No. 15-1350

In the
Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA and BAY PLANNING COALITION,

Petitioners,

v.

UNITED STATES DEPARTMENT OF COMMERCE; *et al.*,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

TABLE OF AUTHORITIES—Continued

Page

Regulation

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

INTRODUCTION

Petitioners Building Industry Association of the Bay Area and the Bay Planning Coalition ask this Court to review a decision of the United States Court of Appeals for the Ninth Circuit. The decision holds that an agency determination not to exclude an area from critical habitat under Section 4(b)(2) of the Endangered Species Act, 16 U.S.C. § 1533(b)(2), is subject to no judicial oversight. App. A-19. Respondents United States Department of Commerce, *et al.* (Service), contend that review of the Ninth Circuit's courthouse-door-closing ruling is unwarranted, but none of its arguments withstands scrutiny.

First, critical habitat designation significantly affects property owners and property values, by determining the availability and conditions of federal permits, as well as by signaling to non-federal permitting agencies that designated land will be subject to onerous land-use limitations. Second, the issue of whether a critical habitat exclusion decision can be judicially reviewed directly affects the substantive challenge Petitioners advance against the exclusion methodology employed by the Service below. Third, the Ninth Circuit's ruling, which exempts the Service's irrational exclusion methodology from any judicial review, turns upon an interpretation of the Administrative Procedure Act's bar on judicial review of agency action committed to agency discretion by law, 5 U.S.C. § 701(a)(2), which cannot be reconciled with the interpretation employed by the D.C. Circuit. This Court should grant the petition.

ARGUMENT

I

CRITICAL HABITAT DESIGNATION DIRECTLY AND SIGNIFICANTLY AFFECTS LAND USE THROUGHOUT THE NATION

The Service downplays the significance of judicial review of critical habitat decision-making. In response to the testimony of nearly half the states in the nation, *see* Amicus Br. of Alabama, *et al*., at 1-2, the agency blandly declares that critical habitat designation merely "restricts the authority of federal agencies only," Resp. 4 n.3, because the Endangered Species Act solely forbids *federal* agencies from undertaking or permitting an activity that would result in critical habitat's destruction or adverse modification. *See* 16 U.S.C. § 1536(a)(2). For several reasons, the Service's characterization is inaccurate.

First, critical habitat designation directly affects private parties who require a federal permit to carry out activities on their property. *See* Sheila Baynes, Note, *Cost Consideration and the Endangered Species Act*, 90 N.Y.U. L. Rev. 961, 964 (2015); Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10,678, 10,680 (2013). The need for such federal land-use permits has become commonplace. For example, through the Clean Water Act, federal agencies routinely demand that landowners obtain a permit before embarking on ordinary homebuilding or similar development projects. *See Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion) (observing that the Army

Corps of Engineers and the Environmental Protection Agency "have interpreted their [Clean Water Act] jurisdiction . . . to cover 270-to-300 million acres of swampy lands in the United States").

Second, critical habitat designation directly affects the land market. Designations function as a signal to local governments that approval of land-use projects in designated areas may be costly and risk legal liability, thereby making permitting agencies less likely to approve such projects. *See* Jeffrey E. Zabel & Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. of Reg. Science 67, 94 (2006), *cited in* Amicus Br. for The Cato Inst., *et al*., at 8. Similarly, designations function as a negative signal to private actors in land markets, reducing the land's value. *See* Amicus Br. for The Cato Inst., *et al*., at 9 (in response to the critical habitat designation for the cactus ferruginous pygmy-owl, undeveloped land fell in value by more than 20%). *See also* Turner & McGrath, *supra*, at 10,680 (critical habitat designations result in "significant diminution in the value of the property").

Third, in part owing to its signaling function, critical habitat designation also directly increases a landowner's risk of legal liability. The Act and its implementing regulations forbid any person to "take" a protected species. *See* 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.31. "Take" is defined to include "harm," 16 U.S.C. § 1532(19), and by regulation "harm" has been interpreted to include at least some types of habitat modification, *see* 50 C.F.R. § 17.3. Hence, as a practical matter, modification of critical habitat is much more likely to result in a prohibited "take" than

modification of other types of habitat. *See* James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311, 327 (1990) (discussing a "series of cases illustrat[ing] courts' continuing tendency to merge critical habitat analysis with other [Endangered Species Act] prohibitions" such as the "take" prohibition).

