No. 14-377

IN THE

Supreme Court of the United States

STEWART & JASPER ORCHARDS, a California corporation; ARROYO FARMS, LLC, a California limited liability company, and KING PISTACHIO GROVE, a California limited partnership,

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 FOR THE AMERICAN FARM BUREAU FEDERATION, THE CALIFORNIA FARM BUREAU FEDERATION, AND FARM CREDIT WEST, ACA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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In accordance with Supreme Court Rule 37.2, the American Farm Bureau Federation, the California Farm Bureau Federation, and Farm Credit West, respectfully submit their brief amici curiae in support of Stewart & Jasper Orchards' petition for a writ of certiorari.[1]

INTEREST OF AMICI CURIAE

Amici curiae have a direct interest in ensuring that agricultural water users' access to water—which is put to beneficial use on their land as irrigation for crops—be taken into account when decisions are made under the Endangered Species Act to protect listed species. In reaching its decision, which will deprive California farmers of the water they need to grow their crops, the Ninth Circuit acknowledged "the enormous practical implications of this decision."[2] Amici curiae—the American Farm Bureau Federation, the California Farm Bureau Federation, and Farm Credit West—bear the brunt of the practical implications of the Ninth Circuit's ruling that threatened species be protected whatever the cost.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity—other than amici curiae—made a monetary contribution to fund the preparation or submission of this brief. Counsel of record for all parties received timely notification of the amici's intent to file this brief. Petitioner has filed a blanket consent to the filing amicus briefs; Respondent has specifically consented to the filing of this brief.

[2] *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 593 (9th Cir. 2014).

The American Farm Bureau Federation

The American Farm Bureau Federation 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, the American Farm Bureau strives to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The American Farm Bureau today serves as the unified national voice of agriculture, working through our grassroots organizations to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities.

The California Farm Bureau Federation

The California Farm Bureau Federation is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. The Farm Bureau is California's largest farm organization.

As a state chapter of the American Farm Bureau Federation, the California Farm Bureau represents nearly 78,000 agricultural, associate, and collegiate members in 56 counties throughout California. Together the national and state Farm Bureaus strive to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food

through responsible stewardship of California's resources.

Farm Credit West, ACA

Farm Credit West, ACA is the number one financial services customer-owned cooperative for California's Central Coast, San Joaquin Valley, and Sacramento Valley agricultural industry. Farm Credit West is part of the 98-year old Farm Credit System—the largest provider of credit to American agriculture. As a cooperative lending institution, Farm Credit West finances all types of agricultural operations throughout much of California. 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.

Farm Credit West's approximately 4,000 borrowers represent $31.8 billion in agricultural production in California each year. Farm Credit West 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, Farm Credit West 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. Farm Credit West's loans also support the critical long-term investments that have enabled farmers in California to become the most productive in the country. 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 Farm Credit West and others. California farmers have also engaged in cooperative ventures with environmental organizations to preserve and enhance habitat for fish, wildlife, and waterfowl.

STATEMENT OF THE CASE

This case tests the sufficiency of the biological opinion prepared by the U.S. Fish and Wildlife Service (FWS) for the proposed joint operations plan for California's Central Valley Project (CVP) and the State Water Project (SWP)—two of the largest and most important water projects in the United States. At issue is the Delta smelt, a small, two-to-three inch species of fish endemic to the San Francisco Bay/Sacramento–San Joaquin Delta Estuary. In March 1993 FWS listed the species as threatened under the federal Endangered Species Act[3] and in February 1994 designated the Bay-Delta system a critical habitat for the Delta smelt.[4]

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[3] *See* 50 C.F.R. § 17.11.

[4] Critical Habitat Determination for the Delta Smelt, 59 Fed. Reg. 65,256 (Dec. 9, 1994).

