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; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; UNITED STATES NATIONAL MARINE FISHERIES SERVICE; PENNY PRITZKER, IN HER OFFICIAL CAPACITY AS SECRETARY FOR THE 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

BRIEF FOR ALABAMA, AND 22 OTHER STATES AS AMICI CURIAE SUPPORTING PETITIONERS

LUTHER STRANGE
Attorney General

Andrew L. Brasher*
Solicitor General
Brett J. Talley
Deputy Solicitor General

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us
*Counsel of Record
[counsel for additional *Amici* listed at end of brief]

June 2, 2016

QUESTION PRESENTED

In light of the Administrative Procedures 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Idaho, Kansas, Louisiana, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming are States concerned that the Ninth Circuit's decision declaring certain critical habitat decisions immune from judicial review threatens to undermine the important cost-benefit analysis Congress built into the Endangered Species Act. Critical habitat determinations have serious consequences for the economic and ecological interests of the States. Irrational or arbitrary designations of critical habitat can cost jobs and tax revenue, while the States' efforts to comply with these designations often require the expenditure of taxpayer funds. Moreover, States have a paramount interest in protecting the biological diversity within their borders. A decision to exclude critical habitat on an irrational or arbitrary basis can endanger or even lead to the extinction of threatened species.

These decisions are at the heart of the Endangered Species Act, and States and other interested parties should be able to challenge them in court under the familiar and oft-applied standards of the Administrative Procedures Act. The opinion of the Ninth Circuit instead commits these decisions wholly

---

[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

to agency discretion. Because of the consequences of this expansion of the nonreviewability doctrine both as it relates to the ESA and to agency action in general, this Court should grant the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress, recognizing the significant economic and environmental impact critical habitat designations entail, included in amendments to the ESA a mandatory cost-benefit analysis of critical habitat decisions. Section 4(b)(2) of the ESA requires,

> The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and 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.

16 U.S.C. § 1533(b)(2).

In the decision below, the Ninth Circuit held that "the ultimate decision not to exclude a certain area from designation as critical habitat is committed to agency discretion," and nonreviewable. *Bldg. Indus.*

Ass'n of the Bay Area v. U.S. Dep't of Commerce, 792 F.3d 1027, 1035 (9th Cir. 2015) (citing a provision of the APA shielding certain agency actions from judicial review). The lower court so held even though this Court in *Bennett v. Spear* held that "the Secretary's ultimate decision is reviewable" under an abuse of discretion standard, explaining that nothing in the statute "alter[s] the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" 520 U.S. 154, 172 (1997) (quoting 16 U.S.C. § 1533(b)(2)). Not only did the lower court all but ignore *Bennett*, it ignored this Court's admonition that exceptions to reviewability "should be narrowly construed," as well as the "general presumption that all agency decisions are reviewable under the APA." *Heckler v. Chaney*, 470 U.S. 821, 826 (1985). Further, by basing its decision on the statute's use of the word "may," the lower court created a circuit split with the D.C. Circuit. That court, in examining the use of the word "may" in a similar statute, found that "such language does not mean the matter is *committed* exclusively to agency discretion." *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995); *Envtl. Def. Fund v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (intent to preclude judicial review "cannot be found in the mere fact that a statute is drafted in permissive rather than mandatory terms").

The Ninth Circuit's decision has far-reaching implications for the States and any party affected by critical habitat designations. By taking the power to review designations out of the hands of the judiciary,

the lower court opened the door to arbitrary and capricious critical habitat decisions. Even the most egregious violations of Congress's command to consider economic impact are left with no avenue of review. This error is compounded by the fact that critical habitat designations are not the kind of agency actions that are "beyond the judicial capacity to supervise." *Heckler*, 470 U.S. at 834.

The lower court erred in expanding the nonreviewability doctrine, and the Court should grant the Petition.

