Nos. 14-377, 14-402

In The
Supreme Court of the United States

STEWART & JASPER ORCHARDS, *et al.*,

Petitioners,

v.

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

Respondents.

STATE WATER CONTRACTORS, *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF OF AMICI CURIAE OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici respectfully restate the questions presented as follows:

1. Is the United States Fish and Wildlife Service obligated to demonstrate how a reasonable and prudent alternative required by the Endangered Species Act is economically feasible, and, in so doing, must it consider the devastating effects on the human community that will be caused by the alternative's implementation, or is that consideration limited to the effects on the interested federal governmental agencies, as the Ninth Circuit held?

2. To what extent can the Fish and Wildlife Service dispense with its regulatory definition of "reasonable and prudent alternative" that requires that alternative to be, among other things, "economically feasible," and, when it does so dispense with that requirement, is its interpretation entitled to deference?

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

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10

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[1] Pursuant to this Court's Rule 37.2(a), all have consented to the filing of this brief. Communications evidencing the consent of those parties have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae's* intention to file this brief.

Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. NFIB Legal Center seeks to file in this case because it raises issues of importance to the nations' small business community. The present case is of critical importance to California's small business community—where NFIB represents over 20,000 businesses. In California, water issues are of top concern, especially for agricultural industries. Farmers, ranchers, and other agricultural businesses are hurting with the current drought—which is only exacerbated by the Endangered Species Act (ESA) restrictions at issue here. But NFIB Legal Center supports this petition for *certiorari* not only because of the immediate impacts of the Ninth Circuit's decision, but because its rationale would have truly devastating economic impacts if applied in future cases. If other circuits follow the Ninth Circuit's lead in upholding ESA restrictions—without regard to economic impacts—small businesses would suffer just the same in other geographic regions. As such, the NFIB Legal Center has a profound interest in advocating a sensible approach to the ESA's interpretation, whereby regulators must take into account economic impacts to avoid unduly draconian restrictions on landowners and water users throughout the country.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research

foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs with courts, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* because this case presents an important question of federal law over which there is an irreconcilable circuit split between the Ninth and the Fourth Circuits.[2] The circuits are divided on the question of whether federal agencies must consider economic impacts before imposing environmental restrictions on the public. This circuit split calls into question the continued viability of *Tennessee Valley Authority v. Hill*'s holding that endangered species must be protected "whatever the cost." 437 U.S. 153, 184 (1978).

It is abundantly clear that implementing the "reasonable and prudent alternative" mandated by the Fish and Wildlife Service ("FWS") for the protection of the delta smelt has had, and will continue to have, serious adverse effects on farming

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[2] This *amicus* brief concurrently supports the separate petitions for *certiorari* filed in *Stewart & Jasper et. al. v. Jewell, et. al.* (Sup. Ct. No. 14-377) and *State Water Contractors*, *et al. v. Jewell*, *et al.* (Sup. Ct. No. 14-402). Both petitions arise from, and challenge, the same agency action.

and other communities, and economic interests, in much of California. It is likewise clear that the FWS gave no thought to these effects. Instead, with the Ninth Circuit's blessing, FWS focused entirely on protecting the delta smelt, implementing this Court's 1978 mantra of protecting endangered species "whatever the cost." *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 637 (9th Cir. 2014) (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. at 184).

In contrast, the Fourth Circuit vacated a Biological Opinion that did not contain any discussion of the economic feasibility of a wide-ranging restriction on the agricultural use of pesticides. *Dow AgroSciences, LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013). Where the Ninth Circuit deems the downstream economic effects of agency action to be outside the scope of agency consideration, the Fourth Circuit found the failure to consider those effects enough to invalidate the proposed alternative as arbitrary and capricious. This is a conflict of nationwide import.

