" Pet. App. 14-15 (quoting *Ness Investment Corp.*, 512 F.2d at 715). The court of appeals' statements are best interpreted to accord with the well-settled principle that "a court is not to substitute its judgment for that of the agency" in balancing various otherwise-permissible policy considerations. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That interpretation finds substantial support in the circuit precedent on which the decision below relied, which itself rests on the observation that "this circuit has not been quick to approve review of allegations that an agency abused

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Secretary's decision contained no meaningful inconsistency, recognizing that this Court's precedents require a reviewing court to "uphold even 'a decision of less than ideal clarity' so long as 'the agency's path may reasonably be discerned.'" Pet. App. 23 (quoting *FCC* v. *Fox Television Stations*, 556 U.S. 502, 513-514 (2009)). Second, the court of appeals found the Secretary's decision to be "unambiguous" about the Secretary's non-reliance on the "specific topics" that were the subject of petitioners' criticism, and it rejected the argument that NEPA required the Secretary to address the issue any further. *Id.* at 34.

its discretion *merely* by deciding an issue, involving agency expertise, adversely to a complaining party." *Ness Investment Corp.*, 512 F.2d at 714 (emphasis added).

Petitioners' alternative reading of the court of appeals' opinion does not warrant this Court's review. Petitioners appear (*e.g.*, Pet. 17) to interpret the opinion to misapply the APA by allowing review of arguments that the Secretary's decision violated some specific statutory (or other legal) requirement, while precluding review of arguments that the decision was "arbitrary and capricious" for other reasons—for example, because it failed to provide a "satisfactory explanation for [his] action," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. But it is not clear that the court of appeals intended to make such a distinction, and it would be inappropriate to resolve any ambiguity in the court's language in a manner that presumes the legal error that petitioners assert it committed. Cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 385-386 & n.2 (2008) (cautioning against the assumption that a lower court applied an incorrect legal rule).

Indeed, the court stated that it had "no measuring stick against which to judge [petitioners'] various claims that the Secretary's *policy determination* was mistaken," Pet. App. 26 (emphasis added), reinforcing that the only type of arguments it believed to be unreviewable were arguments that would invite second-guessing of the agency's policy choices. See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. In any event, identifying the precise line that the court was attempting to draw is purely academic, since the court went on to consider each specific argument that peti-

tioners actually made. The petition does not identify any particular, specific, reviewable arguments that were presented to, but disregarded by, the court of appeals. Compare, *e.g.*, Pet. 21 (asserting that petitioners "argued in [their] briefs that the agency decision was an abuse of discretion in violation of APA § 706(2)(A)"), with Pet. C.A. Br. 15 (arguing that "the Secretary's decision rested on four misinterpretations of law *and thus* constituted an abuse of discretion under the APA") (emphasis added); Pet. App. 22-34 (addressing those statute-based arguments).

Even if petitioners had identified some adequately preserved argument that the court of appeals did not consider, this Court's review would still be unwarranted. The particular agency decision at issue in this case, which was undertaken pursuant to a statute that is expressly limited to the specific circumstances of petitioners' oyster operation, Appropriations Act, § 124, 123 Stat. 2932, is not in itself important enough to justify further review (particularly in the interlocutory posture of a preliminary-injunction request). Nor does the decision below have any obvious prospective importance for APA review of decisions under other statutes. It is far from certain that any future panel in the court of appeals would interpret the court of appeals' statements in this case the way that petitioners do, or rely on those statements to foreclose consideration of some particular argument in some alternative statutory context. Should the decision below in fact give rise to such issues in future cases, there would be time enough for this Court to grant certiorari at that point, by which time the contours of circuit law would presumably be clearer and meaningful review would be possible.

c. Petitioners' suggestion (Pet. 14-27) that the Court should grant review in this case to resolve asserted circuit conflicts over the application of the APA's "no law to apply" standard is misplaced. That standard is drawn from this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), which explained that 5 U.S.C. 701(a)(2) renders an agency action unreviewable when the governing statute is "drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)); see *Webster* v. *Doe*, 486 U.S. 592, 599 (1988). Far from being central to this case, that standard is mentioned in the decision below only in a parenthetical in a "*see also*" citation. Pet. App. 14. And the primary point of the paragraph in which that citation appears was to *reject* the government's argument that "under Section 124, the Secretary's decision was 'committed to agency discretion by law'" and was thus wholly unreviewable. *Ibid.* (quoting 5 U.S.C. 701(a)(2)).

Because the court of appeals did not conclude that there was "no law to apply" in this case, the decision below does not implicate any of the circuit conflicts alleged by petitioners. First, the court of appeals did not express a view about whether an agency action that would otherwise be unreviewable under the terms of Section 701(a)(2) might nevertheless be reviewable under Section 706(2)(A). See Pet. 14 & nn.20-21. Petitioners' assertion of a circuit conflict on that issue, moreover, places decisions of the court below on both sides of that alleged conflict, *ibid.*, and thus suggests that the issue would most appropriately be resolved by the court of appeals itself. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Second, because the court of appeals reviewed the Secretary's decision in this case for compliance with every statutory provision on which petitioners relied, see Pet. App. 21-34, petitioners would not benefit from any review of the circumstances under which APA review is unavailable. See Pet. 15-17 & nn.22-26. Nor would this case be an appropriate vehicle for reviewing that issue, given the unique and limited scope of the statute (Section 124) that authorized the Secretary's decision in this case. Third, and relatedly, this case certainly does not implicate any asserted circuit conflict about the application of APA review in the context of statutes that formed no part of the backdrop for the Secretary's decision about petitioners' permit. See Pet. 19-20 & nn.27-31.