In its biological opinion FWS found that the proposed operation of these two water projects would jeopardize the Delta smelt, and prescribed an alternative operations plan that would protect the fish but would severely curtail CVP/SWP water deliveries to homes and farms throughout most of California. Petitioners then brought suit under the Administrative Procedure Act against Reclamation, FWS, and the Secretary of Interior, to prevent the federal defendants from implementing the biological opinion and its alternatives. The district court invalidated the biological opinion as arbitrary and capricious.[5] In its ruling, the district court accused the FWS of "show[ing] no inclination to fully and honestly address water supply needs beyond the species," even as it "interdict[s] the water supply for domestic human consumption and agricultural use for over twenty million people who depend on the Projects for their water supply."[6]

The Ninth Circuit reversed, citing this Court's 1978 decision in *Tennessee Valley Authority v. Hill*,[7] which stated that the ESA requires that listed species be protected whatever the cost.[8] The Ninth Circuit held that under the Endangered Species Act (ESA), FWS could not take into account the economic impacts on the seven million acres of irrigated farmland and 20 million Californians

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[5] *San Luis & Delta–Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010).

[6] *Id.* at 956–957.

[7] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

[8] *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014).

whose water supply comes from CVP or SWP.[9] According to the Ninth Circuit, FWS's duty is "'to halt and reverse the trend toward species extinction, *whatever the cost*.'"[10]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is based on a construction of the ESA that is frozen in time. Although the Ninth Circuit considered authority from the Fourth Circuit that holds agencies must consider economic impacts of decisions under the ESA, it rejected that authority based on an outdated reading of this Court's *Tennessee Valley Authority v. Hill* decision.[11]

Over the last 36 years following this Court's ruling in *Tennessee Valley Authority v. Hill*,[12] countless circuit courts of appeal and federal district courts have rendered decisions repeating the phrase that listed species are to be protected "whatever the cost." And since 1978, courts seldom if ever stop to ask whether the Endangered Species Act still requires the species-take-all analysis set forth in *TVA*, or whether the term "whatever the cost" has become simply an artifact.

The District Court for the Eastern District of California, for instance, reached a conclusion similar to that of the Ninth Circuit in a challenge to

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[9] *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 636–37.
[10] *Id.*
[11] *Id.* at 637.
[12] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

implementation of a reasonable and prudent alternative: "The [Biological Opinion] reasonably concluded that the [reasonable and prudent alternative] is economically feasible for the action agency to implement. Only the costs to the action agency are relevant; economic burdens upon third parties cannot be considered under *TVA v. Hill*."[13] The Tenth Circuit, too, in a challenge to efforts to designate critical habitat for small silvery fish, held that "[i]t is clear that to fulfill the ESA's goal of halting and reversing the Silvery Minnow's decline, no matter the cost, FWS should designate critical habitat as soon as possible."[14] And the Ninth Circuit has held that the ESA displaces the traditional balance of the hardships consideration in claim for injunctive relief, and a "district court [is] not required to balance interests in protecting endangered species against the costs of the injunction when crafting its scope. Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species."[15]

Here, the Ninth Circuit woodenly applied

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[13] *In re Consol. Salmonid Cases*, 791 F. Supp. 2d 802, 956 (E.D. Cal. 2011); *see also id.* at 921 ("*TVA v. Hill* . . . concluded that Congress enacted the ESA to 'halt and reverse the trend toward species extinction, *whatever the cost*.' . . . This language directs the conclusion that the economic feasibility requirement refers only to the costs to the action agency . . . .").

[14] *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1227 (10th Cir. 2002) (citing *Tenn. Valley Auth.*, 437 U.S. at 184.

[15] *Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005).

this Court's statement in *TVA*, never even questioning if the provisions on which this Court rested its *TVA* decision are still in force today.

Although not reflected in the Ninth Circuit's decision, Congress has significantly amended the Endangered Species Act over the last 36 years, starting with a significant amendment in 1978 that was a direct response to the Court's ruling in *TVA*. Congress amended the Act to define "critical habitat," and specifically require that an economic analysis be prepared and considered in designating critical habitat for any listed species.[16] Congress again amended the Act in 1982 to clarify that the economic considerations are only excluded during a decision whether to place a species on the threatened or endangered species list.[17] Likewise, the National Environmental Policy Act (NEPA), which the Ninth Circuit held applied to the agency's decision to implement the reasonable and prudent alternative set forth in the Biological Opinion, also requires the agency to consider the effects of the decision on "the human environment."[18]

Despite these major changes to the Act, confirming that Congress no longer intends for agencies to ignore economic and other human impacts in protecting listed species, courts (such as the Ninth Circuit) continue to mindlessly follow in

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[16] Pub. L. 95–632, §12, 92 Stat. at 3766 (1978) (now codified at 16 U.S.C. § 1533(b)(2)).

