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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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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"?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states. Since MSLF's creation in 1977, MSLF attorneys have been involved in numerous cases involving the proper interpretation and administration of the Endangered Species Act.

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all the parties at least 10 days prior to the filing of this brief and all parties have consented to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

See, e.g., *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834 (D.D.C. 1992) (represented Intervenor-Defendants); *Shuler v. Babbitt*, 49 F. Supp. 2d 1165 (D. Mont. 1998) (represented Plaintiff); *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000) (represented Plaintiffs-Appellees); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (represented Amicus Curiae); *San Luis & Delta-Mendota Water Auth. v. Salazar,* 638 F.3d 1163 (9th Cir. 2011), *cert. denied sub nom*. *Stewart & Jasper Orchards v. Salazar*, 132 S. Ct. 498 (2011) (represented Amicus Curiae in a Commerce Clause challenge to the FWS's exercise of regulatory authority over the delta smelt).

Moreover, MSLF has a tangible interest in this case. Many MSLF members earn a living by utilizing pre-existing water rights to make beneficial use of their property. If the Ninth Circuit's decision is allowed to stand, these members' livelihoods and valuable property rights could be extinguished by the federal government acting under the guise of protecting a species with no commercial value. Therefore, MSLF respectfully submits this amicus curiae brief, urging that the Court grant the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case is the latest installment in a multi-faceted legal battle over water in the Sacramento-San

Joaquin Delta ("Delta"). The fight is between the Fish and Wildlife Service ("FWS"), which has listed as threatened under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44, the delta smelt, a small, two-to-three inch fish found in the Delta, and two major water projects, the Central Valley Project and the State Water Project, that collectively supply water essential "to more than 20,000,000 agricultural and domestic consumers" in California. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014), *aff'd in part and rev'd in part sub nom. San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010).

In 1993, the FWS listed the delta smelt, which has little, if any commercial value, as threatened under the ESA, and designated a large area of the Delta as critical habitat in 1994. *See* 58 Fed. Reg. 12,854, 12,860 (Mar. 5, 1993); 59 Fed. Reg. 65,256 (Dec. 19, 1994). This Delta area also happens to be the source of water for the agricultural and domestic consumers of the Central Valley Project and the State Water Project (collectively, "water projects"). *San Luis*, 747 F.3d at 592. Those consumers play a vital role in California's agricultural economy, which supplies more than half of this nation's fruits, vegetables, and nuts. *See* Committee on Natural Resources, *California's Central Valley: Producing America's Fruits and Vegetables* (Feb. 5, 2014), *available at* http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=368934; Committee on Natural Resources, *Sacramento-San Joaquin Valley Emergency Water Delivery*

Act (H.R. 3964), *available at* http://naturalresources.house.gov/legislation/hr3964/.

Under Section 7 of the ESA, federal agencies must insure their actions are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the listed species' critical habitat. 16 U.S.C. § 1536(a)(2). Because the Bureau of Reclamation ("BOR") operates the Central Valley Project and "coordinate[s] [its] operations with state agencies of the [State Water Project]," interagency consultation under Section 7 was triggered. *San Luis*, 747 F.3d at 597. Under Section 7, the FWS was required to issue a biological opinion ("BiOp") to determine if operation of the water projects would likely jeopardize the listed species or modify its critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. In 2005, the FWS issued its first biological opinion ("2005 BiOp"), which determined the water projects' operations would not adversely affect the delta smelt or its critical habitat. *San Luis*, 747 F.3d at 597. However, the 2005 BiOp was successfully challenged by environmental groups, thereby requiring the FWS to render another BiOp. *Id*.

In 2008, the FWS issued its second BiOp ("2008 BiOp"), which found that the water projects' operations would likely jeopardize the continued existence of the delta smelt, as well as adversely modify its critical habitat. *Id*. Upon finding jeopardy or adverse modification, the Secretary was required to "suggest those reasonable and prudent alternatives which he believes would not violate [the jeopardy or adverse

modification standards] and can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A). The FWS suggested alternatives that the BOR could take in operating the water projects. *San Luis*, 747 F.3d at 598-99. However, those alternatives sought to decrease the amount of water available for domestic and agricultural uses, as well as for storage, *id.*, and were neither reasonable nor prudent.