More generally, the Ninth Circuit's decision illustrates the "needless economic dislocation" that this Court unanimously warned can result from "agency officials zealously but unintelligently pursuing their environmental objectives" to the exclusion of economic consequences. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Ninth Circuit's view, dispensing with any requirement to consider economic impacts on non-governmental actors, allows *TVA v. Hill's* "whatever the cost"

holding to live on despite subsequent congressional changes to the ESA—reforms that suggest Congress intended to require consideration of economic impacts. This view would not only allow FWS to cripple entire industries within a geographic location, but it would also allow FWS to impose heavy-handed restrictions without any consideration of the untold impacts it might have on the national economy.

ARGUMENT

In this brief, *amici* will show that, contrary to the Ninth Circuit's conclusion, this Court's 1978 understanding that the Endangered Species Act (ESA)—requiring the protection of endangered species "whatever the cost"—has been superseded. As the result of statutory and other legal changes, both on their own and as understood by this Court, consideration of the economic impact of the agency's chosen alternative is required. And, the economic effects to be considered are not those of the federal government alone. Those statutory changes mandate the overruling or express limitation of *TVA v. Hill's* "whatever the cost" rubric.

I. This Court Should Grant *Certiorari* to Determine Whether Congressional Amendments Have Repudiated or Limited *TVA v. Hill*.

A. *TVA v. Hill* Mandates the Preservation of Endangered Species "whatever the cost."

Since this Court's decision in *TVA v. Hill*, Congress has amended the Endangered Species Act several times. Those amendments include a number of provisions that undercut any further reliance on *TVA v. Hill's* "whatever the cost" approach. Failing to take account of those changes, as the Ninth Circuit did, renders its analysis seriously incomplete.

In *TVA v. Hill*, this Court held that the ESA required that the protection of the endangered snail darter be put ahead of the completion of the Tellico Dam, which was then "virtually complete[] and …essentially ready for operation." *Id.*, 437 U.S. at 157-58. The Secretary of the Interior reasoned that completion of the dam would destroy the snail darter's habitat. Relying on its reading of the legislative history, this Court concluded, "The plain intent of Congress in enacting this statute [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Id.*, at 184.

This Court explained that its interpretation of congressional intent covered not only ongoing and nearly completed projects, but also activities "intimately related to national defense." *Id.*, at 186-

87. In reaching the latter conclusion, the Court relied on a statement by Congressman Dingell (D-MI) in the Congressional Record. *Id*., at 183-84 (citing 119 Cong. Rec. 42319 (1973).[3] As explained below, both of these conclusions have since been addressed by Congress.

"Not all observers were as impressed with the statute or the fish at the time—the decision was ridiculed by many and brought sweeping condemnations in Congress—and the ESA has since been no stranger to controversy." Ruhl, J.B., *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 Harv. Envtl. L. Rev. 487, 490 (2012) (Ruhl) (footnotes omitted). The unimpressed included dissenting Justices Powell, Blackmun, and Rehnquist.

In his dissent, Justice Powell, joined by Justice Blackmun, complained that the Court's "decision casts a long shadow over the operation of even the most important projects, serving vital needs of society and national defense.…" *Id.*, at 195-96 (Powell, J., dissenting). In particular, Justice Powell found that stopping the construction of the Tellico Dam, which Congress had continued to fund, to be a "waste of at least $53 million." *Id*., at 210 (Powell, J., dissenting). For his part, then Justice Rehnquist concluded that the district did not abuse its discretion in declining to enjoin the completion of the

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[3] Cf. *Zedner v. United States*, 547 U.S. 489, 510 (2006)(Scalia, J., concurring in part and concurring in the judgment)(It is a "naïve belief" to treat "what is said by a single person in a floor debate" as "the view of Congress as a whole.").

Tellico Dam. He explained:

> Here the District Court recognized that Congress, when it enacted the Endangered Species Act, made the preservation of the habitat of the snail darter an important public concern. But it concluded that this interest on one side of the balance was more than outweighed by other equally significant factors. These factors, further elaborated in the dissent of my brother Powell, satisfy me that the District Court's refusal to issue an injunction was not an abuse of discretion.

Id., at 213 (Rehnquist, J., dissenting).

B. As the Result of Statutory Changes, the ESA No Longer Requires the Protection of Endangered Species "whatever the cost."