[17] *See* S. Rep. No. 97-418 (1982) at 4.

[18] 42 U.S.C. § 4332.

lockstep this Court's statement in *TVA* that species are to be protected "whatever the cost."[19]

The costs borne here by the agricultural community (amici curiae) are staggering. With 95% of California already in "severe" to "exceptional" drought conditions, causing farmers to leave fields unplanted, cattle ranchers to reduce herds, and almond growers to tear out orchards, the Ninth Circuit's ruling that the limited water supply must be dedicated exclusively to the Delta smelt is indefensible. In 2009–2010, for instance, more than 300 billion gallons (or 1 million acre-feet) of water were diverted away from farmers (including amici curiae)—who would have put that water to beneficial use on their farms in the Central Valley—and allowed to flow into the San Francisco Bay, eventually going out into the Pacific Ocean, in order to protect threatened and endangered fish species (including the smelt).[20]

This Court should grant this Petition to resolve the split between the Ninth Circuit's view that agencies cannot consider economic impacts under the outmoded *TVA* rule, and the Fourth Circuit's more accurate view that agencies under the modern Endangered Species Act must consider such impacts.[21]

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[19] *Tenn. Valley Auth.*, 437 U.S. at 184.

[20] http://naturalresources.house.gov/issues/issue/?IssueID=5921.

[21] *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 637.

Argument

I. Ignoring Congress's amendment of the Endangered Species Act in response to *Tennessee Valley Authority v. Hill*, the Ninth Circuit's continued reliance on that decision's interpretation of ESA language that has since been amended is improperly frozen in time

Interpreting the original Endangered Species Act as passed by Congress in 1973, this Court in *TVA* stated: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost.* This is reflected not only in the stated policies of the Act, but in literally every section of the statute."[22] While noting that "[i]t may seem curious to some that the survival of a relatively small number of three-inch fish . . . would require the permanent halting of a virtually completed dam," this Court nevertheless enforced the statute as Congress had originally written it, stating "the explicit provisions of the Endangered Species Act require precisely that result."[23]

A quick computer search on Westlaw shows 7,674 citations to this Court's *TVA* decision, including 1,155 that contain the precise quote "whatever the cost" from that decision.

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[22] *Tenn. Valley Auth.*, 437 U.S. at 184 (emphasis added).
[23] *Id.* at 172–73 (quoted in 9th Cir. decision).

What those courts—including the Ninth Circuit in this case—fail to recognize is that Congress reacted almost immediately to this Court's *TVA* decision by amending the Endangered Species Act so that it no longer required species protection "whatever the cost." In November 1978, a few months after this Court handed down its *TVA* decision and, following extensive hearings, Congress added provisions to the ESA requiring the Secretary to designate critical habitat for listed species only "after taking into consideration the economic impact, and any other relevant impact" of the designation.[24]

As the Solicitor of the Department of Interior states in a 2008 formal opinion, by this amendment "Congress wanted the Secretary to understand the costs on human activity of making a designation before he made a decision and thereby provide an opportunity to minimize potential future conflicts between species conservation and other relevant priorities at an early opportunity."[25]

Congress amended the ESA again in 1982 to clarify that the Secretary must take economic and cost considerations into account when designating critical habitat, limiting the exclusion of cost considerations to a decision whether to place a species on the threatened or endangered species list.[26] In 2003 Congress again amended the ESA to

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[24] 92 Stat. at 3766 (now codified at 16 U.S.C. § 1533(b)(2)).
[25] Memorandum from Solicitor to Deputy Secretary, U.S. Dept. of the Interior, No. M-37016 (Oct. 3, 2008).
[26] *See, e.g.*, H.R. Rep. No. 97-567, at 20 – 21.

exempt certain military facilities to "allow for a balance between military training requirements and protection of endangered or threatened species."[27]

So the time has come for this Court to update its interpretation of the Endangered Species Act to account for Congress's amendments so that lower courts will no longer be misled by the *TVA* decision.

