No. _____

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; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; UNITED STATES NATIONAL MARINE FISHERIES SERVICE; PENNY PRITZKER, in her official capacity as Secretary for the United States Department of Commerce; EILEEN SOBECK, in her official capacity as Assistant Administrator for Fisheries, National Marine Fisheries Service,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Administrative Procedure Act creates a strong presumption in favor of judicial review of final agency action. For that reason, this Court reads narrowly the Act's exception for "agency action . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

The Endangered Species Act requires the government to designate "critical habitat" for protected species, but only "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Using this analysis, the government "may exclude any area from critical habitat" if it determines that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," so long as the exclusion would not result in the species' extinction. *Id.* Below, the United States Court of Appeals for the Ninth Circuit held that, because the Endangered Species Act says "may," a decision on whether to exclude an area from critical habitat is immune from any judicial oversight. The question presented is:

In light of the Administrative Procedure Act's strong presumption in favor of judicial review of final agency action, is a decision on whether to exclude areas from critical habitat immune from such review?

LIST OF ALL PARTIES

The Petitioners are the Building Industry Association of the Bay Area and the Bay Planning Coalition.

The Federal Respondents are the United States Department of Commerce, National Oceanic and Atmospheric Administration, United States National Marine Fisheries Service, Penny Pritzker (in her official capacity as Secretary of Commerce), and Eileen Sobeck (in her official capacity as Assistant Administrator for Fisheries, National Marine Fisheries Service). Secretary Pritzker and Administrator Sobeck have been substituted in pursuant to Federal Rule of Appellate Procedure 43(c)(2).

The Intervenor-Respondent is Center for Biological Diversity.

CORPORATE DISCLOSURE STATEMENT

The Building Industry Association of the Bay Area and the Bay Planning Coalition 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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PETITION FOR WRIT OF CERTIORARI

The Building Industry Association of the Bay Area and the Bay Planning Coalition respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 792 F.3d 1027 (9th Cir. 2015), and is included in Appendix (App.) A. The opinion of the district court is not published but is available at 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012), and is included in App. B. The order of the Court of Appeals denying the petition for rehearing *en banc* is not published and is included in App. C.

JURISDICTION

On July 7, 2015, the Court of Appeals entered its judgment. On August 11, 2015, the Petitioners filed a petition for rehearing *en banc*. On January 6, 2016, the Court of Appeals denied the petition. On March 15, 2016, Justice Kennedy granted the Petitioners' application for an extension of time in which to file their Petition, to May 5, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

16 U.S.C. § 1533(b)(2):

> The Secretary shall designate critical habitat . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such 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 concerned.

5 U.S.C. § 701(a)(2):

> This chapter applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law.

INTRODUCTION

"One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). The decision below contravenes this basic principle of administrative law. In the Ninth Circuit's view, the agencies that administer the Endangered Species Act, 16 U.S.C. §§ 1531-1544, may

designate an area as critical habitat under the Act, even if the designation would impose billions of dollars in costs, or pose significant threats to national security, or produce other substantial and harmful consequences, while achieving little or no environmental benefit. The agencies supposedly have this arbitrary power, according to the Court of Appeals, notwithstanding that Congress amended the Act specifically to authorize the agencies to exclude areas from designation when their inclusion would produce absurd cost-benefit outcomes. Such power, under the Ninth Circuit's decision, is committed to agency discretion under law and therefore falls within "a very narrow exception," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), to the right of judicial review that the Administrative Procedure Act establishes. *See* App. A-18 to A-19 (citing 5 U.S.C. § 701(a)(2)).

The Ninth Circuit's miserly construction of the judicial review afforded aggrieved parties under the Administrative Procedure Act warrants this Court's review, for two reasons:

First, whether a decision on the exclusion of areas from critical habitat is subject to judicial review is an issue of national importance. Designations of critical habitat can cover hundreds of thousands of acres and impose hundreds of millions of dollars in economic costs, as well as other substantial social costs. Yet often they provide little or no conservation benefit. Hence, allowing judicial review of a decision on whether to exclude areas that would suffer disproportionate impacts would provide a needed safeguard against abusive agency action and irrational environmental regulation.