In 1978, some five months after this Court's decision in *TVA v. Hill*, Congress amended the ESA. As one commentator observed those changes "clearly reflect a congressional retreat from the 1973 unequivocal commitment to the continued viability of endangered and threatened species against any interference from federal public works projects" in response to *TVA v. Hill*. Stromberg, David B., *The Endangered Species Act Amendments of 1978: A Step Backwards*?, 7 Bos. Coll. Envtl. Aff. L. Rev. 33, 35 (1978).

The significant changes Congress made in the 1978 Amendments include:

(1) Overturning the FWS's regulatory definition of critical habitat. In its regulations, the FWS defined critical habitat to include "any air, land, or water area … or any constituent thereof, the loss of which would *appreciably decrease the likelihood of the survival and recovery of a listed species* or a distinct segment of its population." 43 Fed. Reg. 869, 874-75 (Jan. 4, 1978) (emphasis added). In the 1978 statutory amendments, Congress expressly limited the scope of critical habitat to those "specific" areas "essential to the conservation of the species." Pub. L. 95-632, § 2, 92 Stat. 3751; *see also id.* ("Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."); H.R. Rep. No. 95-1625, at 23, reprinted in 1978 U.S.C.C.A.N. 9453, 9475 ("In the Committee's view, the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat.").

(2) Adding "economic impact" to the factors to be considered in designating critical habitat. The new statutory language provided, "In determining the critical habitat of any endangered or threatened species, the Secretary *shall consider the economic impact*, and any other relevant impact, of specifying any particular area as critical habitat…." Pub. L. 95-632, § 11, 92 Stat. at 3766 (emphasis added); cf.

Bennett v. Spear, 520 U.S. at 177)("[E]conomic consequences are an *explicit* concern of the [ESA]")(emphasis added).

(3) Authorizing the Interior Secretary to exclude areas from critical habitat designations if certain criteria are met. In addition to mandating the consideration of "economic impact," Congress provided that the Secretary "may exclude any such area *if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat*, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species." *Id*. (emphasis added).

(4) Calling for interagency consultation regarding the environmental impact of planned projects and establishing an Endangered Species Committee with the power to grant or deny exemptions from the Interior Secretary's establishment of a protected critical habitat. See Pub. L. 95-632 § 7, 92 Stat. at 3752-3758.

Subsequently, in October 1982, Congress again amended the ESA. Those changes include:

(1) Rewriting section 4(b) of the ESA adding, among other things, the requirement that the best scientific data available be used:

> The Secretary shall designate critical habitat … on the basis of the best scientific data available and *after taking*

> *into consideration the economic impact*, and any other relevant impact, of specifying any particular area as critical habitat.

Pub. L. 97-304, § 2, 96 Stat. 1411, 1412 (codified at 16 U.S.C. § 1533(b)(2)) (emphasis added).

(2) Allowing for the incidental taking of an endangered species even where a project or activity goes forward. Pub. L. 97-304, § 16, 96 Stat. at 1422. Congress empowered the Interior Secretary to prescribe the circumstances that would permit "any taking not otherwise prohibited … if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id*. Absent such an allowance the criminal provisions of the ESA would bar that taking and expose those responsible to imprisonment, the imposition of a fine, or both.

The National Defense Authorization Act for Fiscal Year 2004 further reinforces the statutory limitation of *TVA v. Hill* with respect to matters of national defense. In 1978, when it created the exemption process, Congress mandated that the Department of Defense had priority: "Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security." Pub. L. 95-632, § 3, 92 Stat. at 3758. The 2004 Act goes on to bar the Interior Secretary from designating critical habitat on Department of Defense lands that are subject to an "integrated natural resource management plan," if the Interior

Secretary determines that the plan provides a benefit to the species. Pub. L. 108-136, § 318(a), 117 Stat. 1392, 1433. In addition, that law added "the impact on national security" to the § 1533(b)(2) factors that the Secretary must consider in designating critical habitat. *Id.*, at, § 318(b), 117 Stat. at, 1433.

