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

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Service obligated to demonstrate how a reasonable and prudent alternative is economically feasible; if so, can it ignore the devastating impacts on the human community caused by the alternative's implementation, as the Ninth Circuit held below in conflict with the Fourth Circuit?

2. To what extent (if any) is the Service's interpretation of its own regulation defining "reasonable and prudent alternative"—an interpretation that dispenses with the obligation to explain or provide evidence of the alternative's economic feasibility—entitled to deference?

3. 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"?

CORPORATE DISCLOSURE STATEMENT

Stewart & Jasper Orchards, Arroyo Farms, LLC, and King Pistachio Grove hereby state that they have no parent corporations and that no publicly held company owns 10% or more of the stock of any of them.

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INTRODUCTION

The Ninth Circuit's decision greatly exacerbates the effects of the ongoing California drought and raises nationally significant questions of environmental and administrative law. As set forth below, none of the arguments of Respondents Sally Jewell, *et al.* (Service), or Natural Resources Defense Council, *et al.* (environmental groups), undercuts the Petition's reasons for why this Court's review of the Ninth Circuit's decision is warranted.

ARGUMENT

I

THE SMELT BIOLOGICAL OPINION HAS EXACERBATED THE EFFECTS OF CALIFORNIA'S DROUGHT

Both the Service and the environmental groups contend that the impacts of the smelt-inspired water-cutbacks have been exaggerated. Service Resp. 24-25; Envtl. Groups Resp. 1-2, 9. But neither the Service nor the environmental groups respond to, much less distinguish, the findings of the district court that verify the significant social, economic, and environmental consequences of the biological opinion's so-called reasonable and prudent alternative. *See* Pet. 7-8, 32-33. The Service's and the environmental groups' whitewashing also runs contrary to the Ninth Circuit's own acknowledgment of the "enormous practical implications of [its] decision," Pet. App. A-15, as well as its holding that the effects of the biological opinion's implementation are significant enough to merit an environmental impact statement under the National Environmental Policy Act, Pet. App. A-33.

To be sure, the current water crisis in California is not solely attributable to the biological opinion. Pet. 2-3. But that uncontroversial observation cannot change the fact that, since the biological opinion's implementation, a significant amount of water that otherwise could have been used for human and agricultural consumption has been irretrievably lost. Pet. 3 (noting that, in just one winter, 700,000 acre-feet of water was lost owing to the biological opinion's prescriptions). And it cannot change the fact that the biological opinion's ongoing implementation will *continue* to result in substantial losses to California's water supply. These consequences are significant, and they support review of the Ninth Circuit's decision.

II

THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THE FOURTH CIRCUIT'S DECISION

Below, the Ninth Circuit held that the economic feasibility of a reasonable and prudent alternative is solely a function of whether it is economically feasible for the consulting agency (or the non-federal applicant) *to implement that alternative.* Pet. App. A-105 to A-108. In contrast, the Fourth Circuit in *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (2013), held that economic feasibility depends, at least in part, on the economic consequences *once the alternative has been implemented. See id.* at 474-75. The Service and the environmental groups seek to explain away this patent conflict, but their efforts are unavailing.

First and foremost, the Fourth Circuit's decision simply does not make sense unless one presumes that the court understood economic feasibility to include consideration of the economic impacts of an alternative's implementation. It is no doubt true, as the Service and the environmental groups observe, Service Resp. 19-20; Envtl. Groups Resp. 14-15, that the Fourth Circuit chastised the Fisheries Service for failing to offer any explanation of the economic feasibility of the challenged alternative. *See Dow AgroSciences*, 707 F.3d at 474-75. But the reason for the court's criticism is *not* the reason that the Service and the environmental groups advance. Rather, as the Fourth Circuit explained, the "absence of a justification [for economic feasibility] becomes especially relevant in view of the *potential economic consequences* of such a [buffer] requirement." *Id.* at 474 (emphasis added). The court went on to note in detail how broad-ranging the buffer requirement would be, applying to "*any* waterway that is connected, *directly or indirectly*, at *any* time of the year, to *any* water body in which salmonids *might* be found at *some point*." *Id.* at 475 (emphasis in original).