Second, the Ninth Circuit's construction of the Administration Procedure Act's bar on judicial review of agency action committed to agency discretion by law conflicts with the case law of the D.C. Circuit. Under the latter court's decisions, an action is not wholly committed to agency discretion so long as the statutory text sets forth examples of when the exercise of such discretion would be appropriate. In contrast, according to the decision below, such textual examples merely establish the predicate for the exercise of a discretion wholly immune from judicial review.

For these reasons, more fully set out below, the Petition should be granted.

STATEMENT OF THE CASE

A. Economic Considerations Play a Limited but Nonetheless Key Role Under the Endangered Species Act

This case concerns the designation of critical habitat for the southern distinct population segment of the North American green sturgeon. The sturgeon is a species of fish listed as "threatened" under the Endangered Species Act. *See* 50 C.F.R. § 223.102(e).

The Act directs the Secretary of Commerce (who has delegated her authority to the National Marine Fisheries Service) (hereinafter "the Service") to develop a list of "endangered" and "threatened" species.[1] *See* 16 U.S.C. § 1533(a)(1) ("The Secretary

[1] The Secretaries of Commerce and Interior have joint responsibility for administering the Act. *See* 16 U.S.C. § 1532(15). The former has jurisdiction over marine species (such as the (continued...)

shall . . . determine whether any species is an endangered species or a threatened species . . . ."). An "endangered species" is one that "is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). In contrast, a "threatened species" is one that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). The Service makes its listing determinations based on biological and related factors. *See id.* § 1533(a)(1)(A)-(E).

The Act also generally requires the Service to designate critical habitat for listed species. *See id.* § 1533(a)(3)(A) (directing the designation of critical habitat for listed species "to the maximum extent prudent and determinable"). Critical habitat that is occupied by the species must contain the physical or biological features essential to the species' conservation.[2] *Id.* § 1532(5)(A)(i).

Economic and other non-biological considerations play no role in the listing process or in the initial eligibility determination for critical habitat. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010) ("The decision to list a species as endangered or threatened is made without reference to the economic effects of that decision."); Policy

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[1] (...continued)
sturgeon), whereas the latter has jurisdiction over freshwater and terrestrial species.

[2] The Act provides a different standard for "unoccupied" critical habitat. *See* 16 U.S.C. § 1532(5)(A)(ii). That standard is not at issue in this case. 74 Fed. Reg. 52,300, 52,330 (Oct. 9, 2009), *codified at* 50 C.F.R. § 226.219 ("This final rule does not designate any unoccupied areas as critical habitat . . . .").

Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226, 7228 (Feb. 11, 2016) ("The Act's language makes clear that biological considerations drive the initial step of identifying critical habitat.").

Such considerations do, however, play a crucial role in determining which areas ultimately will be designated as critical habitat. Section 4(b)(2) of the Act mandates that the Service "shall designate critical habitat" only after "taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. 16 U.S.C. § 1533(b)(2). *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) (noting the "categorical *requirement*" to consider such impacts). Building on this obligation, the second sentence of the same provision gives the Service the authority to exclude areas that otherwise would qualify as critical habitat, based on a designation's impacts. Specifically, the Service "may exclude any area" if the agency 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 only limitation on this power is that the Service may not exclude any areas if such exclusion would result in the species' extinction. *Id*.

B. The Service Designated Large Swaths of Aquatic Areas as Critical Habitat, and Categorically Refused to Exclude Many Areas Based on Economic Impact, Even If That Impact Was Disproportionately Large

In October, 2010, the Service designated over 11,000 square miles of marine habitat, nearly 900 square miles of estuary habitat, and hundreds of miles of riverine habitat in Washington, Oregon, and California, as critical habitat for the sturgeon. *See* 74 Fed. Reg. 52,300, 52,345-51 (Oct. 9, 2009), *codified at* 50 C.F.R. § 226.219.

