No. 14-402

In the Supreme Court of the United States

STATE WATER CONTRACTORS, et al.,
Petitioners,
v.
SALLY JEWELL, SECRETARY OF THE INTERIOR, et al.,
Respondents.

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

BRIEF OF *AMICI CURIAE* FARM CREDIT WEST, ACA; FARM CREDIT SERVICES OF AMERICA; FARM CREDIT MID-AMERICA, ACA; NORTHWEST FARM CREDIT SERVICES; GREENSTONE FARM CREDIT SERVICES; FARM CREDIT EAST; 1ST FARM CREDIT SERVICES; AMERICAN AGCREDIT; AGSTAR FINANCIAL SERVICES, ACA; FARM CREDIT ILLINOIS; UNITED FCS, ACA; YOSEMITE FARM CREDIT, ACA; COBANK, ACB; NATIONAL COUNCIL OF FARMER COOPERATIVES; AMERICAN FARM BUREAU FEDERATION; WESTERN GROWERS ASSOCIATION AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

A. Farm credit associations throughout the country provide critical financing that supports California and national agriculture.

Collectively, the farm credit associations filing this brief represent over 270,000 members in 30 states and over 60% of the total loan volume of the 98-year-old Farm Credit System, a nationwide network of banks and retail lending associations chartered by Congress to support the borrowing needs of United States agriculture and the nation's rural economies. The Farm Credit System was the result of a presidential commission appointed in 1908 by Theodore Roosevelt to address the problems facing a predominantly rural population, including a lack of adequate agricultural credit. Today, farmers, ranchers, agribusiness, rural homeowners and rural utilities depend on the Farm Credit System's funding and services to produce high quality food and agricultural products enjoyed in the United States and around the globe. The loans held by the lending institutions filing this brief reflect more than $120 billion in financing and investment in the nation's farms and food production.

Farm Credit West, ACA (FCW) is a cooperative lending institution that finances all types of agricultural operations throughout much of California.

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[1] No person other than amici curiae or their counsel authored this brief in whole or in part, or made a monetary contribution to its preparation or submission. All parties received notice of the intent to file this *amicus curiae* brief 10 days prior to the due date for such brief and have consented to the filing of this brief pursuant to Supreme Court Rule 37.

Its borrowers range from small family farms to large agri-business operations. The borrowers produce a broad spectrum of agricultural products including row crops, grains, fruit and nuts, wine grapes, and beef and dairy products. FCW's approximately 4,000 borrowers represent $31.8 billion in agricultural production in California each year. FCW provides farmers and ranchers with long-term loans for the purchase of agricultural real estate and extends commercial loans and lines of credit to manage the cycles of farming and meet the day to day financial needs of farmers and ranchers. In addition, FCW extends operating credit to farmers during a year when a lack of water or other conditions make it impossible or difficult for them to produce a full crop. Providing these short-term loans on a one- to two-year basis allows farmers to stay in business and bounce back from a drought year. FCW's loans also support the critical long-term investments that have enabled California to become the most productive farm state in the union. For example, over the past several decades California farmers have invested heavily in water conservation measures (including highly efficient drip and micro irrigation systems) utilizing credit provided by FCW and others. California farmers have also engaged in cooperative ventures with environmental organizations to preserve and enhance habitat for fish, wildlife and waterfowl.

In addition to FCW, the following farm credit associations, all members of the Farm Credit System, serve the financial needs of the farmers and ranchers who produce the food to feed our nation.

Farm Credit Services of America (FCSAmerica) is a customer-owned financial cooperative dedicated to serving the agricultural credit and financial needs of approximately 50,000 farmers, ranchers and rural residents in Iowa, Nebraska, South Dakota and Wyoming, including the special needs of young and beginning producers.

Farm Credit Mid-America, ACA, (FCMA) is a cooperative lending institution that finances all types of agricultural operations throughout the states of Indiana, Ohio, Kentucky and Tennessee. With nearly 100,000 customers, FCMA provides farmers, ranchers, and rural residents with long-term loans for the purchase of agricultural real estate and extends commercial loans and lines of credit to manage the cycles of farming and meet the day to day financial needs of farmers and ranchers.

Northwest Farm Credit Services (Northwest FCS) is a customer-owned cooperative that provides agricultural lending and crop insurance in the northwestern United States. Northwest FCS supports approximately 19,500 farmers, ranchers, agribusiness, commercial fishermen, timber producers and farm-related businesses in Washington, Oregon, Idaho, Alaska and Montana who help to provide food and fiber to the world.