Taken as a whole, these statutory changes to the ESA demonstrate that Congress has not been comfortable with the notion that endangered species are to be protected "whatever the cost." Accordingly, the ESA, as amended, now calls for consideration of "economic impact", and national security interests, in the designation of critical habitat. Simply put, Congress wanted a sensible approach to environmental regulation—whereby environmental concerns are to be balanced against economic impacts and other societal needs.

C. This Court's Holding in *TVA v. Hill*—as Applied to the Tellico Dam Project—Has Been Factually Undermined

TVA v. Hill has also been factually superseded in two ways. First, Congress expressly provided for the completion of the Tellico Dam, reflecting its dissatisfaction with the application of the "whatever the cost" rubric to that project. The snail darter also turned out to be less endangered than everyone thought.

Congress started the ball rolling in the Endangered Species Act Amendments of 1978. In

pertinent part, Congress fast-tracked the Endangered Species Act Committee's consideration of an exemption for the Tellico Dam and other projects. Pub. L. 95-632, § 5, 92 Stat. at 3761. When that Committee rejected the proposed exemption, Congress overrode that decision and funded the dam's completion. In the Energy and Water Development Appropriation Act of 1980, Congress included a rider to the effect that "notwithstanding the provisions of 16 U.S.C., chapter 35 or any other law," the Tennessee Valley Authority was "authorized and directed to complete, operate and maintain the Tellico Dam and Reservoir project for navigation, flood control, electric power generation and other purposes." Pub. L. 96-69, Title IV, 93 Stat. 437, 449-50.

Second, the snail darter's "ultimate survival seems assured." Plater, Zygmunt J. B., *Law and the Fourth Estate*; *Endangered Nature*, *the Press*, *and the Dicey Game of Democratic Governance*, 32 Envtl. L. 1, 8 n. 22 (2002). In 1994, the FWS reclassified the snail darter, downgrading it from endangered to threatened and rescinding its then-present critical habitat. 49 Fed. Reg. 27510 (July 5, 1984). The FWS explained that, notwithstanding efforts to introduce the snail darter to other streams in the Tennessee River Valley, "[t]o date, these introductions have proven successful only in the Hiwassee River, Polk County, Tennessee." *Id*. Populations of snail darters were also found in other steams in Tennessee, Georgia, and Alabama. *Id*. This postscript only underscores why Congress would want a balanced approach to environmental regulation.

D. This Court's Decisions Since *TVA v. Hill* Reflect a Retreat From the "whatever the cost" Holding.

Since this Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *TVA v. Hill* "has become the extreme outlier" in this Court's Endangered Species Act jurisprudence. Ruhl, 36 Harv. Envtl. L. Rev. at 490. In *Lujan*, this Court held that environmental groups did not have standing to challenge agency rules limiting the scope of the ESA to the United States and the high seas. Thereafter, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), this Court renounced the draconian application of the ESA in upholding, but limiting, the scope of the statutory taking prohibition to require proof of the "ordinary requirements of proximate causation and foreseeability" and of "but for" causation. *Id*., at 700 n.13; *see also id*., at 711-13 (O'Connor, J., concurring). Later in *National Assn. of Home Builders v. Defenders of Wildlife*, this Court upheld agency rules limiting the consultation procedure in section 7 of the ESA to discretionary agency actions, thereby opening the door to state control of the authority to issue water pollution permits under the Clean Water Act. 551 U.S. 644 (2007). And finally, in *Bennett*, this Court made clear that the ESA is not merely a tool for environmental activists, in holding that those complaining about agency overenforcement of the ESA have standing. 520 U.S. at 166. In each case, this Court has signaled that the ESA is no longer viewed as the blunt instrument envisioned in *TVA*.