During the administrative process preceding the designation, many interested parties requested that various areas be excluded. *E.g.*, Bay Planning Coalition Comments, Admin. R. 007024 (requesting the exclusion of South San Francisco Bay, as well as deep channels, near-shore development, and other developed areas in the Bay "to avoid potential for the designation to impose increased cost to the key industries in a time of economic crisis"); Pacific Coast Shellfish Growers Association Comments, Admin. R. 006751 (requesting an exclusion because "an adequate analysis of the economic impacts of designating shellfish beds [in Washington State's Willapa Bay and Grays Harbor] as critical habitat for green sturgeon would have shown that the benefits of excluding shellfish beds from that critical habitat designation far outweigh any marginal benefit that might be achieved by such a designation"); State Water Contractors & San Luis & Delta Mendota Water Auth. Comments, Admin. R. 006605, 006624 (requesting the exclusion of the lower portion of the Feather River given that the "estimated economic

impacts already substantially exceed the $100,000 criteria for exclusion," and noting that a failure to exclude "could severely compromise the operations" of the State Water Project and the Central Valley Project); Tehama-Colusa Canal Authority Comments, Admin. R. 006588-006589 (requesting the exclusion of areas around the Red Bluff Diversion Dam along the Sacramento River owing to the designation's significant economic impacts, which "could well undermine the viability" of the Authority). *See also* 74 Fed. Reg. at 52,315-19 (discussing some of the foregoing and other exclusion requests).

The Service responded that many of the particular areas requested for exclusion would fall within areas of so-called "high conservation value." *See, e.g.*, *id.* at 52,317 (noting that portions of the Sacramento River around Red Bluff Diversion Dam are "areas of High conservation value"); Final ESA Section 4(b)(2) Report, Admin. R. 005816 (Table 1) (noting as areas of high conservation value the Upper and Lower Sacramento River, San Francisco Bay, San Pablo Bay, Willapa Bay, and Grays Harbor). Taking such areas out of the designation would, in the Service's view, significantly impede the sturgeon's conservation. *See* 74 Fed. Reg. at 52,334. The Service therefore refused to consider excluding any particular area from high conservation value zones based on economic impacts.[3] *See id.* at 52,315 (affirming "the decision rule . . . that no

[3] The Service also rejected the exclusion of some areas of medium conservation value. The agency reassessed these areas as high conservation value based on anticipated—but presumably not guaranteed—habitat improvements. *See* 74 Fed. Reg. at 52,336 (deeming the lower Feather and Yuba Rivers to be areas of high conservation value because future improvements would increase the areas' conservation value from medium to high).

economic impact could outweigh the benefit of designation for . . . specific areas . . . with a High conservation value"). *See also* Section 4(b)(2) Report, Admin. R. 005807 ("[A]ll areas with a conservation value rating of 'high' were not eligible for exclusion regardless of the level of economic impact because of the threatened status of the green sturgeon.").

Nevertheless, the agency ultimately did exclude many areas from the proposed designation. 74 Fed. Reg. at 52,337. Remarkably, over a dozen were within the zones that the Service had determined to be of high conservation value and thus ineligible for consideration of exclusion on the basis of economic impacts. *Id.* at 52,337 (Table 2); *id.* at 52,340 (Table 3). The Service justified these high conservation value exclusions by citing the benefits to national security and Indian tribe relations that would accrue if these areas were not kept within the sturgeon's critical habitat. That the particular areas fell within purportedly high conservation value zones did not matter, in the Service's view, because the areas were small enough such that their exclusion would not impede the sturgeon's recovery. *See id.* at 52,338-39.

The Service did not, however, explain why the exclusion of some particular areas within high conservation value zones was consistent with the agency's blanket decision not to exclude within high conservation value zones any other areas—no matter how small—on account of economic impacts. For example, the Service designated approximately 329 square kilometers of San Pablo Bay as critical habitat. *See* 74 Fed. Reg. at 52,329 (Table 1). The Service declined to consider any exclusions within that area on account of economic impacts because it was of

purported high conservation value.[4] *See* Section 4(b)(2) Report, Admin. R. 005816 (Table 1); 74 Fed. Reg. at 52,316. Yet the Service excluded approximately 319 square kilometers of the Strait of Juan de Fuca—another purported high conservation value area—on account of national security impacts.[5] *See* 74 Fed. Reg. at 52,337 (Table 2).

C. The District Court and the Ninth Circuit Held That the Service's Decision on Whether to Exclude Areas from Critical Habitat Is Exempt from Judicial Review, Even When an Exclusion Would Save Billions of Dollars, or Avoid Other Significant Social Impacts, and Would Harm No Species

In March, 2011, the Petitioners sued to challenge the Service's economic impact and exclusions

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[4] The agency did exclude a small portion of San Pablo Bay on account of national security impacts. *See* 74 Fed. Reg. at 52,338.