GreenStone Farm Credit Services, ACA and its subsidiaries, GreenStone Farm Credit Services, FLCA and GreenStone Farm Credit Services, PCA, (collectively "GreenStone") together are a cooperative lending institution that provides financing and related financial services to all types of agricultural operations throughout its territory of the state of Michigan and 10 counties in northeast Wisconsin. GreenStone provides its approximately 23,000 members with financial products and services to rural residents within its territory.

Farm Credit East, ACA (FCE) is a customer-owned lender and financial services leader committed to serving Northeast agriculture, commercial fishing and the forest products industries. As the largest lender to agriculture in the Northeast, FCE serves approximately 13,700 customers across our seven-state territory, including New York, New Jersey, Connecticut, Maine, Massachusetts, New Hampshire and Rhode Island.

1st Farm Credit Services, ACA (1st FCS), headquartered in Normal, Illinois, is a farmer-owned cooperative that provides credit and credit-related services to more than 13,000 eligible members in the northern 42 counties of Illinois.

American AgCredit, the seventh largest Farm Credit Association in the United States, with approximately 7,550 shareholders, provides financial services to agricultural and rural customers throughout California, Colorado, Kansas, New Mexico, Nevada and Oklahoma, as well as to capital markets customers in more than 30 states across the nation.

AgStar Financial Services, ACA (AgStar) is a cooperative lending institution headquartered in Mankato, Minnesota. AgStar's chartered retail territory includes large portions of Minnesota and Wisconsin and serves approximately 20,000 clients. In addition to financing all types of agricultural operations in Minnesota and Wisconsin, AgStar participates in financing other agricultural assets with lenders across the United States.

Farm Credit Illinois, ACA (FCI) is a cooperative lending institution that finances agricultural operations throughout the southern half of Illinois and is owned and operated by the farmers and other rural customers it serves. FCI provides approximately 8,600 farmers with long-term loans for the purchase of agricultural real estate and extends commercial loans and lines of credit to manage the cycles of farming and meet the day to day financial needs of farmers.

United FCS, ACA (United FCS) is a cooperative lending institution that provides mortgage and operating financing and related products and services to all types of agriculture throughout its chartered territories in Minnesota and Wisconsin. United serves a customer base of over 6,000 farmers, ranchers and agribusinesses that produce a wide variety of crops, livestock and livestock products, including cash grains, dairy, sugar beets, cranberries, potatoes, cattle, hogs, poultry and eggs.

Yosemite Farm Credit, ACA (YFC) is a cooperative lending institution headquartered in Turlock, California and finances agricultural operations throughout California's Central Valley. Its approximately 5,000 borrowers range from small family farms to large agri-business operations.

CoBank, ACB (CoBank), is a national cooperative bank serving vital industries across rural America. CoBank is a district bank that meets the lending needs of FCW and other Farm Credit System members. The bank provides wholesale loans and other financial services to affiliated farm credit associations and serves approximately 70,000 farmers, ranchers, and other rural borrowers in 23 states around the country.

It also provides loans, leases, export financing and other financial services to agribusinesses and rural power, water and communications providers in all 50 states.

FCW, FCSAmerica, FCMA, Northwest FCS, GreenStone, FCE, 1st FCS, American AgCredit, AgStar, FCI, United FCS, Yosemite Farm Credit and CoBank are referred to collectively herein as "Farm Credit Associations."

B. The Farm Organizations protect and promote agricultural interests throughout California and the United States.

The National Council of Farmer Cooperatives (NCFC) is a nonprofit trade association composed of regional and national farmer cooperatives, which in turn are composed of nearly 3,000 local farmer cooperatives and other farmer-owned enterprises. Farmer cooperatives handle, process and market almost every type of agricultural commodity; furnish farm supplies; and provide credit and related financial services, including export financing.

The American Farm Bureau Federation (AFBF) is an independent, non-governmental, voluntary general farm organization with over 6 million member families in all 50 states and Puerto Rico. Established in 1919, AFBF strives to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. The California Farm Bureau Federation (CFBF), as the California chapter of AFBF, represents nearly 78,000 agricultural, associate and collegiate members in 56 counties throughout California. Together AFBF and CFBF strive to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Since 1926, Western Growers Association (WGA) has represented family farmers growing fresh produce in the Western United States. WGA's approximately 2,500 members provide roughly half the nation's fresh fruits, vegetables and tree nuts including one-third of America's fresh organic produce. In addition to their home states in the West, WGA members farm throughout the United States with operations in more than 25 states, and have operations in over a dozen foreign countries.