But the court's discussion of the buffers' extent has nothing to do with the economic feasibility of imposing those buffers as a condition to pesticide registration. Nor does it have anything to do with the economic feasibility of offering for sale the pesticides with the buffer requirements on their label. Thus, the only conceivable relevance of the Fourth Circuit's discussion of the Fisheries Service's proposed buffer zones would be to highlight the potentially significant economic impacts of the *implementation* of those extremely burdensome buffer zones. And the persons relevant to that analysis (the individuals actually

implementing the buffer zones) would be the *farmers using the pesticides*—the very same class of affected persons that the Ninth Circuit below found to be irrelevant to the economic feasibility analysis.

Second, although the environmental groups are correct that the Ninth Circuit determined that the smelt alternative is economically feasible, Envtl. Groups Resp. 15-16, the observation misses the point. The Ninth Circuit's holding was based on the court's very narrow understanding of economic feasibility. Pet. App. A-110 to A-111. But it is that same blinkered approach which the Fourth Circuit held, and which the Petition contends, to be illegal. *Dow AgroSciences*, 707 F.3d at 474-75; Pet. 19-21.

Finally, the Service and the environmental groups suggest that their interpretation of the Fourth Circuit's decision comports with the purportedly reasonable view that the consultation process is only concerned with impacts to consulting agencies and project applicants, not with impacts to "downstream" individuals (such as California residents and businesses dependent on a reliable water supply). Service Resp. 20-21; Envtl. Groups Resp. 16. But that view would require the Service to ignore, among other things, an alternative's technological feasibility for such downstream individuals. *Cf.* 50 C.F.R. § 402.02 (defining a reasonable and prudent alternative to be, *inter alia*, "technologically feasible"). Applying that approach to the facts of *Dow AgroSciences*, the Service could propose, as a condition to pesticide registration, an alternative so technologically advanced that no pesticide user would have the skill or equipment to implement it. Such a plainly unworkable alternative would nevertheless satisfy the Service's and the

environmental groups' test, because such a requirement could be feasibly added to the document authorizing the pesticide's registration (the duty pertaining to the consulting agency) and the label governing its use (the duty pertaining to the pesticide manufacturer).

Accordingly, this conflict merits the Court's review.

III

THE NINTH CIRCUIT'S DECISION THREATENS TO OVERTURN THE BASIC PRINCIPLE THAT AGENCY DECISION-MAKING BE ADEQUATELY EXPLAINED AND JUSTIFIED

The Ninth Circuit ruled that, even if the Service were required to take into account the economic impacts of a proposed alternative's implementation when determining whether that alternative would be "reasonable and prudent," the Service's failure to meet that obligation here would nevertheless be permissible. App. A-105. The court reasoned that the Service is under no duty to explain or justify any action governed by a mere "definitional" provision, such as Section 402.02 of the Service's consultation regulations. *Id.* But as the Petition explains, such a holding undermines the basic administrative law requirement of reasoned decision-making. Pet. 12-14.

The Service makes no real response to this key criticism. Rather, it contends, first, that the Ninth Circuit found that the Service had adequately justified the *scientific* aspects of the biological opinion. Service Resp. 18. This observation, however, is irrelevant to the issue of whether the Service adequately explained

the proposed alternative's *economic* feasibility. Second, the Service argues that the Ninth Circuit did in fact determine that the proposed alternative is economically feasible. *Id.* But as noted above, the Ninth Circuit held that the alternative is economically feasible only by ignoring those aspects of feasibility that Stewart & Jasper Orchards contend to be relevant, *viz.*, the economic impacts that follow the alternative's implementation. Finally, the Service argues that the Ninth Circuit did not excuse the Service from complying with its own regulations. *Id.* But this merely begs the question of whether those regulations, because they contain "definitional" provisions, can impose *any* obligation on the agency.

For their part, the environmental groups contend blandly in a footnote that the Ninth Circuit's "definitional" fixation is not significant because the definition of a "reasonable and prudent alternative" comes from a regulation, rather than directly from the statutory text. Envtl. Groups Resp. 23 n.13. The point is unavailing: the Ninth Circuit's rationale does not depend on the source of the definition, *i.e.*, regulation or statute. Rather, what mattered to the Ninth Circuit is simply that the legal provision in question was a definition, which purportedly renders the provision incapable of supporting any legal obligation. App. A-105 (explaining that the economic feasibility requirement comes from a "definitional section," which merely "defin[es] what constitutes a[] [reasonable and prudent alternative—it does] not set[] out hoops that the [Service] must jump through"). Moreover, a validly enacted regulation is as much the law as the statutory text that it seeks to interpret. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). Thus, if the Ninth Circuit's decision is to the contrary

(as the environmental groups appear to suggest), then that holding, rather than undercutting the need for review, actually provides a further and independent basis for review of such a novel and unprecedented principle.