[5] It may be that the Service did not consider all high conservation value areas to be of equal value. *See* Section 4(b)(2) Report, Admin. R. 005826 ("Although it is within a critical habitat area with high conservation value (Strait of Juan de Fuca), and has a sizable overlap with that area (11 percent), the Admiralty Inlet site has less conservation value than other portions of the specific area . . . ."); Nat'l Marine Fisheries Serv., Designation of Critical Habitat for the threatened Southern Distinct Population Segment of North American Green Sturgeon Final Biological Report 90 (Oct. 2009), Admin. R. 005735 (noting the varying conservation value of particular areas within the Strait). If so, the agency did not explain why a more precise analysis of high conservation value areas was afforded some potential habitat exclusions but not others.

analyses.[6] Among the grounds for the challenge was that the Service's process for considering and making habitat exclusions was arbitrary and capricious. *See* App. B-4. The district court ruled against the Petitioners. The court explained that Section 4(b)(2) provides a standard for determining when an area may—but not must—be excluded from critical habitat. *See id*. at B-13 to B-14. Consequently, in the court's view, the Service's decision not to exclude any area fell within the Administrative Procedure Act's prohibition on judicial review of "agency action committed to agency discretion by law." *See id*. (quoting 5 U.S.C. § 701(a)(2)).

On appeal, the Ninth Circuit affirmed. With respect to the Petitioners' exclusion claims, the Ninth Circuit agreed with the district court that they were not subject to judicial review. *See* App. A-17 to A-19. Emphasizing Section 4(b)(2)'s use of the word "may," the Court of Appeals explained that the exclusion power is wholly discretionary with the Service because the Act "does not set standards for when areas *must* be excluded from designation." *Id*. at A-18. The Ninth Circuit therefore concluded that the Service's decision on whether to exclude areas from critical habitat was "committed to agency discretion by law." *See* App. A-18 (quoting 5 U.S.C. § 701(a)(2)). Thus, no aspect of the Service's exclusion decision—whether an area qualifies as high conservation value, how to assess

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[6] The Petitioners began their action in the District for the District of Columbia. *See* Doc. 1, Compl. for Decl. & Injunc. Relief, No. 1:11-cv-00521-RWR (D.D.C. Mar. 10, 2011). That court subsequently granted the motion to intervene by Intervenor-Respondent Center for Biological Diversity, *see* Minute Order (July 15, 2011), and transferred the case to the Northern District of California, *see* Doc. 20, Mem. Op. & Order (Aug. 1, 2011).

particular benefits, or how to weigh the competing benefits—can be judicially reviewed. As a result, within the Ninth Circuit the Service has the authority to designate areas as critical habitat even when such a designation would produce only marginal benefits to a species and, at the same time, would result in economic ruin or social catastrophe for property owners and local communities.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE IMPORTANT FEDERAL QUESTION OF WHETHER A DECISION ON THE EXCLUSION OF AN AREA FROM CRITICAL HABITAT UNDER THE ENDANGERED SPECIES ACT IS IMMUNE FROM JUDICIAL REVIEW

Critical habitat designations can have enormous economic and social impacts.[7] In this case alone, the Service estimated for the proposed designation a yearly economic impact of up to $578 million. *See* Indus. Econ., Inc., Economic Analysis of the Impacts of Designating Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon ES-4 (Sept. 28, 2009), Admin. R. 010523.

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[7] The significant number of exclusions from sturgeon critical habitat that the Service awarded for national security reasons demonstrates that a designation's impacts extend well beyond the purely economic. *See* 74 Fed. Reg. at 52,337 (Table 2).

The sturgeon's case is not unique. For example, the Service's designation of critical habitat for the California red-legged frog is expected to cost from $150 million to $500 million over the next two decades. 75 Fed. Reg. 12,816, 12,858 (Mar. 17, 2010). The critical habitat designation for the coastal California gnatcatcher is estimated to cost over $1 billion through 2025. Econ. & Planning Sys., Economic Analysis of Critical Habitat Designation for the California Gnatcatcher 13 (Feb. 24, 2004).[8] Similarly expensive is the critical habitat designation for 15 California vernal pool species. *See* 68 Fed. Reg. 46,684, 46,753 (Aug. 6, 2003) (estimating a total cost of $1.3 billion over twenty years). Sometimes, critical habitat costs are so disproportionate that even the agencies are moved to action. *See* Designation of Critical Habitat for *Astragalus magdalenae var. peirsonii* (Peirson's milk-vetch), 69 Fed. Reg. 47,330, 47,345 (Aug. 4, 2004) (excluding areas from the proposed designation because their inclusion would have cost between $53 million and $121 million, and resulted in the possible loss of from 1,179 to 2,525 jobs).