Petitioners and other parties challenged the 2008 BiOp because of the devastating impacts that would result if the water inflow limits were implemented. *San Luis*, 760 F. Supp. 2d at 865-67. The district court found that the FWS "has articulated absolutely no connection between the facts in the record and the required conclusion that the [reasonable and prudent alternative] is (1) consistent with the purpose of the underlying action; (2) consistent with the action agency's authority; and (3) economically and technologically feasible." *Id*. at 957. Significantly, the district court recognized that those factors are required to be analyzed under the FWS's regulation that defines "reasonable and prudent alternatives," as:

> [A]lternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that [are] economically and technologically feasible, and that the Director believes would

> avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Id. at 948-57, 970; 50 C.F.R. § 402.02. Because the FWS failed to explain why their chosen alternatives were reasonable and prudent, the district court held that the 2008 BiOp violated the FWS's own regulation, 50 C.F.R. § 402.02, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*. and remanded back to the FWS. *San Luis*, 760 F. Supp. 2d at 957.

The federal agencies, environmental intervenors, and several plaintiffs appealed to the Ninth Circuit. *San Luis*, 747 F.3d at 601. The Ninth Circuit disagreed with the district court's finding "that both the FWS's regulation and the APA required the FWS to engage in a record exposition of the non jeopardy factors, and that the FWS did not do so."[2] *Id.* at 635. Instead, the Ninth Circuit ruled that the FWS's regulation, 50 C.F.R. § 402.02, "is a definitional section; it is defining what constitutes [a reasonable and prudent alternative], not setting out hoops the FWS must jump through." *Id.* at 635. Then, at the urging of the FWS, the Ninth Circuit accorded the Handbook[3]

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[2] Based upon the FWS's ESA Consultation Handbook ("Handbook"), the Ninth Circuit suggested that the last factor was the "jeopardy" factor, whereas the other factors were known as the "non-jeopardy" factors. *Id*. at 635.

[3] *Available at* https://www.fws.gov/ENDANGERED/esa-library/pdf/esa_section7_handbook.pdf.

deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to bolster its ruling. *San Luis*, 747 F.3d at 634-35. Relying on the Handbook, the Ninth Circuit held the FWS does not need to analyze the non-jeopardy factors in a BiOp, unless a reasonable and prudent alternative fails to meet a non-jeopardy factor. *Id*. at 635-36.

Although the Ninth Circuit "recognize[d] the enormous practical implications of this decision," *id*. at 593, the panel nonetheless concluded that its hands were tied by the strict interpretation of the ESA announced in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) ("*TVA*"). *San Luis*, 747 F.3d at 593. The Ninth Circuit ruled that the "economic feasibility" non-jeopardy factor does not require consideration of the economic impact on the decreased water supply for domestic uses or irrigation, because "the FWS's duty is to opine on the viability of the smelt and 'to halt and reverse the trend toward species extinction, *whatever the cost*.'" *Id*. at 637 (quoting *TVA*, 437 U.S. at 184) (emphasis added by Ninth Circuit). The Ninth Circuit also agreed with *TVA* that "the ESA reflects 'a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.'" *San Luis*, 747 F.3d at 637 (quoting *TVA*, 437 U.S. at 185). As such, the Ninth Circuit held that the economic feasibility factor applies only to the question of whether the reasonable and prudent alternative, itself, is economically feasible for the BOR to implement. *Id*. Thus, the Ninth Circuit relied on *TVA* to support its

ruling that the economic impact on the water consumers was irrelevant, *id.* at 593, without considering the pivotal changes to the law that occurred since *TVA* was decided. *Id*. at 601.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision failed to balance the interests of the delta smelt, a small, two-to-three inch fish, with little, if any, commercial value, against the economic interests of two major water projects and the millions of individuals, farmers, growers, and businesses they serve. Instead, the Ninth Circuit determined the interests of the delta smelt were paramount, "whatever the cost." *San Luis*, 747 F.3d at 637. In reaching this illogical conclusion, the Ninth Circuit made at least two errors that warrant this Court's review.