ARGUMENT

The Ninth Circuit's opinion finding nonreviewable all decisions regarding the exclusion of areas from critical habitat designations raises serious issues for the States, contradicts this Court's precedents, and creates a circuit split with the D.C. Circuit. The Court should grant the petition to address the far-reaching impact of the lower court's decision and give clarity to the scope of review available under the ESA.

I. The Ninth Circuit's approach eliminates effective cost-benefit analysis from habitat determinations while undermining protection for threatened and endangered species.

The reasoning of the Ninth Circuit would preclude States from seeking judicial review of regulatory decisions with significant costs and consequences. "Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of

agency decisions." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015). In the ESA context, it is beyond dispute that "[c]onsiderable regulatory burdens and corresponding economic costs 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 A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10678, 10680 (2013). For example, the first major Supreme Court decision examining the ESA, *Tennessee Valley Authority v. Hill*, resulted in the suspension of a dam-building project that was 80 percent complete and for which Congress had spent more than $100 million of taxpayer money. 437 U.S. 153, 172 (1978).

It was a harbinger of things to come. Critical habitat designations, by their very nature, limit human activity. That activity almost always has economic value that is lost. The impact ripples through the economy; in an average industry, every billion dollars in regulatory costs results in a loss of over 8,000 jobs. Sam Batkins & Ben Gitis, *The Cumulative Impact of Regulatory Cost Burdens on Employment*, AM. ACTION FORUM (May 8, 2014), http://www.americanactionforum.org/research/the-cumulative-impact-of-regulatory-cost-burdens-on-employment/. As a consequence, States also suffer a subsequent loss of tax revenue, both as a result of reduced employment as well as foreclosed industrial and recreational use of areas designated critical habitat.

Evaluating the proposed rule in the case at bar, the government estimated the critical habitat designation for the green sturgeon would have a *yearly* economic impact of up to $578 million. Final Rulemaking to Designate Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon, 74 Fed. Reg. 52,300 (Oct. 9, 2009). And the green sturgeon is only one recent example of the significant consequences of habitat decisions. Proposals to conserve the sage grouse "could cost up to 31,000 jobs, up to $5.6 billion in annual economic activity and more than $262 million in lost state and local revenue every year . . . ." Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST, May 11, 2014, https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

While the ESA may certainly require such sacrifices in order to preserve endangered species, the decision to impose those costs on States and the public should at least be subject to judicial review, even if only under the APA's heightened standard.

Moreover, decisions on whether or not certain areas should be included within critical habitat can have severe consequences for the environment. As the ESA itself recognizes, failure to properly designate critical habitat for threatened species can lead to their extinction. The States are committed to ensuring that threatened species are preserved. Alabama has had laws in place to conserve wildlife since 1867. *See* Code of Alabama 1867, Sections 3750–3753. Today, the Alabama Department of Conservation and Natural

Resources is charged to "protect, conserve, and increase the wildlife of the state. . . ." Ala. Code § 9-2-2(1). The ESA acknowledges the important interest States have in conserving threatened and endangered species, enshrining in law the requirement that the Secretary "cooperate to the maximum extent practicable with the States." 16 U.S.C. § 1535(a).

But under the Ninth Circuit's reasoning, a decision to exclude areas from critical habitat on the basis of a faulty economic analysis is wholly within the agency's discretion and nonreviewable, no matter how arbitrary and capricious it might be, and no matter what the consequences for the species. With recourse to the courts foreclosed, States, conservation groups, and the species they seek to protect will be at the mercy of the Secretary when important critical habitat decisions are made.

The *Bennett* Court recognized that the requirement that agencies use the best scientific and commercial data available served the dual purpose of preserving species while preventing unnecessary economic costs. "While this [requirement] no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. 176–77. The lower court's decision short-circuits that protection.