Thus, the burdens that critical habitat impose extend well beyond the federal government. They underscore the importance of judicial review of decisions on whether to exclude areas from such habitat.

II

RESOLUTION OF WHETHER CRITICAL HABITAT EXCLUSION DECISIONS ARE JUDICIALLY REVIEWABLE WOULD HAVE A SUBSTANTIAL IMPACT ON THIS LITIGATION

Whether a party may seek judicial review of the Service's decision to exclude, or not to exclude, an area from critical habitat is an issue of great importance to landowners, as well as to state and local governments. *See* Pet. 12-14; Amicus Br. of Alabama, *et al*., at 1-2; Amicus Br. of The Cato Inst., *et al*., at 7-9; Amicus Brief of Nat'l Ass'n of Home Builders, *et al*., at 2. The Service argues that the Court should nevertheless pass because, regardless of its importance, resolution of the issue would not affect Petitioners' underlying challenge to the Service's decision-making concerning the green sturgeon's critical habitat. Resp. 11-14. The agency is wrong.

Section 4(b)(2) establishes a two-step exclusion process. First, the agency must consider the economic and other impacts attendant upon critical habitat designation. 16 U.S.C. § 1533(b)(2). Second, using the impact data, the agency may exclude areas from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, and if the exclusion would not result in the species' extinction. *See id*. The lower courts affirmed that the agency adequately discharged its *first-step* obligation, *see* App. A-12 to A-17; App. B-11 to B-13, and Petitioners do not challenge that holding. Petitioners *do* challenge (i) the agency's compliance with the *second step* of the Section 4(b)(2) analysis, as well as (ii) the Ninth Circuit's ruling that such a challenge cannot be judicially reviewed.

The Service characterizes Petitioners' substantive argument against the agency's second-step analysis as merely a challenge to its decision not to exclude any areas within so-called high conservation value zones. *See* Resp. 11. The description is too simplistic. The Service's analysis is faulty, Petitioners contend, not simply because certain areas otherwise deserving of exclusion were not excluded, *but also* because the Service's exclusion methodology was irrational.

That methodology was as follows:

(i) An area was of high conservation value if its exclusion from critical habitat designation would have significantly impeded the sturgeon's conservation. *See* 74 Fed. Reg. 52,300, 52,334 (Oct. 9, 2009).

(ii) Consequently, no exclusion would be granted, for economic reasons, to areas within high conservation value zones, because such exclusion would significantly

impede the sturgeon's conservation. *Id.* at 52,315, 52,334.

(iii) Nevertheless, some areas within high conservation value zones would be excluded, on account of impacts to national security and relations with Indian tribes. *See* 74 Fed. Reg. at 52,337 (Table 2); *id.* at 52,340 (Table 3).

Such a methodology is patently unreasonable. Whether an area is biologically important to a species' conservation does not depend on the nature of the non-biological impacts that flow from its designation as critical habitat. In other words, if excluding an area from critical habitat would impair a species' conservation, then that conclusion should hold regardless of the reason—economic or otherwise—for a proposed exclusion. Here, the Service inconsistently asserted that an area can be so biologically important that no *economic* exclusions can be afforded, and yet not be so biologically important so as to preclude exclusions that would further national security or relations with Indian tribes. *See* Pet. 8-10. The agency cannot have it both ways.

The decision below precludes Petitioners from contesting the Service's irrational methodology. It is enough, according to the Ninth Circuit, that the Service made some attempt to assess economic impacts throughout the proposed designation, and gave a perfunctory explanation for why economic reasons would not suffice to justify an area's exclusion. *See* App. A-15 to A-17. But nowhere in the Ninth Circuit's opinion, or in the Service's response in this Court, is there any defense of the agency's grossly inconsistent

exclusion methodology.[1] This Court should grant certiorari to affirm that such brazen examples of agency irrationality (or animus) are subject to judicial review.[2]