NCFC, AFBF, CFBF and WGA are referred to collectively herein as "Farm Organizations."

SUMMARY OF ARGUMENT

The divided Ninth Circuit panel opinion imposes potentially crippling economic impacts on the country's most productive agricultural region and generates a level of uncertainty that threatens the agricultural community nationwide. The agriculturalist and lending institutions filing this brief urge the Court to reconsider how the Endangered Species Act should serve to protect endangered and threatened species while giving due consideration to the economic impacts resulting from that protection and providing reasonable and prudent project alternatives that are based on best available science.

The Ninth Circuit's majority opinion accurately characterizes the Central Valley Project and the California State Water Project as "perhaps the two largest and most important water projects in the United States." Pet. App. 25a. Despite acknowledging the opinion's "enormous practical implications," *id.* at 28a, the majority opinion grants unfettered and unpredictable regulatory control to the United States Fish and Wildlife Service (FWS) to alter project operations in a way that directly reduces water supply in California's Central Valley and profoundly exacerbates Endangered Species Act-created doubt about water supply reliability throughout the United States. If the Ninth Circuit's panel majority opinion is allowed to stand, thousands of acres of Central Valley farm land will be deprived of water, reducing the production value of that land and crippling farmers' ability to secure and repay the loans that have enabled California to become the most productive farm state in the union. Moreover, when the government is allowed to rely on faulty science to achieve more precautionary results while ignoring the economic impacts of its preferred outcome, it exposes regulated entities and industries to arbitrarily high costs and unacceptable uncertainty. As Justice Breyer has cautioned, this "tunnel vision" approach to regulation ultimately fails to serve the public given the reality of limited resources.[2]

The Ninth Circuit's extreme interpretation of the Endangered Species Act must be reconsidered.

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[2] STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 42-51 (1993).

ARGUMENT

A. A reliable water supply is the one indispensable resource for both the agricultural community and lending institutions.

Unlike other replaceable resources, water supply is the life or death of all agricultural production. As such, uncertainty regarding the predictable availability of water can devastate agricultural production and inhibit the extension of credit for farm operations. Without reliable and foreseeable revenues from farms, the ability of farm credit lenders to provide financing for the short-term or long-term needs of agriculture would be severely restricted. And without financing, farmers cannot invest in water conservation measures, cannot purchase new equipment and technologies, and cannot continue to increase the productivity that feeds the nation. A reliable water supply is the *sine qua non* of a viable farm economy.

In California, this interdependence between lending institutions and agriculture heavily depends on water supply made available through the Central Valley Project (CVP) and the State Water Project (SWP). The operation of these projects affects the endangered Delta smelt and is the subject of a 2008 Biological Opinion issued by the United States Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA). In order to continue operating and comply with the ESA as interpreted by the Ninth Circuit, the amount of water delivered by the projects must be reduced by hundreds of thousands of acre-feet per year. In one 3-month period in 2012-2013, experts estimate that roughly 700,000 acre-feet of water was lost to the

Projects due to restrictions imposed by the 2008 Biological Opinion.[3] That is enough water to irrigate more than 200,000 acres of farmland for a year.[4]

The reduction in water supply reliability resulting from environmental regulation disrupts financing, impairs the agricultural economy, and may well cause some agricultural lenders to cease operations in California. The ESA's lawful administration does not compel these dire impacts.

B. Environmental regulation that is blind to third party costs and the best available science wreaks havoc on regulated communities such as agriculture and the lenders who support them.

In upholding the 2008 Biological Opinion, the Ninth Circuit majority accepted the FWS's precautionary approach to setting flow limitations when the agency was faced with what it deemed to be uncertainty in the underlying science. Pet. App. 62a-68a. As a consequence, the Ninth Circuit has approved an approach to regulation that has been challenged by experts in regulation such as Justice Breyer and

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[3] California Natural Resources Agency, Questions and Answers about Water Diversions and Delta Smelt Protections, at 2 (2013) *available at* http://resources.ca.gov/docs/Smelt_QandA.pdf (last visited Oct. 20, 2014).