Choices about whether and to what extent areas should fall within critical habitat designations should not be left to one person or agency, immune from

judicial review, especially when those decisions are arbitrary and capricious. See *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, No. 15-290, slip op. (U.S. May 31, 2016), http://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf. The Courts have a role to play in enforcing the ESA, including provisions requiring an effective cost-benefit analysis of habitat exclusions.

II. The Ninth Circuit's decision conflicts with this Court's ruling in *Bennett v. Spear*.

Moreover, this Court has already considered and rejected the argument that § 1533(b)(2) is wholly discretionary and thus immune from judicial review. In *Bennett v. Spear*, the Court considered the provision in a case brought under the ESA's citizen-suit provision. 520 U.S. 154 (1997). Much like the APA, the ESA precludes suit when the challenged decision is "discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C).

In *Bennett*, the government sought to dismiss the underlying action on the basis that the duties of § 1533(b)(2) were discretionary and thus nonreviewable. 520 U.S. at 172. The Court rejected that argument: "[T]he terms of § 1533(b)(2) are plainly those of obligation rather than discretion…" *Id.* The Court noted that the Secretary was required, by the plain text of the statute, to designate and revise critical habitat based on the best scientific data available after taking into consideration the economic impact of the designation. *Id.*

Those decisions were reviewable, notwithstanding the discretion granted by the "may" clause. The Court found that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). On this point the Court was emphatic: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)). Thus the Court concluded that regardless of the nonreviewability provision of the ESA, a "§ 1533 claim is reviewable." *Id.*

The lower court considered *Bennett* only as it applied to the question of whether "there is a specific methodology that an agency must employ when considering the economic impact of designation." *Bldg. Indus. Ass'n of the Bay Area*, 792 F.3d at 1033. When turning to the nonreviewability doctrine, the lower court put *Bennett* aside, pointing instead to a "recent proposed policy statement clarifying the regulations for implementing section 4(b)(2)," explaining that this proposal stated that "the decision to exclude is always completely discretionary, as the Act states that the Secretaries 'may' exclude areas." *Id.* at 1035.

This was error. The lower court's failure to conduct any kind of searching inquiry into the

application of *Bennett* to this case, while instead pointing to the Secretary's own proposed policy pronouncements, underscores the need for this Court's intervention.

III. The Ninth Circuit's decision is inconsistent with the Supreme Court's nonreviewability doctrine and creates a circuit split with the D.C. Circuit.

Finally, the Ninth Circuit failed to apply the guideposts laid out in *Heckler* for assessing claims of nonreviewability. Instead, it focused almost exclusively on the use of the word "may" in the statute. The lower court reasoned, "the use of the word 'may' establishes a discretionary process by which the Secretary *may* exclude areas from designation . . ." *Bldg. Indus. Ass'n of the Bay Area*, 792 F.3d at 1035 (emphasis in original).

Declaring the word "may" all but dispositive puts the lower court in opposition with the D.C. Circuit, which has rejected the Ninth Circuit's formalistic approach to the nonreviewability doctrine. That Circuit has explained,

> When a statute uses a permissive term such as "may" rather than a mandatory term such as "shall," this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination. However, such language does not mean the matter is *committed* exclusively to agency discretion.

Dickson v. Sec'y of Def., 68 F.3d 1396, 1401 (D.C. Cir. 1995); *Envtl. Def. Fund v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (intent to preclude judicial review "cannot be found in the mere fact that a statute is drafted in permissive rather than mandatory terms").

This split could have been avoided if the lower court followed the Supreme Court's guidance on the nonreviewability doctrine. In determining that an agency's decision not to employ its prosecutorial powers was nonreviewable, the *Heckler* Court noted that an agency "generally does not exercise its coercive power . . . and thus does not infringe upon areas that courts often are called upon to protect" when it refuses to act. 470 U.S. at 832. The Court also explained that nonreviewability should not "set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Id.* at 833. And the Court noted that actions committed to the absolute discretion of agencies tend to be those that are "beyond the judicial capacity to supervise." *Id.* at 834 (citations omitted).