A. The ESA amendments of 1978, passed in response to *TVA*, injected economic considerations into species protection for the first time

Congress acted swiftly and decisively to change the law in reaction to this Court's *TVA* decision. The House Merchant Marine and Fisheries Committee "conducted the most extensive set of oversight hearings ever held on the operation of the Endangered Species Act," the focus of which was to determine "the likelihood of future conflicts between listed species and federally authorized activities."[28]

The Committee report, citing *TVA*, focused on the devastating effect the decision would have on the missions of federal agencies:

As we have seen in the celebrated

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[27] H.R. Conf. Rep. 108-354, at 668 (2003), reprinted in 2003 U.S.C.C.A.N. 1446.
[28] *Id.* at 12.

> snail darter case, Section 7 can potentially have an enormous impact on federal activities. In June of this year, the U.S. Supreme Court affirmed the lower court decision in the Tellico Dam case holding that the Tennessee Valley Authority facility could not be completed as planned because it would jeopardize the existence and destroy the critical habitat of the snail darter. . . . In reaching this conclusion the Court indicated that the legislative history of the Act revealed that Congress intended to halt and reverse the trend towards species extinction—whatever the cost. The Court indicated that the pointed omission of any type of qualifying language in the statute revealed Congressional intent to give the continued existence of endangered species priority over the primary missions of federal agencies.[29]

Concluding "that some flexibility is needed in the act to allow consideration of those cases where a Federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of [ESA],"[30] on November 10, 1978, Congress passed amendments to the Endangered Species Act.[31] Specifically,

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[29] H.R. Rep. 95-1625, 10, 1978 U.S.C.C.A.N. 9453, 9459-60.
[30] *Id.* at 13.
[31] Endangered Species Act Amendments of 1978, Pub. L. No. 65-632, 92 Stat. 3751.

Congress added a new provision explicitly requiring the Secretary to consider economic and other relevant impacts of designating critical habitat for listed species:

> In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the 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.[32]

The Committee report explained that under this provision:

> Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. The Secretary is not required to give economics or any other "relevant impact" predominant consideration in his specification of critical habitat

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[32] 16 U.S.C. § 1533(b)(4).

> for invertebrates.[33] *The consideration and weight given to any particular impact is completely within the Secretary's discretion.*[34]

In 1980, FWS amended its regulations to conform to the 1978 ESA amendments regarding critical habitat designation. The amended regulations required FWS, in considering an area for designation, to "identify the significant activities that would . . . affect an area considered for designation . . . and consider the reasonably probable economic and other impacts of the designation upon such activities."[35] The regulations also incorporated the statutory language authorizing FWS to exclude an area from critical habitat if it determined that the benefits of exclusion outweighed the benefits of inclusion.[36]

The 1978 amendments also required the Secretary, as part of the agency consultation process, to suggest "reasonable and prudent alternatives" that would "avoid jeopardizing" the species or "adversely modifying the critical habitat of such species."[37] These alternatives must be ones

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[33] The limitation to invertebrates was dropped in the final version.

[34] H.R. Rep. No. 95-1625, at 17 (emphases added).

[35] Rules for Listing Endangered and Threatened Species, Designating Critical Habitat, and Maintaining the Lists, 45 Fed. Reg. 13,010, 13,023 (Feb. 27, 1980) (codified at 50 C.F.R. § 424.12(c)).