The foregoing figures, from the very agencies that administer the Act, evidence the "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." 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). Bluntly, critical

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[8] *Available at* http://www.fws.gov/economics/Critical%20Habitat/Final%20Draft%20Reports/CA%20coastal%20gnatcatcher/CAGN_DEA_Feb2004.pdf.

habitat designations "have the ability to ruin individuals' lives." Matthew Groban, Case Note, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give a Hoot About the Public Interest It "Claims" to Protect?*, 22 Vill. Envtl. L.J. 259, 279 (2011). In particular, "hundreds of thousands of rural citizens face the potential loss of their livelihoods stemming from . . . designations of [critical habitat]." *Id*. What is worse, these citizens suffer for no good reason. *See* 68 Fed. Reg. at 46,684 ("In 30 years of implementing the [Endangered Species Act], the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources."). *See also* Sheila Baynes, Note, *Cost Consideration and the Endangered Species Act*, 90 N.Y.U. L. Rev. 961, 998 (2015) (observing that "the biologists themselves have found critical habitat [to be] of such little utility").

The significant economic, social, and other impacts that critical habitat designations produce make judicial review of exclusion decisions crucial. Yet under the Ninth Circuit's ruling, the Service has no obligation to grant an exclusion to avoid an economically or socially catastrophic designation, even when the designation would produce minimal conservation benefits. Ironically, that is the precise result which Congress sought to avoid in granting the Service the power to exclude areas from critical habitat. The Endangered Species Act of 1973 did not contain a provision for excluding areas of critical habitat. The origins of that power lay with this Court's decision in *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153 (1978). In *TVA*, the Court ruled that the construction of the almost-finished Tellico Dam could

not be completed. Such work, it was thought, would eradicate the endangered snail darter, a small freshwater fish.[9] *See id.* at 162 ("The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat.") (quoting 40 Fed. Reg. 47,505, 47,506 (Oct. 9, 1975)) (emphasis removed). Consequently, the work would violate the Endangered Species Act's prohibition on federal agencies taking action that would jeopardize the continued existence of a protected species or adversely modify its critical habitat. *See TVA*, 437 U.S. at 193 (citing 16 U.S.C. § 1536(a)(2)). The Court defended this arguably "absurd result," *TVA*, 437 U.S. at 196 (Powell, J., dissenting), based on its understanding that Congress intended the Endangered Species Act to protect species "whatever the cost," *id.* at 184 (majority op.).

The Court's decision incited an uproar in Congress,[10] resulting in the Endangered Species Act

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[9] Subsequent to the Court's decision, "several small relict populations" of snail darter were discovered in other streams. Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 Envtl. L. 1, 8 n.22 (2002). In 1984, the Service downlisted the fish to threatened status and rescinded its critical habitat. 49 Fed. Reg. 27,510 (July 5, 1984).

[10] *See, e.g.*, Committee on Environment & Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, & 1980, at 822 (Congressional Research Service eds., 1982) [hereinafter Legislative History] (statement of Rep. Robert Leggett of California) ("We should be concerned about the conservation of endangered species, but I, for one, am not prepared to say that we should be concerned about them above all else."); *id.* at 919 (statement of Sen. Howard H. Baker, Jr., of Tennessee) ("I do not

(continued...)

Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3,751 (Nov. 10, 1978). These amendments added several provisions to increase the Act's flexibility and to make it more accommodating to economic, national security, and other interests. They included the requirement that such considerations be taken into account when designating critical habitat. *Id*. § 11, 92 Stat. at 3,766. They also included the exclusion power. *Id*.