But in this case, these factors all cut towards reviewability for habitat decisions.

A. Habitat decisions exercise coercive power.

When the Secretary refuses to exclude areas from a critical habitat designation, he is not refusing to act in the sense used by the *Heckler* Court. Rather, he is exercising his coercive power to the fullest. When he does so, his action touches upon the most basic

property rights of those within the critical habitat designation.

The ESA includes a cost-benefit analysis requirement for a reason; while the ESA is "a noble effort," it is one that has "the ability to ruin individuals' lives . . . [M]ost Americans do not realize that hundreds of thousands of rural citizens face the potential loss of their livelihoods stemming from FWS designations of [critical habitat] under the ESA." Matthew Groban, *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). The Secretary cannot ignore these costs or impose them without a commensurate benefit. As this Court has found, it is inherently irrational "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. E.P.A.*, 135 S. Ct. at 2701. The decision of the lower court would allow the Secretary to do just that, with no recourse to the courts.

The decision to designate critical habitat and the decision to exclude certain areas from that designation cannot be separated, and to do so is to create a distinction without a difference. In both instances, the Secretary is exercising the coercive power of the government over private property. When the Secretary abuses his discretion, the courts must have the power to correct that overreach.

B. The lower court's decision sets the Secretary free to disregard legislative direction in the statutory scheme that the agency administers.

The ESA mandates that critical habitat decisions, both as to what areas to designate and what areas to exclude, are to be made "on the basis of the best scientific data available and after taking into consideration the economic impact. . . ." 16 U.S.C. § 1533(b)(2). As this Court recognized in *Bennett*, "the terms of § 1533(b)(2) are plainly those of obligation rather than discretion." 520 U.S. at 172.

But removing judicial review of these decisions frees the Secretary to disregard legislative direction intended to guide and restrain the use of his power. Although the Secretary is granted discretion to determine when the benefits of a habitat designation outweigh the cost, that discretion is not unfettered. Congress requires the Secretary to use the best scientific and commercial data available in conducting a cost benefit analysis. And the Secretary's final decision must not abuse his discretion in light of the results of that analysis. If he fails at either step, that failure is subject to judicial review.

The history of this provision only serves to underscore the lower court's error. The ESA did not initially include a cost-benefit-analysis requirement. This Court found that fact dispositive in the seminal case of *Tennessee Valley Authority v. Hill*, noting that Congress intended to protect threatened species "whatever the cost." 437 U.S. 153, 184 (1978). Congress responded to this conclusion with alacrity,

passing amendments to the ESA, including the statutory provision at issue in this case. *See* PL 95–632 (S 2899), 92 Stat 3751 (Nov. 10, 1978).

The lower court's ruling effectively undoes Congress's work. By declaring these decisions nonreviewable, the lower court did exactly what this Court warned it should not—it set the Secretary free from the legislative direction contained in the ESA.

C. Courts regularly review habitat designations.

Critical habitat designations are constantly under review by the courts. For instance, the Center for Biological Diversity is an organization that regularly files suit to challenge what it views as "bad critical habitat decisions." *Protecting Critical Habitat*, CTR. FOR BIOLOGICAL DIVERSITY (visited May 17, 2016), http://www.biologicaldiversity.org/programs/biodiversity/endangered_species_act/protecting_critical_habitat/. Since 2009, the Center has "filed suit over designations for 49 species and the Obama administration has redone or agreed to redo critical habitat for 40, with talks ongoing for others." *Id.*

In one case, the Center challenged a decision in which, "[p]ursuant to ESA Section 4(b)(2), the Service excluded almost 30,500 acres from the final designation after concluding, based on the final economic analysis, that the benefits of exclusion outweighed the benefits of inclusion, and that exclusion would not result in the extinction of the species." *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1143 (N.D. Cal.