[4] Press Release, California Natural Resources Agency, Water Supplies Curtailed to Protect Delta Smelt (February 12, 2013) *available at* http://resources.ca.gov/docs/Smelt_and_Water_Supply_Release_Final_2-11-13_Updated.pdf (last visited Oct. 20, 2014).

Professor Cass Sunstein.[5] "The [precautionary] principle threatens to be paralyzing, forbidding regulation, inaction, and every step in between. . . . [T]he precautionary principle gives the (false) appearance of being workable only because of identifiable cognitive mechanisms, which lead people to have a narrow rather than wide viewscreen. With that narrow viewscreen, it is possible to ignore, or to neglect, some of the risks that are actually at stake."[6] And when too many resources are expended to achieve overly conservative results, that money cannot be spent to combat other serious risks facing the environment.[7]

Here, indeed, the FWS imposed its pumping restrictions without so much as a mention of the costs that such a choice would impose on third parties, such as the agriculture customers who receive water from the Projects. Pet. App. 129a-130a. Here, the economic costs resulting from the FWS's precautionary approach to dealing with scientific uncertainty will be devastating to California's agricultural economy.

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[5] *See* BREYER, *supra* note 2, at 48 (resolving uncertainties and knowledge gaps in favor of results that "'err on the safe side'. . . can produce random results"); Cass Sunstein, Beyond the Precautionary Principle, 151 U. PA. L. REV. 1003 (2002-03).

[6] Sunstein, 151 U. PA. L. REV. at 1004.

[7] *See* BREYER, *supra* note 2, at 18 ("The second reason that it matters whether the nation spends too much to buy a little extra safety is that the resources available to combat health risks are not limitless.").

1. Here, altering project operations without consideration of impacts on third parties will cause reductions in water supply that will have a crippling impact on the Central Valley's agricultural economy and the nation's food supply.

The "enormous practical implications," Pet. App. 28a, referenced by the majority panel opinion are readily seen in the debilitating impacts to California agriculture caused by water supply reductions. California is the nation's leading producer of almonds, avocados, broccoli, carrots, cauliflower, lettuce, milk, spinach and dozens of other commodities, according to a 2012 Department of Agriculture report.[8] The state produces one-third of the nation's vegetables and two-thirds of its nuts and fruits each year.[9] Simply put: The United States can't eat without California.

Agriculture is the lifeblood of the Central Valley's economy, and Central Valley agriculture is dependent on water exported from the Sacramento-San Joaquin Delta. The 2008 Biological Opinion upheld by the panel majority opinion requires significant reductions in water exports from the Delta in order to protect the endangered Delta smelt. *See* Pet. App. 26a; Pet. App. 227a-232a. Those water supply reductions will result in the loss of agricultural production, income and jobs in

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[8] United States Department of Agriculture, California Agricultural Statistics 2012 Crop Year, *available at* http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2012cas-all.pdf (last visited Oct. 20, 2014).

[9] *Id.*

the Central Valley. Cuts in agricultural production, in turn, will cause consumer food prices to increase, putting a disproportionate economic burden on low-income consumers.[10]

Several peer-reviewed studies confirm that depriving the Central Valley of water exported from the Delta will have debilitating economic impacts on the region. Although exact conclusions differ based on methodology, there is a growing consensus that Delta export restrictions, such as those imposed by the 2008 Biological Opinion, have severe impacts on California's farm economy. For example, a 2009 study projected the direct economic and water supply impacts of Judge Wanger's 2007 Interim Remedial Order, which restricted Delta exports from both the CVP and SWP during the period when FWS was preparing the 2009 Biological Opinion. *See* Pet. App. 37a-38a. That study projected that the Interim Remedial Order would reduce SWP and CVP deliveries by between 266,000 and 426,000 acre-feet per year, depending on the type of water year. Those reduced deliveries, in turn, would impose direct costs on users within the CVP and SWP contractor areas between $34 million and $64.3 million, depending on the year type.[11]

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[10] *See, e.g.,* Russ Parsons, *Drought likely to push up prices of lettuce, avocados, grapes and broccoli the most*, LA TIMES (May 1, 2014); Paul Davidson, *Rising food prices pinching consumers*, CNBC (April 19, 2014), *available at* http://www.cnbc.com/id/101588110 (last visited Oct. 20, 2014).