III

THE NINTH CIRCUIT'S REVIEWABILITY ANALYSIS CANNOT BE RECONCILED WITH THAT EMPLOYED BY THE D.C. CIRCUIT

The Service contends that the Ninth Circuit's analysis of when agency action is committed to agency

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[1] Petitioners have contested the agency's irrational exclusion analysis throughout this litigation. *See* Aplts.' Opening Br. at 42-43, No. 13-15132 (9th Cir. filed Apr. 29, 2013) ("[The Service] offered no explanation as to why it refused to balance the benefits in high conservation value areas when it came to economic impacts but not when it came to national security and tribal relations impacts."). *See also* Aplts. Reply Br. at 3 (same); Plts.' Not. of Mot., Mot. for Summ. J., & Mem. of Points & Auths. in Support of Mot. for Summ. J. at 20-21 (same), Doc. No. 45, Case No. 4:11-cv-04118-PJH (N.D. Cal. filed Apr. 13, 2012).

[2] The Service also suggests that it has no authority to exclude areas within high conservation value areas because Section 4(b)(2) forbids any exclusion that would result in the species' extinction. *See* Resp. 13. *Cf.* 16 U.S.C. § 1533(b)(2). The Service's *non-economic* exclusions within purportedly high value conservation areas belie the factual predicate for the agency's defense. *See* 74 Fed. Reg. at 52,338-39. In any event, merely because an action may impede the "conservation" of a species does *not* mean that it would result in the species' extinction. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (the Act is not intended "merely to forestall the extinction of species (*i.e.*, promote a species survival)," but also "to allow a species to recover"). *Cf.* 74 Fed. Reg. at 52,334 (exclusion of areas of high conservation value "would significantly impede *conservation* of the species") (emphasis added).

discretion by law, and therefore unreviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), does not conflict with the approach of the D.C. Circuit. Yet, understandably uncomfortable with the Ninth Circuit's hyper-focus on the word "may," the Service tries to paper over the lower court's flawed analysis by highlighting how the opinion below acknowledges that some Section 4(b)(2) decision-making *is* judicially reviewable, notwithstanding that section's "may" clause. Resp. 17-18.

The Service's gloss is not convincing. To be sure, the ruling below allows for judicial review of some Section 4(b)(2) decision-making, *but only of* the Service's (i) consideration of economic and other impacts, and, arguably, (ii) decisions to exclude when the predicate for the exclusion power—benefits of exclusion outweigh benefits of inclusion and exclusion would not result in the species' extinction—is challenged.[3] *See* App. A-14, A-19. Neither agency action relates to Section 4(b)(2)'s "may" clause. *See* 16 U.S.C. § 1533(b)(2). Thus, neither concession to judicial review of those actions moderates the Ninth Circuit's "may" clause obsession.

The Service's recasting fares no better with *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), which the decision below expressly followed. *See* App. A-18. The Service contends that *Bear Valley* allows for judicial review of *all* habitat exclusions, not just those in which the predicate for the exclusion power is alleged to be absent. *See* Resp. 17-18. Again, the agency's gloss does not convince. As the Service's

[3] Thus, if the predicates have been established, a decision to exclude an area from critical habitat, according to the logic of the Ninth Circuit's ruling, also would be unreviewable.

quoted portion of the opinion makes plain, *Bear Valley* merely conceded that the exclusion of "essential habitat" is reviewable. *See id*. (quoting *Bear Valley*, 790 F.3d at 990). The court arrived at that conclusion because it interpreted Section 4(b)(2) as requiring the designation of such essential habitat. *See Bear Valley*, 790 F.3d at 990. In other words, *Bear Valley*'s small nod to judicial review is premised on one of the *mandatory* predicates to the exclusion power—namely, the clause forbidding an exclusion that would result in the species' extinction. *See* 16 U.S.C. § 1533(b)(2). It was *not* based on Section 4(b)(2)'s "may" clause. Thus, the Service's interpretive gymnastics simply cannot change the fact that the Ninth Circuit's review-denying rulings turn upon Section 4(b)(2)'s use of the word "may."[4] *See* App. A-18 (citing, inter alia, *Bear Valley*); *Bear Valley*, 790 F.3d at 989 (rejecting an argument from case law that "a statute is not made unreviewable by the use of permissive language alone").