2006). Citing *Bennett*, the district court noted that it would review "the Service's decision to exclude areas pursuant to Section 4(b)(2) 'for abuse of discretion.'" *Id.* It then conducted that abuse of discretion review, ultimately concluding,

> [B]y finding that there were no additional regulatory benefits to be gained by designating critical habitat in areas that were ultimately excluded, the Service improperly ignored the recovery goal of critical habitat. In addition, in excluding significant areas from the final critical habitat designation, the Service relied on assumptions that had no factual support in the record, improperly considered economic impacts of critical habitat designation that are coextensive with restrictions resulting from the listing of the milk-vetch, and failed to evaluate the economic benefits associated with reduced visitation.

Id. at 1122.

There is no indication the district court had particular difficulty addressing the claims raised in this case or that the issues raised in reviewing the decision to exclude areas from critical habitat were appreciably different from those inherent in the decision to designate critical habitat in the first place.

* * *

The lower court's decision wrongly takes the power to review critical habitat exclusions from the hands of the judiciary. It contradicts this Court's precedents, undermines the goals of the ESA, and

leaves no avenue of review for arbitrary and capricious habitat decisions. In doing so, the lower court diverged sharply with the D.C. Circuit. This case is worthy of the Court's time and attention.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

Luther Strange
Ala. Attorney General

Andrew L. Brasher
Solicitor General
Counsel of Record

Brett J. Talley
Deputy Solicitor General

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us
Counsel for Amici Curiae

COUNSEL FOR ADDITIONAL *AMICI*

Craig W. Richards
Alaska Attorney General
P.O. Box 110300
Juneau, AK 99801
(907) 465-3600

Mark Brnovich
Arizona Attorney General
1275 W. Washington St.
Phoenix, AZ 85007
(602) 542-5025

Leslie Rutledge
Arkansas Attorney General
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-2007

Cynthia H. Coffman
Colorado Attorney General
Ralph L. Carr Judicial Bldg.
Denver, CO 80203
(720) 508-6000

Sam Olens
Georgia Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
(404) 656-3300

Lawrence G. Wasden
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720
(208) 334-2400

Derek Schmidt
Kansas Attorney General
120 SW 10th Avenue, 2nd Fl.
Topeka, KS 66612
(785) 296-2218

Jeff Landry
Louisiana Attorney General
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6079

Timothy C. Fox
Montana Attorney General
215 N Sanders
Helena, MT 59620
(406) 444-3442

Douglas J. Peterson
Nebraska Attorney General
2115 State Capitol Building
Lincoln, NE 68509
(402) 471-2683

Adam Paul Laxalt
Nevada Attorney General
100 North Carson St.
Carson City, NV 89701
(775) 684-1150

Wayne Stenehjem
North Dakota Attorney General
600 E Boulevard Ave.
Dept. 125
Bismarck, ND 58505
(701) 328-2213

Michael DeWine
Ohio Attorney General
30 E Broad St.
17th Floor
Columbus, OH 43215
(614) 995-2273

E. Scott Pruitt
Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Bruce L. Castor, Jr.
Pennsylvania Solicitor General
16th Fl., Strawberry Sq.
Harrisburg, PA 17120
(717) 787-3391

Alan Wilson
South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211
(903) 734-3970

Marty J. Jackley
South Dakota Attorney General
1302 E Highway 14, Ste. 1
Pierre, SD 57501-8501
(605) 773-3215

Ken Paxton
Texas Attorney General
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2100

Sean D. Reyes
Utah Attorney General
Utah State Capitol Complex
350 North State St., Ste 230
Salt Lake City, UT 84114
(801) 538-9600

Patrick Morrisey
West Virginia Attorney General
1900 Kanawha Blvd E, #26
Charleston, WV 25305
(304) 558-2021

Brad D. Schimel
Wisconsin Attorney General
17 West Main St.
Madison, WI 53707
(608) 266-1221

Peter K. Michael
Wyoming Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-7844