[11] Sunding, *et al.*, *Economic Impacts of Reduced Delta Exports Resulting from the Wanger Interim Order for Delta Smelt*, UC BERKELEY DEPARTMENT OF AGRICULTURAL & RESOURCES ECONOMICS (2009); *see also* CALIFORNIA DEPARTMENT OF FOOD AND

Another 2009 study estimated that zero CVP exports and 10% of normal SWP exports would cost the Central Valley region between $1.2 and $1.6 billion in direct revenue losses.[12] Those losses would translate into income losses for the region between $1.6 and $2.2 billion, with thousands of jobs likely to be lost.[13] A 2011 study found that a "no export" scenario would cost the San Joaquin Valley between $153 million and $164 million per year, and would cost the Tulare Lake Basin between $563 and $719 million per year. [14] The same study found that reducing Delta exports by just 18% would cost the region approximately $90 million per year.[15] Water availability reductions during the

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AGRICULTURE, CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2010-2011 67 (noting reduced production due to 2009 drought conditions).

[12] Howitt *et al.*, *Economic Impacts of Reduction in Delta Exports on Central Valley Agriculture – Update Summary*, UC DAVIS DEPARTMENT OF AGRICULTURAL & RESOURCES ECONOMICS (2009).

[13] *See* Howitt *et al.*, *Economic Impacts of Reductions in Delta Exports on Central Valley Agriculture*, GIANNINI FOUNDATION OF AGRICULTURAL ECONOMICS (2009) *available at* http://www.usbr.gov/mp/drought/docs/UCD%20Study%20Cal%20Drought%20.pdf; *see also Consol. Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1055 (E.D. Cal. 2010) (citing employment impacts analysis by Dr. Jeffrey Michael).

[14] Tanaka *et al.*, *Economic Costs and Adaptations for Alternative Regulations of California's Sacramento-San Joaquin Delta*, SAN FRANCISCO ESTUARY AND WATERSHED SCIENCE, 9(2) (2011) *available at* https://escholarship.org/uc/item/3z016702 (last visited Oct. 20, 2014).

[15] *Id.*

present drought stand to cost the Central Valley nearly $2.2 billion and 17,100 full time and seasonal jobs.[16]

These production losses are expected to be even more acute now and in the future than in earlier periods of reduced Delta exports. Groundwater is less plentiful after three consecutive dry years, and most of the feasible significant improvements in water use efficiency have already been made.[17] The result is that Central Valley water demand now has largely "hardened," reducing adaptability to water supply reductions.[18] With dry conditions occurring more frequently with the onset of climate change,[19] farm and ranch operations' continued viability will require that they capitalize on wet years when they do occur. The Delta export restrictions in the 2008 Biological Opinion would significantly limit farmers' ability to rely on wet year surface water supplies.

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[16] Howitt *et al.*, "Economic Analysis of the 2014 Drought for California Agriculture," CENTER FOR WATERSHED SCIENCES, UNIVERSITY OF CALIFORNIA, DAVIS, at ii (2014), *available at* https://watershed.ucdavis.edu/files/biblio/DroughtReport_23July2014_0.pdf (last visited Oct. 17, 2014).

[17] HOWITT *ET AL.*, ECONOMIC MODELING OF AGRICULTURE AND WATER IN CALIFORNIA USING THE STATEWIDE AGRICULTURAL PRODUCTION MODEL: A REPORT FOR THE CALIFORNIA DEPARTMENT OF WATER RESOURCES 22 (2010).

[18] *Id*.

[19] Berghuijs *et al*., *A precipitation shift from snow towards rain leads to a decrease in streamflow*, 4 NATURE CLIMATE CHANGE 583 (2014), *available at* http://www.nature.com/nclimate/journal/vaop/ncurrent/full/nclimate2246.html (last visited Oct. 20, 2014).

In addition to reducing farm revenues on a year-to-year basis, Delta export restrictions threaten California's longstanding market reputation as a stable supplier of high-value crops. California produces many of this nation's high-value crops such as citrus, almonds, pistachios, grapes, and a variety of other produce.[20] In this age of global food production (and global competition), purchasers can afford to look worldwide for the most secure supply of a given crop. Delta export restrictions that cut production send global market signals that California is not a reliable producer.[21] Thus, even during normal years when Central Valley growers have an adequate water supply, they can still face difficulties finding a market for their crops.

C. The Ninth Circuit's split opinion creates uncertainty that will impact California agriculture and agricultural lending nationwide.