The Ninth Circuit's decision effectively undoes Congress's ameliorative efforts. Without judicial review of a decision whether to exclude an area, property owners have no relief from a designation that, as in *TVA*, would prove to be economically ruinous without providing any meaningful environmental

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[10] (...continued)
believe, however, that Congress intended that the protection or management of an endangered species should in all instances override other legitimate national goals or objectives with which they might conflict."); *id*. at 1068 (statement of Sen. William Scott of Virginia) ("People are more important than fish."); *id*. at 1006 (statement of Sen. Edwin Garn of Utah) ("Certainly, in 1973, there was a great environmental push. The Endangered Species Act passed the Senate extremely easily, with no dissenting votes. But, talking to many of my colleagues, I learn that they certainly would not have voted for it if they had known the implications and the extremes to which the act would be carried."); *id*. at 1102 (statement of Sen. Garn) ("In the case of TVA against Hill, the Supreme Court concluded that it had been Congress[']s intent to provide endangered or threatened wildlife and plants the highest possible degree of protection from Federal actions. All other national goals, the Court said, must fall in the face of a threat to an endangered species. [¶] That interpretation is, in my opinion, patent nonsense, and it is not the interpretation put upon the act by the Congress in passing it.").

benefit.[11] For example, under the Ninth Circuit's decision, the Service could make an express finding that an area's exclusion would avoid one billion dollars in costs, whereas its inclusion would afford just one dollar in conservation benefits. Nevertheless, the Service's refusal to grant an exclusion in these circumstances could not be reviewed *at all*.[12] This Court has never countenanced such plainly irrational agency behavior.[13] *See Michigan*, 135 S. Ct. at 2707. *See also Bennett*, 520 U.S. at 172 (observing that "the

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[11] The original proposed version of the exclusion power was limited to invertebrate species. *See* H.R. Rep. No. 95-1625, at 16 (Sept. 25, 1978). It was subsequently amended on the floor of the House to apply to all listed species. *See* House consideration and passage of H.R. 14104, with amendments, Oct. 14, 1978, *reprinted in* Legislative History, *supra* n.10, at 884-85. The amendment's sponsor, John Buchanan of Alabama, advocated for the change owing to the negative economic impact in his Congressional district caused by endangered species protections afforded two small minnowlike fish. *See id*.

[12] Given the Service's position that only biological factors matter in determining whether an area is initially eligible for designation, 81 Fed. Reg. at 7,228, there is no point in assessing a designation's non-biological impacts if the implementation of that assessment—through the exclusion process—is immune from review. Thus, the Ninth Circuit's decision impermissibly converts into a meaningless paper exercise the Service's obligation to assess the economic and other impacts before designating critical habitat. *Cf. Bennett*, 520 U.S. at 172 (holding that the Service has a categorical obligation to assess such impacts prior to designation).

[13] To endorse such unreviewable discretion would raise serious constitutional questions. *See* Amee B. Bergin, Comment, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?*, 28 B.C. Envtl. Aff. L. Rev. 363, 396-97 (2001) (suggesting that a wholly unreviewable grant of discretionary power would violate the nondelegation doctrine).

Secretary's ultimate decision" whether to exclude an area from critical habitat "is reviewable . . . for abuse of discretion"). *Cf.* Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332, 1339 (2008) ("In a legal culture that is firmly committed to judicial review, wedded to reasoned decisionmaking, and devoted to a fair and regular process, there is little space for the exercise of unreviewable legal power that is dispensed without reason and without the need to be consistent."); Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965, 970 (1969) ("[T]he exception of 'discretion' from review shield[s] 'sound' discretion only; it in no wise exempt[s] the antithetical 'abuse of discretion' from the review expressly directed by [the Administrative Procedure Act].").

Allowing for judicial review of a decision whether to exclude areas from critical habitat is important beyond the Endangered Species Act as well. In this era of the ever-expanding administrative state, ensuring meaningful judicial review of agency action has been a matter of keen importance to this Court. *See, e.g.*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651-53 (2015) (relying on the "strong presumption" in favor of judicial review to allow for review of EEOC's conciliation duties regarding employment discrimination claims); *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) (relying on the same presumption to allow for review of compliance orders issued under the Clean Water Act). *See also U.S. Army Corps of Eng'rs v. Hawkes Co.*, Doc. No. 15-290 (cert. granted Dec. 11, 2015) (presenting the question of whether a jurisdictional determination by the United States Army Corps of Engineers under the Clean Water Act is judicially reviewable). Review of the Ninth Circuit's

decision would therefore be consistent with this Court's abiding concern to ensure some measure of judicial review to check the abusive exercise of agency discretion.

