No. 15-1350

In The
Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA, ET AL.,

Petitioners,

v.

DEPARTMENT OF COMMERCE, ET AL.,

Respondents.

On Petition for Writ of Certiorari from The United States Court of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AND AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

ELLEN STEEN
DANIELLE QUIST
American Farm Bureau Federation
600 Maryland Avenue, S.W., Suite 1000W
Washington, D.C. 20024
(202) 406-3618
Counsel for American Farm Bureau Federation

THOMAS J. WARD*
JEFFREY B. AUGELLO
National Association of Home Builders of the United States
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200
tward@nahb.org
* *Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page*(s)*

Cases

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

STATUTORY AND REGULATORY PROVISIONS

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

OTHER

INTEREST OF *AMICI CURIAE*

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. [1] Chief among NAHB's mission is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes in the United States. NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members.

The American Farm Bureau Federation ("AFBF"), a not-for-profit, voluntary general farm organization, was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents about 6 million member families through Farm Bureau organizations in all

---

[1] 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. Letters of consent are on file with the Clerk. No counsel for a 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*, its members, or its counsel made a monetary contribution to its preparation or submission.

50 states plus Puerto Rico. AFBF frequently advocates on behalf of its members in federal courts.

Many of *amici's* members are private landowners with reasonable expectations regarding the lawful use of their property. Given that a predominant number of the species protected under the Endangered Species Act ("ESA") have the major share of their habitat on private land, critical habitat decisions significantly impact *amici's* members. The ESA prohibits the National Marine Fisheries Service ("NMFS") from considering the economic impacts of adding species to the list of endangered or threatened species. However, NMFS must consider the economic impacts of specifying any particular area as critical habitat for listed species. Therefore, amici's members are always concerned with decisions that limit economic considerations in the context of ESA "critical habitat" determinations.

In this matter, the Ninth Circuit has decided that landowners who request that the government exclude certain areas from a critical habitat designation cannot obtain judicial review if the government rejects their request. However, if the government grants their request, then judicial review is appropriate for those who oppose the exclusion. As landowners who request exclusions, *amici's* members have a specific interest in the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

As the Petitioners have demonstrated, the decision below conflicts with precedent from the Court of Appeals for District of Columbia Circuit. In addition, *amici* suggest that the Ninth Circuit's decision conflicts with precedent from the Court of Appeals for the Third Circuit.

Furthermore, the Ninth Circuit's decision is internally inconsistent as it excludes judicial review if the agency makes one decision, but allows review if, after using the same process and data, the agency makes the opposite decision.

ARGUMENT

I. AGENCY ACTION IS PRESUMPTIVELY REVIEWABLE UNDER THE APA.

The cardinal rule governing the relationship between the courts and administrative agencies is that a final agency action is presumptively subject to judicial review. *See e.g.*, *Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1142 (9th Cir. 2010)("We begin with the presumption favoring judicial review of administrative action."). The Administrative Procedure Act ("APA") provides two exceptions to the basic presumption of reviewability: (1) where Congress has explicitly precluded judicial review under the terms of the governing statute, and (2) where Congress has committed particular actions "to agency discretion by law." 5 U.S.C § 701(a). The Ninth Circuit expansively applied the second of these narrow exceptions to find that Section 4(b)(2) of the Endangered Species Act ("ESA") offers no standard for reviewing a decision *not* to exclude areas from critical habitat. The effect of the Ninth Circuit's opinion – insulating NMFS's negative exclusion determination from judicial review – is inconsistent with the APA's presumption favoring judicial review and this Court's interpretation of that presumption.

Congress passed the APA in 1946 in direct response to concerns over unbridled administrative agency power. In hearings on the APA, Congressman Francis Walter, Chairman of the House Judiciary Committee, in discussing the

section 701(a)(2) exception for matters committed to agency discretion by law, remarked that agencies "do not have authority in any case to act blindly or arbitrarily." H.R. REP. NO. 79-1980 (1945), *reprinted in* APA HISTORY, *supra* n.42, at 368-69. Senator Patrick McCarran, Chairman of the Senate Committee on the Judiciary, further emphasized the "indispensable" value of judicial review "since its mere existence generally precludes arbitrary exercise of powers." 92 CONG. REC. 2,159 (1946), *reprinted in* Administrative Procedure Act: Legislative History, S. DOC. NO. 79-248, at 326 (2d SESS. 1946). In addition, the House Judiciary Committee noted that all agency decisions are presumptively reviewable absent clear Congressional intent to withhold that right:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. REP. NO. 79-752, at 212 (1945).