[36] *Id.*

[37] Pub. L. No. 95-632, § 3, 92 Stat. 3751 (codified as amended at 16 U.S.C. § 1536(b)).

that "can be taken by the Federal agency . . . in implementing the agency action."[38] In addition, these alternatives must, according to Interior Department regulations, be "economically and technologically feasible."[39]

In a third major amendment to the ESA Congress created an exemption procedure under which an Endangered Species Committee could grant federal agencies permission to proceed with a proposed project or activity even though it would likely jeopardize the continued existence of the species or result in the "destruction or adverse modification" of critical habitat when there are "no reasonable and prudent alternatives to the agency action," and that the "benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat."[40] As the Solicitor of the Interior Department concluded, in passing this ESA amendment Congress expressly provided a mechanism by which the government could avoid "a repeat of the Tellico Dam situation, in which survival of a particular species trumped all other considerations regardless of how costly the impact of listing or designation of critical habitat might be on human activities."[41]

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[38] Pub. L. No. 95-632, § 3, 92 Stat. 3751 (codified as amended at 16 U.S.C. § 1533(b)).

[39] 50 C.F.R. § 402.02.

[40] Pub. L. 95-632, § 3, 92 Stat. at 3758 (codified at 16 U.S.C. § 1536(h)(1)(A)).

[41] Memorandum from Solicitor to Deputy Secretary, U.S. Dept. of the Interior, No. M-37016 (Oct. 3, 2008).

B. The 1982 amendments reaffirm that economic considerations are part of the ESA process

Congress revisited the ESA again in 1982, in part because of unintended consequences of the 1978 amendments. By requiring the Secretary to designate critical habitat at the same time he listed a species, and by requiring the Secretary to consider the economic impacts of designation, these amendments had unintentionally "indirectly introduced economic considerations into the listing process."[42] While making it clear that the *listing decision* must be based on "biological information alone,"[43] Congress reaffirmed its determination, expressed in the 1978 amendments, that critical habitat designations must consider economic and other factors.[44]

In 1984, FWS amended its regulations to conform to the 1982 amendments, thereby bringing the regulations into their current form. The amended regulations added the provision that critical habitat should be designated to the maximum extent "prudent and determinable."[45] As with the statutory amendments, the regulatory amendments left intact the concepts of prudency,

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[42] S. Rep. No. 97-418 (1982) at 4.

[43] H.R. Rep. No. 97-567, at 12 (1982), reprinted in 1982 U.S.C.C.A.N. 2812.

[44] *See id.* at 20-21.

[45] Amended Procedures To Comply With the 1982 Amendments to the Endangered Species Act, 49 Fed. Reg. 38,900, 38,909 (Oct. 1, 1984); 50 C.F.R. § 424.12(a).

consideration of economic and other non-biological impacts, and the option to exclude based on a balancing of benefits, but reinforced their importance and clarified their application in the preamble.[46]

C. The 2003 amendments further limit species protection on military lands and require balancing of defense considerations

In 2003, as part of the National Defense Authorization Act, Congress amended the critical habitat provisions of ESA section 4 in two ways. First, it amended section 4(a)(3) to bar the Secretary from designating critical habitat on certain Department of Defense lands, and it added (in addition to economic impacts), "the impact on national security" to the list of factors the Secretary must consider before designating an area as critical habitat for a listed species.[47] The conference report on the bill explained that this provision "would allow for a balance between military training requirements and protection of endangered or threatened species."[48]

Thus, by the end of 1978—and certainly by 2003—it was no longer possible to say that the

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[46] 49 Fed. Reg. at 38,909, 38,912; *see also id.* at 38,903–04, 38,906-07; 50 C.F.R. §§ 424.12, 424.19.

[47] Pub. L. 108-136, s 318(a), 117 Stat. 1433 (2003).

[48] H.R. Conf. Rep. 108-354, at 668 (2003), reprinted in 2003 U.S.C.C.A.N. 1446.