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT CIRCUIT CONFLICT ON WHETHER A "MAY" CLAUSE NECESSARILY GRANTS AN UNREVIEWABLE DISCRETION UNDER THE ADMINISTRATIVE PROCEDURE ACT

A. The Ninth Circuit's Narrow Interpretation of the Right of Judicial Review Afforded by the Administrative Procedure Act Conflicts with the D.C. Circuit's More Generous—and More Reasonable—View

In holding that decisions on whether to exclude critical habitat are beyond judicial review, the Ninth Circuit created a conflict with the D.C. Circuit. Under the latter court's jurisprudence, the use of the word "may" does not trigger the Administrative Procedure Act's bar unless there is truly "no law" for the court to apply. *See, e.g.*, *Amador County v. Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011) (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 410)). There is law to apply, according to the D.C. Circuit, so long as the relevant text sets forth examples of when the exercise of discretion would be appropriate.

For example, in *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995), veterans petitioned the Army Board for Correction of Military Records for an upgrade to their discharge classifications. The Board rejected the petitions on timeliness grounds, even though the statute in question gave the Board the authority to waive the statute of limitations. *See id.* at 1399 (quoting 10 U.S.C. § 1552(b) ("[A] board . . . *may* excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.") (emphasis added)). The district court ruled that the statute granted a wholly unreviewable discretion to the government on whether to waive the limitations bar, but on appeal the D.C. Circuit disagreed. The court explained that the statute's use of the word "may" "does not mean that the matter is *committed exclusively* to agency discretion"; it means simply that the "courts should accordingly show *deference* to the agency's determination" when reviewing it. *Dickson*, 68 F.3d at 1401. A contrary interpretation, the court observed, would produce the bizarre outcome of the Board being able to deny a waiver even when the Board had expressly found such a waiver "to be in the interest of justice." *Id.* at 1402 n.7.

The D.C. Circuit reached a similar result in *Amador County*, 640 F.3d 373. In that case, a county sued to overturn the Secretary of Interior's "no-action" approval of a gaming compact between an Indian tribe and the state of California. The relevant statutory standard provided that the Secretary "may disapprove" such a compact "only if such compact violates" one of three enumerated limitations. *See* 25 U.S.C. § 2710(d)(8)(B)(i)-(iii). The Secretary argued that, because of the statute's use of "may," his decision not to disapprove a compact was wholly discretionary and

unreviewable. *See Amador County*, 640 F.3d at 380-81. Relying on *Dickson*, the D.C. Circuit disagreed. It reasoned that the decision not to disapprove a compact was reviewable because the enumerated limitations provided the standards for such review. As the court explained, although the use of the word "may" might give the Secretary the unreviewable discretion to disapprove (or not) in some circumstances, the Secretary nevertheless "*must* . . . disapprove a compact if it would violate any of the three limitations." *See id.* at 381 (emphasis added).

Under *Dickson* and *Amador County*, the Service's decision not to exclude areas from critical habitat should be subject to review. As noted above, Section 4(b)(2) provides that the Service "may exclude any area from critical habitat if [it] 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). Notwithstanding its "may" clause, the statute clearly provides the "judicially manageable standards . . . for judging how and when an agency should exercise its discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The Service would undoubtedly abuse its discretion if it were to deny an exclusion when the benefits of that exclusion substantially outweighed the benefits of inclusion. *See Michigan*, 135 S. Ct. at 2707 (agency action that produces substantial costs with little or no benefit is "not . . . rational"); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("If an agency takes action not based on neutral and rational principles, the [Administrative Procedure Act] grants federal courts power to set aside the agency's action as 'arbitrary' or 'capricious.'"). *Cf.* Andrew M. Grossman,

Michigan v. EPA: A Mandate for Agencies to Consider Costs, 2015 Cato Sup. Ct. Rev. 281, 283 ("*Michigan* provides an opportunity to obtain judicial review of how agencies regard costs."); Case Note, *Clean Air Act–Cost Benefit Analysis–Michigan v. EPA*, 129 Harv. L. Rev. 311, 319 (2015) ("If this [*Michigan*] analysis reveals that a regulation's costs are wholly disproportionate to its benefits, the regulation could well be struck down as arbitrary and capricious under [*Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)] review.").