In addition to these potentially devastating impacts to the California economy and food production generally, uncertainty about regulatory outcomes reduces the financial industries' ability to analyze risk and continue to lend financial support to agricultural

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[20] UNITED STATES DEPARTMENT OF AGRICULTURE, 2012 STATE AGRICULTURAL REVIEW—CALIFORNIA, *available at* http:///www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=CALIFORNIA (last visited Oct. 20, 2014).

[21] *See, e.g.*, Amy Quinton, *Farmers Forecasting Less Rice*, *Higher Prices Because of Drought,* CAPITAL PUBLIC RADIO (April 30, 2014), *available at* http://www.capradio.org/22646 (last visited Oct. 20, 2014).

production.[22] Indeed, Justice Breyer has noted that the problems of scientific uncertainty in regulation are further "aggravated by distorting and inconsistent assumptions, political pressures, failures of communication and procedural rigidities."[23] This uncertainty, when combined with regulatory "tunnel vision," results in severe economic harm to regulated entities in the form of "limited technological choice, high cost, devotion of considerable agency resources, large legal fees, and endless argument."[24] Studies of the effects of regulatory uncertainty on investment in other industries provide ample support for Justice Breyer's analysis and exemplify the national significance of the uncertain regulatory outcomes that the panel opinion invites.[25]

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[22] *See* Kira R. Fabrizio, *The Effect of Regulatory Uncertainty on Investment: Evidence from Renewable Energy Generation*, at 19-21 (concluding from an empirical study of the pattern of investments in renewable generation assets in the U.S. electricity industry that "firms may be unwilling to invest in assets that are long-lived and location- and policy-specific in an environment with significant regulatory uncertainty" and that this insight is "generalizable across industries and settings.") *available at* http://www-management.wharton.upenn.edu/henisz/msbe/2011/4_2_Fabrizio.pdf (last visited Oct. 17, 2014).

[23] Stephen Breyer, *Beyond the Vicious Circle*, 3 N.Y.U. ENV'TL LAW J. 251, 252 (1994-95).

[24] BREYER, *supra* note 2, at 11. Justice Breyer has defined "tunnel vision" as a "classic administrative disease" that arises when an agency's unswerving pursuit of a single goal causes more societal harm than the agency intended to prevent in the first place. *Id.*

[25] *See* Peter S. Reinelt & David W. Keith, *Carbon Capture Retrofits and the Cost of Regulatory Uncertainty*, 28 THE ENERGY JOURNAL

1. The Ninth Circuit opinion creates uncertainty about the role of third-party impacts during ESA consultation, and thus wild disparities among potential outcomes.

The Ninth Circuit majority's opinion creates uncertainty and confusion about the breadth of alternatives that can be considered "reasonable" under the ESA, which is an issue with enormous implications. As explained in the Petition for Writ of Certiorari, the panel opinion conflicts with prior decisions of this Court and the Fourth Circuit regarding whether and how FWS must consider economic impacts to third parties when determining whether an alternative is "feasible."[26] This split in authority leaves FWS with conflicting direction regarding the relevance of third-party impacts for biological opinions. Whether and how FWS will consider economic feasibility drastically influences the range of potential outcomes from the ESA consultation process.

If, as the Ninth Circuit majority holds, the "downstream economic impacts" of reduced exports are irrelevant to consideration of a project alternative, Pet. App. 129a-130a, then FWS will more readily impose regulations that result in water supply reductions. If, on the other hand, "downstream economic impacts" must be considered in the development of reasonable and prudent alternatives, then the scope of alternatives

101, 101 (2007) (finding that "regulatory uncertainty can increase the expected social cost of reducing emissions by 40 to 60%.").

[26] *See* Petition, at 21.

FWS deems "reasonable" will be properly constrained, in accordance with ESA.

The Ninth Circuit majority opinion also validates FWS ignoring the best available scientific and commercial data, creating further uncertainty about the level of record support needed for conservation measures that will have significant third-party impacts. *See* Petition, 25-26. When the potential economic impact of a project alternative is considerable (as is the case here, *see supra*, at 10), such uncertainty can stifle planning and productive risk-taking throughout the agricultural economy. The confusion about proper ESA implementation across the country poses potentially crippling uncertainty and unquantifiable risk that customers of the Farm Credit Associations will be cut off from the water that makes them financially viable. As explained below, this uncertainty affects the agricultural community as a whole as FWS issues biological opinions under the ESA for water projects and other federal actions throughout the country.