Of these decisions, *Bennett v. Spear* warrants detailed discussion—as the opinion was premised in part on the notion that some form of economic analysis is required. In *Bennett*, this Court unanimously held that irrigation districts, and ranchers in those districts, who may "claim a competing interest" in the waters, have standing to file suit under the ESA in challenge to restrictions deemed "necessary" to protect endangered fish. 520 U.S. at 160. In so doing, this Court rejected the Ninth Circuit's view that only those alleging an interest in the preservation of endangered species have standing to complain about underenforcement of the ESA. In particular, the Bennett Petitioners could pursue their claim that the Biological Opinion limiting the Petitioners' use of water "implicitly determine[d] critical habitat without complying with the mandate of § 1533(b)(2) that the Secretary 'tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.'" *Id.*, at 172.[4]

Without the ability to require the Interior Secretary to justify his action, "needless economic dislocation produced by agency officials zealously but

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[4] The Ninth Circuit's decision *sub silentio* guts this Court's decision in *Bennett* by limiting the degree to which those complaining about agency overreaching, who have standing under *Bennett to* complain about the failure to consider economic impact, can complain about the economic impact to them that will result from implementing the reasonable and prudent alternative that is recommended. Cf. Ruhl, 36 Harv. Envtl. L. Rev. at 504 ("That a unanimous Court would endorse concern over the potential for zealously unintelligent, economically disruptive implementation of the ESA seems a far cry from Hill's protect 'at any cost' theme.")

unintelligently pursuing their environmental objectives" might result. *Id.*, at 177-78. But, avoiding such disruption was "another objective" of the ESA, "if not indeed the primary one." *Id.*, at 177. Further, *Bennett* also held that Secretary's consideration of economic impact is a "categorical *requirement*." *Id.*, at 172 (emphasis in original). It rejected the Government's attempt to treat the statutory "shall" as discretionary.

Also important, Justice Scalia's dissent in *Babbitt*, joined by Chief Justice Rehnquist and Justice Thomas, emphasized concerns over the inequitable distribution of benefits and burdens—which seemingly builds on *Bennett*'s warning about "needless economic dislocation." Justice Scalia observed, "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." 515 U.S. at 714. To be sure, the chief problem with the ESA is that "[o]ver time, … changes in agency implementation of the ESA gave the statute the qualities of 'big' pollution control statutes, with expansive jurisdiction over land use, complex regulations, expensive and time-consuming permitting, and a gristmill of environmentalist litigation." Ruhl at 492 (footnotes omitted); cf. *Babbitt*, 515 U.S. at 721 (2006)(Scalia, J., dissenting) ("A large number of routine private activities—farming, ranching, roadbuilding, construction, and logging—are subjected to strict-liability penalties when they fortuitously injure protected wildlife.…").

The warnings in *Bennett* and the *Babbitt* dissent about agency overreaching are impossible to square with the "whatever the cost" holding of *TVA v. Hill*. This Court should use these cases to reconsider the continued validity of that holding.

II. The Ninth Circuit's Understanding of the Economic Feasibility Analysis Conflicts with that of the Fourth Circuit.

Certiorari review is also warranted because the Ninth Circuit's conclusion, that the FWS need not consider the downstream economic effects of its recommended reasonable and prudent alternative, conflicts with the Fourth Circuit's understanding. Moreover, the Ninth Circuit's attempt to distinguish the Fourth Circuit's *Dow AgroSciences* decision is unpersuasive.

After Congress mandated the consideration of economic impact in the designation of critical habitat, the Interior Department promulgated regulations that define a reasonable and prudent alternative as one that is, among other things, "economically and technologically feasible." 50 C.F.R. § 402.02. One might ask: Economic feasibility for whom?[5] But, the answer should be derived with an

[5] In October 2008, the Solicitor for the Interior Department issued an opinion in which he concluded that the only economic impacts the matter in the designation of critical habitat are those that fall on "ongoing or potential activities that are either carried out by the federal government, or that are funded or authorized by the federal government." The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act, Memorandum M-37016 (Oct. 3, 2008), *available* at

appreciation for the way in which Congress and this Court have reined in the hard-wiring of *TVA v. Hill's* "whatever the cost" mandate.