IV

WHETHER AND TO WHAT EXTENT COURTS SHOULD DEFER TO AGENCY INTERPRETATIONS OF THEIR OWN REGULATIONS IS AN ISSUE PROPERLY RAISED IN THIS CASE THAT MERITS THE COURT'S REVIEW

Below, the Ninth Circuit deferred, under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to the Service's interpretation of its own regulations. Pet. App. A-104. The Service and the environmental groups contend that this Court's review of that holding is unwarranted, but their arguments are without merit.

First, the Service argues that, because Stewart & Jasper Orchards did not brief the issue of deference below, that issue has been waived. Service Resp. 22. But the issue was plainly raised and decided in the Ninth Circuit's decision. Pet. App. A-104. That is enough to preserve it for further review. *See Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (noting that a claim not raised below may still be addressed by this Court so long as "it was addressed by the court below").

Second, the Service implicitly raises an objection of judicial estoppel, *cf.* Service Resp. 22, but that too is unavailing. A party generally cannot be estopped from advancing a position inconsistent with a prior position

unless the party gained an advantage through judicial adoption of the prior position. *See Zedner v. United States*, 547 U.S. 489, 503 (2006). Below, Stewart & Jasper Orchards gained no advantage by joining in a brief that merely acknowledged the existing law of the circuit, *viz.*, the Service's *Consultation Handbook* merits some measure of judicial deference. *See* State Water Contractors Princ. & Resp. Br. 38 (noting that the *Consultation Handbook* "has been afforded deference by th[e Ninth Circuit]") (citing *Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1165 (9th Cir. 2009)). To the contrary, such advocacy *prejudiced* Stewart & Jasper Orchards, given the Ninth Circuit's subsequent interpretation and application of the *Consultation Handbook*.

Third, both the Service and the environmental groups contend that the Ninth Circuit's decision is not a good vehicle for addressing the propriety of judicial deference to an agency interpretation of its own regulation, because the Ninth Circuit did not apply the more substantial deference of *Auer v. Robbins*, 519 U.S. 452 (1997). Service Resp. 22; Envtl. Groups Resp. 25-27. But this contention fails to grasp that the reasons for questioning *Auer* deference—such as the excessive delegation of legislative and judicial power to administrative agencies that it entails—generally apply as well to whether *Skidmore* deference (or any other type of deference, for that matter) would be proper. Moreover, the contention fails to acknowledge that, should the Petition be granted, it is virtually certain that the Service will defend itself before this Court as it did before the Ninth Circuit, *viz.*, through reliance on *Auer* deference. *See* Brief for Federal Defendant-Appellants 69 (arguing that the Service's

interpretation of economic feasibility merits substantial deference under *Auer*). Further, review of the Ninth Circuit's decision would allow this Court to address another important and closely related issue: whether *Skidmore* deference has any meaningfully constraining effect on judicial interpretation. *Compare United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (holding that an agency interpretation may still be controlling under *Skidmore* even if that interpretation does not merit the more substantial deference of *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984)); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (applying *Skidmore*-like considerations to determine the propriety of *Chevron* deference), *with Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting) (criticizing the majority opinion for requiring courts to "give the agency view some indeterminate amount of so-called *Skidmore* deference"); *id.* at 247 (observing that "*Skidmore* deference gives the agency's current position some uncertain amount of respect"). *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1250 (2007) ("What remains unclear, at least from the Supreme Court's opinions, is precisely how much less deferential *Skidmore* is and in what way this is so.").

Thus, this case is an appropriate vehicle for the Court to consider the significant issue of whether and to what extent an agency's interpretation of its own regulation can affect or control a court's interpretation of the same.

V

WHETHER THE CONTINUING APPLICATION OF *TVA V. HILL* EFFECTIVELY NULLIFIES CONGRESS' POST-*TVA* AMENDMENTS TO THE CONSULTATION PROCESS IS AN ISSUE THAT MERITS THIS COURT'S REVIEW

The Service and the environmental groups provide several reasons for why the Ninth Circuit's decision does not warrant this Court's revisiting of *TVA v. Hill*, 437 U.S. 153 (1978). But as set forth below, none is convincing.