Congress enacted the APA to capture a wide range of agency activities. "The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed

that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Labs. v. Gardner,* 387 U.S. 136, 140-41 (1967) (internal citations and footnotes omitted)(*abrogated on other grounds* by *Califano v. Sanders,* 430 U.S. 99 (1977)). Furthermore, "the Court [has] held that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141 (internal quotation omitted); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230 n.4 (1986)(providing that "the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude judicial review."). "A restrictive interpretation of § 704 would unquestionably, in the words of Justice Black, 'run counter to § 10 and § 12 of the [APA]. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes . . .'" *Bowen v. Massachusetts,* 487 U.S. 879, 904 (1988) (quoting *Shaughnessy v. Pedreiro,* 349 U.S. 48, 51 (1955)).

In *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402 (1971), this Court advanced its first interpretation of the APA's "committed to agency discretion" exception to judicial review. Drawing on the legislative history of the APA the Court explained that section 701(a)(2) is a "very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is *no law to apply*'." *Id.* at 410

(emphasis added)(quoting S. REP. NO. 79-752, at 26 (1945)).[2]

The presumption of reviewability embodied in the APA and its relationship to the section 701(a)(2) exception was further clarified in *Heckler v. Chaney*, 470 U.S. 821 (1985). In *Chaney* this Court determined that agency decisions not to pursue enforcement actions are presumptively *unreviewable* absent "law to apply" in the form of substantive guidelines restricting the agency's enforcement discretion. "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'"[3] *Id.* at 830.

Chaney, while holding that the agency action was unreviewable, is limited to cases involving agency refusal to initiate enforcement proceedings. The Court left intact the presumption favoring judicial

---

[2] Similar to the case at hand, the statute in *Overton Park* required the Secretary of Transportation to conduct a balancing of competing interests. *Overton Park,* 401 U.S. at 413.

[3] The primary source of a "meaningful standard" for judicial review is typically the language of the statute at issue. However, *Chaney* did not say that a statute is the only source. The Court only said that a reviewing court must 'have' such a standard. Kenneth Culp Davis, *No Law to Apply*, 25 San Diego L. Rev. 1, 4 (1988). In *Chaney*, the court reviewed the governing statute for standards or guidelines in addition to the agency's own policy statements and regulations before concluding that Congress provided no meaningful standards to guide its review. *Chaney,* 470 U.S. at 836, 839, 853.

review in cases involving agency discretion not to initiate rulemaking and other nonenforcement decisions. *See Chaney,* 470 U.S. at 825 n.2, 833 n.4.

Therefore, in contrast to the Ninth Circuit's interpretation of section 701(a)(2), the APA's legislative history and Supreme Court precedent call for a narrow reading of section 701(a)(2).

II. THE NINTH CIRCUIT'S DECISION BELOW CONFLICTS WITH THIRD CIRCUIT PRECEDENT.

In addition to conflicting with decisions of the Court of Appeals for the District of Columbia Circuit (Pet. for Writ of Cert. at 19, *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce,* No. 15-1350 (May 3, 2016)), the decision below conflicts with precedent from the Court of Appeals for the Third Circuit.

The second sentence of ESA section 4(b)(2) begins: "The Secretary may exclude any area . . .." 16 U.S.C. § 1533(b)(2). The Ninth Circuit explains, "the word 'may' *establishes* a discretionary process . . . but does not set standards for when areas must be excluded from designation." *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1029 (9th Cir. 2015) (emphasis added). Thus, in the Ninth Circuit's view, when Congress uses the word "may" it has "established" that there is no "meaningful standard against which to judge the agency's exercise of discretion." *Chaney,* 470 U.S. at 830. Under this view, the Ninth Circuit felt no need

to analyze the remainder of the second sentence of section 4(b)(2) that provides: "if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . .." 16 U.S.C. § 1533(b)(2).