Endangered Species Act, as amended, required federal agencies to protect species "*whatever the cost.*"[49]

II. The Ninth Circuit's decision also ignores NEPA's requirement that the agency consider all significant impacts on the human environment

If *TVA* demands, as the Ninth Circuit held, that the only alternatives FWS may consider are those that are most protective of the species "whatever the cost,"[50] then NEPA's requirement that the agency take a hard look at all reasonable alternatives before deciding on a major federal action would be nullified whenever a listed species is involved. Yet NEPA requires that the agency prepare an environmental impact report for "major Federal actions significantly affecting the quality of the human environment"[51]; it provides no exception for threatened or endangered species:

> An EIS must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor. To trigger this requirement a plaintiff need not show that significant effects will in fact occur, but raising substantial questions whether a

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[49] *Tenn. Valley Auth.*, 437 U.S. at 184 (emphasis added).
[50] *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 637.
[51] 42 U.S.C. § 4332.

> project may have significant effect is sufficient.[52]

NEPA thus requires analysis of both human and other environmental factors before an agency takes action:

> NEPA unambiguously states that the requirement to do an EIS is triggered by "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c) (emphasis added); *see also Ocean Advocates*, 402 F.3d at 864 ("may cause significant degradation of some human environmental factor"). Lest there be any confusion, the regulations make clear that "human environment," as used in NEPA, is to be "interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14.[53]

As NEPA regulations state, the consideration of alternatives is "the heart of the environmental impact statement."[54] So NEPA regulations require that an Environmental Impact

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[52] *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

[53] *Natural Res. Def. Council, Inc. v. Dep't of Energy*, No. C-04-04448 SC, 2007 WL 1302498, at *16 (N.D. Cal. May 2, 2007).

[54] 40 C.F.R. § 1502.14.

Statement "[r]igorously explore and objectively evaluate all reasonable alternatives [to a proposed action], and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."[55]

So, too, the Ninth Circuit has invalidated EISs that fail to consider reasonable alternatives: "We have repeatedly recognized that if the agency fails to consider a viable or reasonable alternative, the EIS is inadequate."[56] The Ninth Circuit has also held that "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate,"[57] and that "informed and meaningful consideration of alternatives—including the no action alternative—is thus an integral part of the statutory scheme."[58]

In addition, NEPA compliance, which is intended to inform the agency decision-maker of the environmental impacts of proposed actions, must occur before the agency has made a decision or an irretrievable commitment of resources to a particular action.[59] So it does no good for FWS to choose the reasonable and prudent alternative first, and then have Reclamation prepare an EIS when, in practical terms, Reclamation has no real

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[55] 40 C.F.R. § 1502.14.

[56] *Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011).

[57] *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004).

[58] *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir.1988).

[59] *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).

alternative but to comply with FWS' chosen reasonable and prudent alternative which, as this Court recognized, "has a powerful coercive effect on the action agency."[60]

In this case, the Ninth Circuit admits that Reclamation's operations plan for the Central Valley Project is a major federal action that significantly affects the human environment, and "the EIS may well inform Reclamation of the overall costs—including the human costs—of furthering the ESA."[61] But, since this analysis occurs only after FWS has prescribed a revised operations plan as its reasonable and prudent alternative, Reclamation can do nothing to mitigate these significant impacts on the human environment—frustrating NEPA's process and purpose.

NEPA and ESA can be harmonized by first preparing the environmental impact study and then having FWS integrate the results into its biological opinion. Of course this may only be done if FWS is freed from the constraints of *TVA* which, as applied by the Ninth Circuit, requires FWS to ignore all environmental impacts—human and non-human—except for impacts to the listed species. Because the Ninth Circuit created an irreconcilable conflict between NEPA and ESA, this Court should grant certiorari to reverse.

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[60] *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

[61] *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 653.

III. The cost of protecting the threatened fish (the Delta smelt) has had catastrophic economic impacts on the farming community in California

The costs of protecting the Delta smelt imposed on amici curiae have been draconian.

California's water storage and transportation system designed by federal and state governments includes 1,200 miles of canals and nearly 50 reservoirs that provide water to about 22 million people and irrigate about seven million acres of land throughout California.[62] As a result of the Ninth Circuit's ruling, thousands of farm workers have lost their jobs, inflicting up to 40% unemployment in certain farming communities, and resulting in the fallowing of hundreds of thousands of acres of fertile farmland in California.[63]

The Ninth Circuit's decision to uphold the Biological Opinion whatever the cost will be most acutely felt in the "breadbasket of the world[64]"—California's Central Valley—which is already undergoing an unprecedented drought and water

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[62] http://naturalresources.house.gov/issues/issue/?IssueID=5921.