This "may" fixation cannot be reconciled with the case law of the D.C. Circuit. In *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), the statute at issue provided that the government "may" act, but only if one of three predicates were present. *See id*. at 380-81 (discussing 25 U.S.C. § 2710(d)(8)(B)). The D.C. Circuit concluded that, notwithstanding the statute's use of "may," the government would be required to act if any of the three predicates were established.

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[4] The Service also contends that the Ninth Circuit relied, in its reviewability analysis, on the Service's joint Section 4(b)(2) policy. Resp. 18. If the agency is correct that its policy was crucial to the Ninth Circuit's analysis, then that fact would present a separate, additional ground for review: Should a court defer to an agency's view of whether its actions are committed to agency discretion by law, and therefore unreviewable?

Amador County, 640 F.3d at 381. The decision in *Amador County* is reconcilable with the ruling below, the Service argues, because the statute at issue in *Amador County* not only specified the circumstances when the government *may* act, but also impliedly specified the circumstances when the government *had* to act. *See* Resp. 20-21 (citing, inter alia, *Amador County*, 640 F.3d at 381; 25 U.S.C. § 2710(d)(8)(A)). This distinction, however, did not drive the D.C. Circuit's analysis. *See Amador County*, 640 F.3d at 381. Rather, what mattered was the court's reluctance to accept the government's argument that, "[b]ecause Congress used 'may' instead of 'shall,'" the government "is never obligated" to act. *Id.* The court therefore read the statute's "use of 'may' . . . to limit" the government's discretion, *id.*, such that the predicates for the government's ostensibly discretionary power to act became the "law to apply." *Id.* at 380 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)). In contrast, the Ninth Circuit ruled below that the predicates to the Service's power to exclude under Section 4(b)(2) can *never* provide any law to apply when the agency declines to act. *See* App. A-18.

Similarly unsuccessful is the Service's attempt to harmonize the Ninth Circuit's approach to reviewability with that articulated in *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995). The Service tries to reconcile the decisions on the ground that *Dickson* relied on "statutory context" to support its conclusion in favor of judicial review, whereas such favorable context is supposedly absent from Section 4(b)(2). *See* Resp. 21-22 (citing *Dickson*, 68 F.3d at 1399; *Chappel v. Wallace*, 462 U.S. 296 (1983)). It is true that statutory context played a role

in the D.C. Circuit's analysis. But that fact does not help the Service here, because the illuminating context *was itself discretionary*. As *Dickson* observed, this Court in *Chappel* held that "decisions to correct or not correct a military record are reviewable despite the fact that § 1552(a)(1) provides that the Secretary '*may* correct any military record.' 10 U.S.C. § 1552(a)(1) (emphasis supplied)." 68 F.3d at 1402. Therefore, the D.C. Circuit could "see no reason why the use of 'may' in § 1552(b) should preclude review of waiver determinations when it does not preclude review of decisions on the merits under § 1552(a)(1)." *Id.* Thus, if anything, the Service's supposed ground for reconciling *Dickson* with the Ninth Circuit's rule actually serves further to highlight the conflict in how a "may" clause affects the right of judicial review. In any event, the Service entirely ignores *Dickson*'s key holding that a "may" clause indicates the *level* of review, not *whether* review is available. *See Dickson*, 68 F.3d at 1401. *See also* Amicus Br. of Mountain States Legal Found. at 9-11 (the Administrative Procedure Act's legislative history shows that a grant of discretionary authority does not necessarily insulate an agency from judicial review).

The Ninth Circuit's refusal to allow judicial review of exclusion decisions is, contrary to the case law of the D.C. Circuit, simply because the relevant statutory text uses a "may" clause.[5] This Court should grant the petition so as to definitively reject

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[5] The Ninth Circuit's ruling also conflicts with the law of the Third Circuit. Amicus Br. for Nat'l Ass'n of Home Builders, *et al.*, at 8-11 (discussing *Hondros v. United States Civil Service Commission*, 720 F.2d 278 (3d Cir. 1983)).

that pernicious and liberty-threatening interpretive principle.

CONCLUSION

The petition should be granted.

DATED: August, 2016.

Respectfully submitted,

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