2. Petitioners next contend (Pet. 27-32) that the court of appeals erred in holding that NEPA does not apply to "conservation efforts" by federal agencies. That contention reflects a misunderstanding of the court of appeals' decision. Although the court of appeals' opinion contained some discussion of whether NEPA applied to the Secretary's decision, Pet. App. 29-32, the court of appeals went on to clarify that "[u]ltimately, *we need not resolve whether NEPA compliance was required* because, even if it was, the Secretary conducted an adequate NEPA review process and any claimed deficiencies are without consequence," *id.* at 32 (emphasis added). The court of appeals' discussion of NEPA's applicability is accordingly dictum and would not bind any future circuit panel.[3]

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[3] A recent Ninth Circuit decision referred to the discussion of NEPA's applicability in the decision below without suggesting it was dictum. *San Luis & Delta-Mendota Water Auth.* v. *Jewell*,

This case would, in any event, be an unsuitable vehicle for reviewing the circumstances in which an agency has undertaken a "major Federal action[] significantly affecting the quality of the human environment" that would trigger the requirements of NEPA. 42 U.S.C. 4332(2)(C). First, even assuming the court of appeals' discussion of that issue were not dictum, the court of appeals' conclusion that the Secretary did sufficiently comply with NEPA, Pet. App. 32, means that the question of NEPA's applicability is not outcome-determinative in this case. Second, any review of NEPA's applicability in this case would require consideration of the threshold issue of whether Section 124's "notwithstanding any other provision of law" supersedes NEPA's requirements, which could obviate any need to reach the question petitioners present. § 124, 123 Stat. 2932. Third, even putting the "notwithstanding" clause to one side, review of whether NEPA applies in the unique context of allowing a permit to lapse under Section 124 would not be especially likely to provide useful guidance in cases involving decisions under other statutes. Review in this case would not necessarily resolve, for example, any conflict between the Ninth and Tenth Circuits regarding the application of NEPA to the designation of a critical habitat under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* See Pet. 28.

Furthermore, petitioners are incorrect in their bottom-line position that the Secretary's decision in this case was a "major Federal action[]," 42 U.S.C. 4332(2)(C), that triggered NEPA. The decision in this

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747 F.3d 581, 652 (2014). It declined, however, to read the decision below "to stand for the proposition that efforts to preserve the natural environment are per se exempt from NEPA." *Ibid.*

case did not alter the legal status quo. This is not a circumstance in which an agency is required by statute or regulation to act on a permit application. Rather it is a circumstance in which rights reserved in a contract conveying land to the United States were set to expire on their own terms, and the agency did nothing to change that situation. Allowing such rights to expire is not naturally characterized as "major agency action." And none of the circuit decisions relied on by petitioner suggests that NEPA would apply in a circumstance like this. See *Catron Cnty. Bd. of Comm'rs* v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1432 (10th Cir. 1996) (applying NEPA to a critical-habitat determination under the Endangered Species Act); *Friends of Fiery Gizzard* v. *Farmers Home Admin.*, 61 F.3d 501, 502 (6th Cir. 1995) (applying NEPA to a "water impoundment and treatment project to be funded by the agency"); see Pet. App. 31 n.11 (listing different factual contexts of other decisions on which petitioners have relied).

3. Petitioners finally contend (Pet. 32-33) that the decision below misapplies the statutory requirement that a court take "due account * * * of the rule of prejudicial error" in reviewing agency action. 5 U.S.C. 706; see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659 (2007). That fact-bound contention does not warrant this Court's review. The court of appeals correctly determined, based on a review of the record in this case, that petitioners had "shown no prejudice" from claimed "'technical' violations" of NEPA stemming from "the Secretary's failure to publish the EIS more than thirty days before he made his decision and the Secretary's framing of the extension denial in the form of a

Decision Memorandum rather than a Record of Decision." Pet. App. 32; see *id.* at 32-34. In particular, the court of appeals observed that the Secretary "was well aware of" petitioners' criticism of the EIS; specifically referenced that criticism in his decision not to issue a permit; and made clear that the disputed environmental data "did not carry weight in his decision." *Id.* at 34; see *id.* at 33.

Petitioners err in suggesting (Pet. 33) that the court of appeals' decision is in tension or conflict with the D.C. Circuit's decision in *Gerber* v. *Norton*, 294 F.3d 173 (2002). In that case, an agency failed to disclose information highly relevant to a permit application during the public-comment period, thereby depriving the plaintiffs of the opportunity to raise issues concerning that information until after the permit was approved. *Id.* at 176-178. The D.C. Circuit found the procedural error to be prejudicial. *Id.* at 182-184; see *id.* at 178-182. The D.C. Circuit rejected the agency's argument that the agency actually knew about and considered, before authorizing the permit, the issues that the plaintiffs later raised. *Id.* at 182-183. The D.C. Circuit also rejected the agency's argument, which relied on post hoc declarations, that the "procedural error was harmless because, after [the plaintiffs] filed their complaint and elaborated on their concerns, the agency nonetheless concluded that it would not have changed its decision had it known of those concerns at the time it issued the permit." *Id.* at 183.

In this case, by contrast, the Secretary was "well aware" of petitioners' objections *before* he made his decision. Pet. App. 33-34. And the conclusion that those objections would have no effect on the decision

was not a "post hoc rationalization[]," *Gerber*, 294 F.3d at 184, but instead a determination that the Secretary expressly reached at the time of his decision, see Pet. App. 34. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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