[63] *Id.*

[64] Northern California Regional Center, http://eb5northerncalifornia.com/index.php?page=breadbasket-of-the-world.

crisis.[65] The Ninth Circuit's decision will require more water to flow through the delta and out to the Pacific and less water through the Central Valley Project to California's ranchers and farmers.

A. The Central Valley Project

The Central Valley Project stretches from the Cascade Mountains near Redding, California in the north to the Tehachapi Mountains near Bakersfield 500 miles south.[66] Originally conceived by state engineers, the Bureau of Reclamation has operated the project since the 1930s.[67] As the Bureau itself explains, "[t]he CVP serves farms, homes, and industry in California's Central Valley as well as the major urban centers in the San Francisco Bay Area; it is also the primary source of water for much of California's wetlands."[68]

By some estimates the Central Valley produces as much as 45% of all table food served in the United States.[69] According to the USDA, farmers in California are the sole producers of over a dozen crops in the United States, including almonds, artichokes, grapes and raisins, clingstone peaches, pistachios, sweet rice, and walnuts.[70] The

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[65] *See, e.g.*, Gov. Edmund G. Brown, Jr., A Proclomation of a Continued State of Emergency (Apr. 25, 2014).
[66] http://www.usbr.gov/mp/cvp/about.html.
[67] http://www.usbr.gov/projects/Project.jsp?proj_Name =Central+Valley+Project.
[68] http://www.usbr.gov/mp/cvp/about.html.
[69] http://issuu.com/stockton_cvb/docs/centralvalleyguide.
[70] USDA National Agriculture Statistics Service, California Field Office, California Agricultural Statistics 2010 crop year,

state is the top producer of many others, including asparagus,[71] garlic,[72] bell peppers,[73] processing tomatoes,[74] apricots,[75] and olives.[76] Nearly one out of every five pounds of milk and cream produced in the United States is produced in the Central Valley.[77]

In addition to providing the Central Valley with water for agriculture and ranching, the CVP also produces electricity, provides for flood protection, navigation, recreation, and water quality benefits.[78] In total, the CVP delivers 7 million acre-feet of water annually—including irrigation water for one-third of the agricultural land in California, and water to supply 1 million Californian households, and generating power for some 2 million Californians annually.[79]

B. California's State Water Project

Planned, designed, constructed and now operated and maintained by the California Department of Water Resources, the California

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available at http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2010cas-all.pdf.

[71] 50%, *id.* at 6.

[72] 97%, *id.*

[73] 40%, *id.*

[74] 96%, all in the Central Valley, *id.*

[75] 91%, also all in the Central Valley, *id.* at 7.

[76] 96%, in the Central Valley, *id.*

[77] *Id.* at 9, 66.

[78] http://www.usbr.gov/mp/cvp/about.html.

[79] *Id.*

State Water Project provides water to 25 million Californians and 750,000 acres of irrigated land.[80] The Project includes 34 storage facilities, reservoirs and lakes; 20 pumping plants; 4 pumping-generating plants; 5 hydroelectric power plants; and about 701 miles of open canals and pipelines.[81] The state water project serves two-thirds of California's population.[82]

C. The current drought and the ESA

The Ninth Circuit's decision threatens to exacerbate what are already crisis-level conditions in this region. So far 2014 has been the third driest-year on record in California's history. Consultants at the U.C. Davis Center on Watershed Sciences have estimated that the drought has already resulted in a 6.6 million acre-foot reduction in surface water available to agriculture.[83] The direct costs to agriculture will total $1.5 billion, and the total economic costs of the drought will exceed $2 billion, "with a total loss of 17,100 seasonal and part-time jobs."[84]

Approximately "60% of the fallowed cropland, 70% of the statewide crop revenue losses and most of the dairy losses are likely to occur in

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[80] http://www.water.ca.gov/swp/.