2. Uncertainty regarding water supply reliability poses unique and potentially debilitating challenges for agricultural lending and agriculture generally.

California and national agriculture depends on the willingness of lenders like each of the Farm Credit Associations to extend credit to farmers. Farm credit enables farmers to make valuable long-term investments including, for example, investments in more efficient irrigation systems. It also allows some farms to survive the short-term periods when water is unavailable and production is severely reduced.

Although agricultural production necessarily involves some uncertainty, farm lenders are experienced at managing most of the risks that farmers face. However, the 2008 Biological Opinion injects into California agriculture an unprecedented type and degree of uncertainty.

Agricultural lenders evaluate risk according to the five C's of credit: Capital (borrower's ability to survive ups and downs); Capacity (borrower's ability to generate income and service the debt); Character (whether the borrower has the knowledge and experience to foster a stable farming operation); Conditions (what the funds will be used for); and Collateral (borrower's secondary source of repayment). These criteria allow lenders to limit their exposure and form reasonable expectations despite uncertainty in crop prices, land values, or even climate and weather events. Properly managed, such risks do not prevent lenders from extending farmers the credit they need to stay in business.

Water supply is the most important risk for farm lenders to manage because it significantly affects all five C's of credit. Water is *the* primary resource for a farming operation, which simply cannot work around its absence. Lenders thus scrutinize groundwater well tests and require regular water reports from borrowers to ensure a secure water supply to generate the production and income necessary to service their debt and survive market downturns ("Capacity" and "Capital"). A borrower's ability to influence his water supply through sound operations and, when necessary, advocacy, affects "Character." Many agricultural loans are for infrastructure that improves the borrower's water supply situation, such as efficient irrigation or improved wells ("Conditions"). Finally, water availability has a huge impact on the value of farm property as collateral and a corresponding influence on lenders' willingness to extend credit ("Collateral"). In sum, the availability of water determines whether an agricultural venture is viable. Predicting water supply with some certainty governs lenders' willingness to extend credit.

The uncertainty created by the Ninth Circuit majority opinion and the 2008 Biological Opinion make it nearly impossible for farm lenders to form the reasonable expectations that allow them to fully analyze the credit risks in financing California farm and ranch operations. The 2008 Biological Opinion makes water availability even more variable than climate and hydrology. By preventing some water project deliveries even when there is water available in the Delta,[27] the 2008 Biological Opinion would make water unavailable much more often than otherwise. Pet. App. 60a. Farm lenders are well-equipped to extend credit to farmers on a one- to two-year basis when a drought makes water unavailable. But the 2008 Biological Opinion would make water unavailable in substantially more years, forcing farmers to limit production and increasingly rely on credit to stay in business.

On a broader level, the Ninth Circuit majority opinion compromises lenders' certainty that the laws

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[27] *See* Pet. App. 260a (finding that record made it impossible to determine whether alternative restricting pumping was "overly protective.").

and procedures affecting farmers' access to water will be predictable and consistent. The ESA requires the Secretary of the Interior to rely on the best science available when developing reasonable and prudent alternatives to proposed project operations. The lack of scientific support for those alternatives in this instance has caused farm lenders to question whether there is any limit to the ESA's ability to restrict California farms' access to crucial resources like water. Indeed, such uncertainty about ESA-related restrictions resonates nationwide to farmers, ranchers and the financial institutions that support agriculture throughout the country.

This uncertainty will force farm lenders to lend much more conservatively, depriving thousands of farms of credit they desperately need to continue operating. Worse yet, small family farms will be the first to suffer; they have the least capacity to absorb financial loss, making them the most risky for farm lenders to finance. In sum, it is no exaggeration to say that the uncertainty created by the Ninth Circuit's decision would decimate much of California's agricultural economy and the communities it supports along with the accompanying impact to agriculture nationally.

CONCLUSION

The Ninth Circuit majority opinion will significantly reduce the ability of the projects to supply the water they were designed to deliver to Central Valley farm land and will create an unprecedented type and degree of uncertainty that threatens the ability of lending institutions to finance agriculture across the country. Therefore, the Farm Credit Associations and the Farm

Organizations support the petition for writ of certiorari to reconsider the Ninth Circuit's opinion.

Respectfully submitted,

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