In *Dow AgroSciences, LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013), the Fourth Circuit vacated a Biological Opinion that restricted the use of certain agricultural pesticides. It did so because the agency did not address the economic consequences of the proposed reasonable and prudent alternative. The court's opinion shows that economic feasibility is not just the concern of the implementing agency.

In particular, the court rejected the Fisheries Service's contention that it did not have to explain why it chose one "recommended and prudent alternative" over another. The court observed, "The absence of a justification becomes especially relevant in view of the potential economic consequences of such a requirement and the mandate that reasonable and prudent alternatives be 'economically and technologically feasible.'" 707 F.3d at 474 (citing 50 C.F.R. § 402.02). It rejected the contention that there was no need to discuss economic feasibility, explaining, "[T]his position … effectively reads out the explicit requirement of Regulation 402.02 that

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http://www.doi.gov/solicitor/opinions/M-37016.pdf (last viewed Oct. 31, 2014). At best, it is unsettled whether this opinion is entitled to deference as a matter of administrative law; it is not the product of notice-and-comment. Moreover, it gives short shrift to this Court's decision in *Bennett v. Spear*, citing it only once and overlooking this Court's conclusion that the Bennett Petitioners had standing to challenge the Secretary's failure to consider the economic impact on them in designating critical habitat.

the agency evaluate its reasonable and prudent alternative recommendation for, among other things, economic and technological feasibility." *Id*., at 474-75.

The court noted that the "broad prohibition" the Biological Opinion would impose "readily calls for some analysis of its economic and technical feasibility." 707 F.3d at 475. In recommending restrictions on the use of those pesticides, that Biological Opinion "required that the pesticides not be used in ground applications within 500 feet and in aerial applications within … 1000 feet of 'salmonid habitats,' 'intermittent streams' that connect to salmon-bearing waters, and 'all known types of off-channel habitats as well as drainages, ditches, and other manmade conveyances to salmonid habitats that lack salmon exclusion devices.'" *Id*., at 470. In the end, the agency's failure to "address[] the economic feasibility of its proposed 'reasonable and prudent alternative' providing for one-size-fits-all buffers …made it impossible for [the court] to review whether the recommendation satisfied the regulation and therefore was the product of reasoned decision-making." *Id*., at 475.

The Ninth Circuit's decision is clearly to the contrary. It concluded that § 402.02 does not "set out hoops that the FWS must jump through" because it is merely "a definitional section." *San Luis & Delta-Mendota Water Authority*, 747 F.3d at 635. In addition, the court held, "As important and consequential as the question is, the FWS is not responsible for balancing the life of the delta smelt against the impact of restrictions on [Central Valley

Project/State Water Project] operations." *Id*., at 637. In other words, considering the "downstream economic impact" is not the job of FWS.

Put simply, the Fourth Circuit said that the agency had to justify its "broad prohibition," and the Ninth Circuit says the opposite. And the Ninth Circuit's attempt to escape the conflict is unavailing. It explained, "As we read *Dow*, the court was concerned that the FWS had imposed an especially onerous requirement without any thought that it was feasible." 747 F.3d at 636 n. 42. Under this view, it would be acceptable to impose an especially onerous requirement with thought. Of course, this inescapably brings the analysis back to the need to overrule or limit *TVA v. Hill's* "whatever the cost" reading of the ESA.

After 37 years, numerous legislative changes, and a long retreat from *TVA's* heavy-handed approach, the time has now come to reconsider *TVA v. Hill*. Under the Ninth Circuit's rationale, FWS could completely shut down the port of Los Angeles in the interest protecting a single organism—considering only economic impacts to the government. Can it really be that Congress meant for the ESA to be applied *without any consideration* of the national economy? *Amici* NFIB Legal Center and Cato Institute submit that it is simply inconceivable that Congress would have intended for the agency to ignore devastating impacts on the human environment because the ESA, like all federal environmental regimes, was designed to strike a balance between our societal needs and the

needs of the ecological system on which we depend for continued sustenance.

CONCLUSION

For the reasons stated in the Petition for *Certiorari* and this *amici* brief, this Court should grant the writ of *certiorari* and, on review, reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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