The Ninth Circuit reached a contrary conclusion, relying on its recent decision in *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015).[14] *See* App. A-17 to A-18. In that case, the Ninth Circuit attempted to distinguish *Dickson* and *Amador County* on the ground that, in those decisions, "the government argued that it was not obligated to take any action." *Bear Valley*, 790 F.3d at 989-90. In contrast, the Ninth Circuit noted, under Section 4(b)(2) the Service "*is* obligated to take action," because other portions of Section 4(b)(2) require the designation of at least some critical habitat. *Id.* at 990.

The Ninth Circuit's explanation misses the point. That the Service must take some action *under other clauses of Section 4(b)(2)* says nothing about whether, *under Section 4(b)(2)'s "may" clause*, the Service also

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[14] Earlier this Term, the Court denied a petition for certiorari in *Bear Valley*. *See* Order of Jan. 11, 2016, *Bear Valley Mut. Water Co. v. Jewell*, Doc. No. 15-367. The *Bear Valley* petitioners, however, did not seek review of the "committed to agency discretion" issue on which this Petition seeks review. *See* Pet. for Writ of Cert. at i-iii (filed Sept. 22, 2015).

can be compelled to take action. Moreover, the court's heavy reliance on the statute's use of "may" implies that the presence of *any* discretion means that a decision is *committed* to agency discretion. That has never been the law. *See Heckler*, 470 U.S. at 830 (observing that judicial review is unavailable only "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"). *Cf.* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 695 (1990) (observing that "the A[dministrative] P[rocedure] A[ct] contains compelling internal evidence" rejecting the view that the presence of agency discretion necessarily precludes judicial review).

The Ninth Circuit's interpretation of when "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2), conflicts with the D.C. Circuit's interpretation of that limitation on judicial review. This Court's review of the conflict is warranted.

B. The Ninth Circuit's Decision Conflicts with the Rule of the D.C. Circuit that Denials of Petitions for Rule-Making Are Subject to Judicial Review

The Administrative Procedure Act allows any interested person to petition an agency to exercise its rule-making authority. 5 U.S.C. § 553(e). For several decades, the D.C. Circuit has held that the denial of a rule-making petition is subject to judicial review. *See, e.g.*, *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (per curiam). That has been the law notwithstanding an underlying *permissive* grant of rule-making authority. *See, e.g.*, *Defenders of Wildlife*

v. Gutierrez, 532 F.3d 913, 918-19 (D.C. Cir. 2008) (subjecting to judicial review the Service's denial of a petition for emergency Endangered Species Act rule-making, notwithstanding that the petition pertained "to a matter of policy within the agency's expertise and discretion"); *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 3-5 (D.C. Cir. 1987) (subjecting to judicial review the denial of a petition for rule-making under the Horse Protection Act, notwithstanding that the Act states that the Secretary of Agriculture "is authorized to issue such rules and regulations as he deems necessary," 15 U.S.C. § 1828); *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 97-98 (D.C. Cir. 1989) (Ginsburg, J.) (subjecting to judicial review the denial of a petition to initiate rule-making proceedings under the Shipping Act of 1984, notwithstanding that the Act directed that the Federal Maritime Commission "may prescribe rules and regulations as necessary," Pub. L. No. 98-237, § 17, 98 Stat. 67, 84 (Mar. 20, 1984)).

Indeed, Congress commonly couches grants of rule-making authority in permissive language. *See, e.g.*, 12 U.S.C. § 5512(b)(1) (under the Dodd-Frank Act, the Director of the Bureau of Consumer Financial Protection "may" prescribe regulation to carry out the purposes of federal consumer financial laws); 16 U.S.C. § 1533(d) (under the Endangered Species Act, the Service "may" adopt regulations prohibiting take of threatened species); 29 U.S.C. § 1135 (under ERISA, the Secretary of Labor "may" prescribe rules to carry out the Act); 47 U.S.C. § 201(b) (under the Telecommunications Act, the Federal Communications Commission "may" adopt regulations to carry out the provisions of the Act, consistent with the public interest).

According to the decision below, however, agency action or inaction under such clauses cannot be reviewed because they use "may" or similarly permissive wording. *See* App. A-18. Thus, per the Ninth Circuit, an agency's denial of a rule-making petition (just like the denial of a request to exclude an area from critical habitat on account of extraordinary economic, national security, or other impact) is not subject to any judicial review. That conclusion cannot be reconciled with the law of the D.C. Circuit.

Accordingly, this Court's review of the conflict between the circuits is warranted.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

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Respectfully submitted,

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