[81] http://www.water.ca.gov/swp/.

[82] *Id.*.

[83] Richard Howitt, et al., *Economic Analysis of the 2014 Drought for California Agriculture* at ii, available at https://watershed.ucdavis.edu/files/biblio/DroughtReport_23July2014_0.pdf.

[84] *Id.*

the San Joaquin Valley."[85] Particularly hit hard will be the Central Valley, with at least 410,000 acres lost to fallowing, $800 million in lost farm revenue, and an additional $447 million in additional pumping costs.[86]

And these estimates do not take into account the effect of the Ninth Circuit's decision, which will exact millions of dollars of additional costs on the Central Valley's citizens. A 2008 study by Berkeley Economic Consulting estimated the direct impacts of Judge Wanger's 2007 Interim Remedial Order restricting Delta exports from the Central Valley Project and the State Water Project.[87] During an average water year, the flow reduction would result in the loss of 586,000 acre-feet of water supply,[88] enough water to meet the annual water demand of the City of San Francisco—for six years.[89] During

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[85] Howitt, et al., *Economic Analysis of the 2014 Drought for California Agriculture* at iii.

[86] Richard Howitt, et al., *Economic Analysis of the 2014 Drought for California Agriculture* at iii, available at https://watershed.ucdavis.edu/files/biblio/DroughtReport_23July2014_0.pdf.

[87] Sunding, et al., "Economic Impacts of Reduced Delta Exports Resulting from the Wanger Interim Order for Delta Smelt," US Berkeley Department of Agricultural & Resource Economics (2009), *available at* http://cdm16658.contentdm.oclc.org/utils/getfile/collection/p267501ccp2/id/1771/filename/1769.pdf.

[88] *Id.*

[89] Cooley, et al., "California's Next Million Acre-Feet: Saving Water, Energy, and Money," Pacific Institute (2010), *available at* http://www.pacinst.org/wp-content/uploads/sites/21/2013/02/next_million_acre_feet3.pdf.

wet years, losses could exceed 1 million acre-feet.[90]

The study estimated that the economic impact of these steep reductions in water supply would average more than $500 million annually.[91] And the study estimated that economic losses would exceed "$3 billion in a prolonged dry period . . . ."[92] Three years after the study was released, California entered into the worst drought in its history—a drought that has only grown worse with each year. And in hindsight, that study significantly underestimated the amount of water that would be lost to fish flows.[93]

A 2009 study by the Giannini Foundation of Agricultural Economics concluded that zero Central Valley Project deliveries and 10% of normal State Water Project deliveries would cost the Central Valley between $1.6 billion and $2.2 billion in income, and thousands of jobs.[94] A more recent 2011 report prepared for the California Department of Food and Agriculture concluded that water supply reductions during the ongoing drought estimated that nearly 410,000 acres are being

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[90] Sunding, et al., "Economic Impacts of Reduced Delta Exports Resulting from the Wanger Interim Order for Delta Smelt."

[91] *Id.*

[92] *Id.*

[93] http://naturalresources.house.gov/issues/issue/?IssueID=5921.

[94] Howitt, et al., "Economic Impacts of Reduction in Delta Exports on Central Valley Agriculture," Gianinni Foundation of Agricultural Economics (2009).

allowed to lay fallow[95] (an area about ten times the size of the District of Columbia). The same study concluded that the reduced water supply will cost the Central Valley nearly $1.7 billion and 14,500 full time and seasonable jobs.[96]

The Ninth Circuit's decision mandates that FWS ignore these costs in determining reasonable and prudent alternatives for species protection under the Endangered Species Act.

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[95] Howitt, et al., "Preliminary 2014 Drought Economic Impact Estimates in Central Valley Agriculture," California Department of Food and Agriculture (2014), *available at* https://watershed.ucdavis.edu/files/biblio/Preliminary_2014_drought_economic_impacts-05192014.pdf.

[96] *Id.*

CONCLUSION

For all these reasons, the Court should grant the petition for certiorari in this case.

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