The Third Circuit, in contrast, has made clear that only in "rare instances" is an agency action "not reviewable by a court." *Hondros v. U.S. Civil Serv. Comm'n*, 720 F.2d 278, 291 (3d Cir. 1983). And in those rare instances the "restriction on access to judicial review may be effected only upon a strong showing that Congress so intended." *Id.* at 291-92. Thus, to determine Congress's intent, the Third Circuit reviews three factors to determine if an agency action is unreviewable under 5 U.S.C. § 701(a)(2). First, the agency must have broad discretion; meaning, "in a given case there is no law to apply, *not merely that statutes employ the permissive 'may' or other words of discretion*." *Id.* at 293 (internal quotations omitted) (emphasis added). In other words, "[o]nly when 'a fair appraisal of the entire legislative scheme . . . persuasively indicates that judicial review should be circumscribed' will this conclusion be compelled." *Id.* at 294 (quoting *Local 2855, AFGA (AFL–CIO) v. United States*, 602 F.2d 574, 578 (3d Cir.1979)).

Second, the types of issues involved impact the court's review. Thus, according to the Third Circuit, issues "not essentially legal [in] nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment are not readily susceptible to judicial review . . .." *Id.* at 293

(internal quotations omitted). "A characteristic of these choices is their dependence on special agency expertise coupled with the absence of any 'discernible guidelines' against which the expertise can be measured." *Id.*

Third, "even those actions 'committed to agency discretion by law' are reviewable on grounds that the agency lacked jurisdiction, that the agency's decision was occasioned by 'impermissible influences,' or that the decision violates any constitutional, statutory, or regulatory command." *Id.* (quoting *Local 2855*, 602 F.2d at 580.)

Applying this test to the statute at hand, the Third Circuit would have first addressed the ESA's "entire legislative scheme." *Hondros,* 720 F.2d at 294. At the very least this would have included a review of all of the language that Congress used in section 4(b)(2), not just the word "may." Furthermore, the Court would have reviewed the legislative history behind the critical habitat statute and Congress's intent in adding economic considerations into section 4(b). Finally, as part of the ESA's scheme, a Third Circuit court would review the critical habitat regulation that requires the agency to consider the "economic, national security, and other relevant impacts" when balancing the benefits of exclusion against including an area as part of critical habitat. 50 C.F.R. § 424.9(c). Second, under the Third Circuit's analysis, the court would consider the issues involved and decide if the agency's determination that "the benefits of such exclusion outweigh the benefits of

specifying such area as part of the critical habitat" is the type of analysis "not readily susceptible to judicial review." 16 U.S.C. § 1533(b)(2); *Hondros,* 720 F.2d at 293. Finally, the court would ascertain whether any impermissible influences prompted the agency's action and whether any jurisdictional issues or violations of "constitutional, statutory, or regulatory command" are implicated. *Hondros,* 720 F.2d at 293 (quoting *Local 2855*, 602 F.2d at 580)

As illustrated above, the analysis employed by the Third Circuit pursuant section 701(a)(2) is comprehensive and it meaningfully conflicts with the Ninth Circuit's decision which relies solely on the word "may" to exclude judicial review. This Court's review is necessary to resolve this conflict.

III. THE NINTH CIRCUIT'S DECISION IS INTERNALLY INCONSISTENT.

Not only does the decision below conflict with its sister circuits, it demonstrates an internal conflict.

Leading up to the designation of green sturgeon critical habitat, "NMFS assigned 'conservation values' to the areas it was considering for critical habitat designation, which include 'High' for areas deemed to have a high value of promoting conservation of the species (high conservation value or 'HCV' areas), 'Medium,' 'Low' or 'Ultra-low' areas." *Bldg. Indus. Ass'n of the Bay Area*, 792 F.3d at 1030. NMFS concluded that the sturgeon was unlikely to survive without the HCV areas. Yet, the

Service excluded over a dozen areas that were located in HCV areas. *Id.* at 1030.

The Ninth Circuit reviewed, under section 4(b)(2), NMFS's decision to *exclude* these areas. Specifically it explained that NMFS "did not act in an arbitrary or capricious manner or otherwise abuse its discretion in excluding areas from critical habitat designation." *Id.* at 1035.