First, the Service and the environmental groups contend that Congress' 1978 amendments to the Endangered Species Act support rather than undercut the Ninth Circuit's decision. In particular, they cite the language of Section 7 requiring that a reasonable and prudent alternative be one that "can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(a)(2). *See* Service Resp. 16; Envtl. Groups Resp. 12-13. But neither the Service nor the environmental groups explain how completely ignoring the economic impacts that follow upon the implementation of a proposed alternative—an approach that would allow, as here, the imposition of an economically disastrous water-wasting regime—would be either "reasonable" or "prudent" under any ordinary understanding of those concepts. Moreover, it is difficult to imagine how Congress could *not* have wanted to inject some consideration of economic feasibility into the consultation process following *TVA*. After all, *TVA* was a *Section 7* case, 437 U.S. at 195, and the uproar it caused was based

principally on the fact that Section 7, as interpreted in *TVA*, resulted in a significant waste of tax dollars. *See, e.g.*, *id.* at 210 (Powell, J., dissenting) ("I have little doubt that Congress will amend the Endangered Species Act to prevent . . . . the waste of at least $53 million . . . .").

Second, the Service and the environmental groups note that other parts of the 1978 amendments take economic considerations into account and, therefore, on the principle of *inclusio unius exclusio alterius*, it is appropriate for economic considerations to be entirely ignored when formulating a purportedly reasonable and prudent alternative. Service Resp. 16-17; Envtl. Groups Resp. 17-20. Although other provisions of the Act do expressly direct the Service to take account of economic considerations, it does not therefore follow that Section 7's consultation provisions are entirely indifferent to those same considerations. With respect to exclusions from critical habitat designations, 16 U.S.C. § 1533(b)(2), and exemptions granted by the Endangered Species Committee, *id.* 1536(e)-(n) (provisions added by the 1978 amendments), economic considerations may *trump* countervailing species protection. In contrast, under Section 7, as properly interpreted, economic considerations merely influence whether the Service can *propose an alternative* to a jeopardy-causing action. In other words, the role of economic analysis required in the consultation process does not and cannot, standing alone, trump *any* species protection. But it is nevertheless reasonable to conclude that Congress wanted broader economic considerations to play at least *some* role in determining whether a proposed alternative—which by definition may not itself cause jeopardy, *see* 50 C.F.R. § 402.02;

Pet. App. A-107 to A-108—is both "reasonable and prudent."

Third, the Service and the environmental groups contend that this Court has repeatedly affirmed (or at least not called into question) the continuing vitality of *TVA*. Service Resp. 23; Envtl. Groups Resp. 17. But the decisions they cite do not comport with that reading. Indeed, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669-71 (2007), *limited* the scope of Section 7, and *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997), held that one of Section 7's purposes is to avoid "needless economic dislocation." Neither decision endorses the "whatever the cost" slogan of *TVA*. *Cf. Nat'l Ass'n of Home Builders*, 551 U.S. at 694 (Stevens, J., dissenting) ("[The majority opinion] turns its back on our decision in Hill."). And *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), concerned the Endangered Species Act's definition of "take," a term notably absent from Section 7's jeopardy-avoidance provision. *Cf.* 16 U.S.C. § 1536(a)(2).

Finally, although contending that the Petition identifies no reason to reexamine *TVA*, neither the Service nor the environmental groups engage the Petition's arguments that *TVA*'s indiscriminate reliance on legislative history and purposivist statutory analysis makes the decision an outlier. Pet. 30-31. Similarly, neither address the point that *TVA*'s "whatever the cost" command is unachievable and counterproductive. Pet. 31-32. To be sure, the Service rather baldly contends that *TVA* should still be adhered to because *stare decisis* is especially strong when the precedent interprets a statute (given that the interpretation is subject to congressional override).

Service Resp. 25. But of course the very point of the Petition is that Congress *did act*—indeed less than a year later—to restrain *TVA*'s potentially odious consequences. Yet the decision below effectively nullifies Congress' remedial legislation. Now therefore is the appropriate time for *TVA*'s reexamination.

CONCLUSION

The Petition should be granted.

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Respectfully submitted,

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