APA section 706 establishes the "arbitrary, capricious" and "abuse of discretion" standards. 5 U.S.C. § 706(2)(A). Thus, to judicially review NMFS's decision to "exclude" certain areas, the section 701(a)(2) prohibition of review must not be applicable. Moreover, because 701(a)(2) did not apply, the Ninth Circuit must have determined that there was "law to apply" and there existed a "meaningful standard against which to judge the agency's exercise of discretion." *Chaney,* 470 U.S. at 830. In other words, in the Ninth Circuit's eyes, there is law to apply when NMFS excludes an area from critical habitat, but no law to apply when it does not.

Take for example the Department of Defense's request to exclude the Strait of Juan de Fuca and Whidbey Island Naval Restricted Area, the Strait of Juan de Fuca Naval Air-to Surface Weapon Range Restricted Area, the Admiralty Inlet Naval Restricted Area, and the Navy 3 Operating area. 74 Fed. Reg. 52,300, 52,319-20.

NMFS explained:

> that the benefits of designation are low for these areas, because there are relatively few detections of green sturgeon in the area and the consultation history indicates that there are currently no other Federal activities occurring within these areas that may affect critical habitat. In addition, the size of the areas are small relative to the Strait of Juan de Fuca and the total critical habitat designation, and the Navy's presence provides some protection for green sturgeon habitat, either through regulatory control of public access or the nature of the Navy's activities that limit the kinds of other Federal activities that would occur in the areas.

Id. Interestingly, going well beyond its expertise, NMFS also determined:

> that the potential impacts on national security are low for these areas, because the Navy's current activities have a low likelihood of affecting critical habitat. However, we recognize that the range of activities that may be carried out in these areas are often critical to national security and that a critical habitat designation in these areas could delay or halt these activities in the future.

Id. After collecting information, and conducting an analysis, NMFS "determined that the benefits of exclusion" of the above mentioned areas "outweigh

the benefits of designation" and it excluded those areas from the final critical habitat designation. *Id*.

Therefore, because NMFS decided to exclude those areas under the second sentence of section 4(b)(2), the Ninth Circuit did not apply APA section 701(a)(2) and reviewed NMFS's decision. *Bldg. Indus. Ass'n of the Bay Area*, 792 F.3d at 1035. In Supreme Court parlance, the Ninth Circuit therefore must have decided that a "meaningful standard" existed to review the "agency's exercise of discretion." *Chaney,* 470 U.S. at 830.

However, if the agency had analyzed the exact same information and used the exact same process, but in the end decided not to exclude the areas, then suddenly there is no standard to review the agency's exercise of discretion and judicial review is excluded—no matter how much the benefit of exclusion outweighs the benefit of inclusion.

This reasoning is inconsistent and requires the Court's review.

CONCLUSION

The Ninth Circuit's analysis of APA section 701(a)(2) conflicts with that of the Third Circuit. This leads the Ninth Circuit to hold that landowners who request that the government exclude certain areas from a critical habitat designation cannot obtain judicial review if the government rejects their request. However, if the government grants their request, then judicial review is appropriate for those

who oppose the exclusion.[4] This internally inconsistent result cannot stand, especially where a very different outcome could result in a sister circuit.

NAHB and AFBF respectfully requests that the Court grant certiorari to review the Ninth Circuit's perplexing decision denying judicial review of ESA section 4(b)(2).

DATED: June 6, 2016

Respectfully submitted,

ELLEN STEEN
DANIELLE QUIST
American Farm
Bureau Federation
600 Maryland Avenue,
S.W., Suite 1000W
Washington, D.C. 20024
(202) 406-3618
Counsel for American Farm Bureau Federation

THOMAS J. WARD*
JEFFREY B. AUGELLO
National Association of
Home Builders of the
United States
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200
tward@nahb.org

* *Counsel of Record*

[4] *See* Memorandum from the Solicitor of the U.S. Dep't of the Interior on The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act, M-37016, 24 (Oct. 3, 2008)(explaining that the benefits of inclusion and the benefits of exclusion must be addressed "according to the same standard.").