First, the Ninth Circuit erred by relying on *TVA*'s interpretation of Section 7 of the ESA to hold "the FWS is not responsible for balancing the life of the delta smelt against the impact of restrictions" on the water projects. *Id.* at 637. This is the precise interpretation that Congress addressed and remedied when amending Section 7 in the wake of *TVA*. The legislative history and statutory amendment demonstrate that Congress abrogated *TVA's* ruling that listed species are afforded the highest of priorities and must be protected "whatever the cost." *See TVA*, 437 U.S. at 184-85. The Petition offers this Court the

opportunity to recognize Congress's abrogation of *TVA* and bring common sense back to species protection.

Second, the Ninth Circuit erred by according *Skidmore* deference to the FWS's informal interpretation of its regulation defining "reasonable and prudent alternatives," as set forth in the Consultation Handbook. *San Luis*, 747 F.3d at 634-35. Under *Skidmore,* deference may be accorded to an agency's interpretation of a statute – not an agency's interpretation of its own regulation. Resolution of the confusion over *Skidmore* deference is imperative given this case's devastating impact on the supply of water for domestic and agricultural needs.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION PRESENTS AN OPPORTUNITY TO REVISIT THIS COURT'S RULING IN *TVA v. HILL*, WHICH WAS ESSENTIALLY OVERRULED BY CONGRESS IN 1978.

The Ninth Circuit used *TVA* to support its conclusion that "the FWS is not responsible for balancing the life of the delta smelt against the impact of restrictions on [water project] operations[,]" because "'Congress [gave] endangered species priority over the primary missions of federal agencies'" and it is "the FWS's duty to opine on the viability of the smelt and 'to halt and reverse the trend toward species extinction, *whatever the cost*.'" *San Luis*, 747 F.3d at

637 (quoting *TVA*, 437 U.S. at 184-85) (some quotations omitted) (emphasis added by Ninth Circuit). The Ninth Circuit's reliance on *TVA* is problematic, because Congress amended Section 7 of the ESA in 1978, Pub. L. No. 95-632, 92 Stat. 3751 (Nov. 10, 1978), in direct response to this Court's decision in *TVA*.

TVA lacks the precedential value for which the Ninth Circuit cited it, because its Section 7 rulings have been abrogated by statute. First, Congress amended Section 7, which had led to the "whatever the cost" ruling in *TVA*. Second, Congress's intent in amending Section 7 was to instill some flexibility into the original rigid language. Third, Congress added "reasonable and prudent alternatives" language into Section 7 to prevent another *TVA*.

A. Congress Amended Section 7 To Interject "Common Sense And The Public Weal."

In *TVA*, the snail darter, a small, three-inch fish, was found in an area, "which would be completely inundated by the reservoir created . . . " by the "virtually completed" Tellico Dam. 437 U.S. at 157-58, 161. The snail darter was listed as endangered, and the site of the reservoir was designated as critical habitat. *Id*. at 161-62. Because the Dam was a federally funded project, Section 7 of the ESA required agency consultation and ultimately became the cornerstone for enjoining completion of the Dam. *See id*.

at 173-88. This Court was asked to determine whether, under Section 7, a "virtually completed dam" must be enjoined, because operation of the Dam would purportedly eliminate the endangered snail darter. *Id*. at 156, 158.

This Court admitted that "[i]t may seem curious to some that survival of a relatively small number of three-inch fish . . . would require the permanent halting of a virtually completed dam[,]" but felt hamstrung by the "affirmative[ ] command" of Section 7 and the "plain intent of Congress." *Id*. at 173 (Section 7 "affirmatively command[ed] all federal agencies 'to insure that actions *authorized*, *funded*, or *carried out* by them do not *jeopardize* the continued existence' or '*result* in the destruction or adverse modification of habitat of such species. . . .'") (quoting 16 U.S.C. § 1536(a)(2)); *id.* at 184 ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."). This Court noted that it was unable "to view the ESA 'reasonably'" because its duty was to interpret the law, not "to formulate legislative policies" or "establish their relative priority for the Nation[,]" which was the "exclusive province of the Congress." *Id*. at 194. Although the Court was clearly uncomfortable with the absurd result, it recognized that it was bound by the plain language of Section 7 of the ESA.

As such, this Court held that construction of Tellico Dam was properly enjoined.[4] *Id*. at 193-94.

Congress immediately accepted this Court's invitation to introduce some common sense into the ESA following *TVA*. *See, e.g.*, 124 CONG. REC. S10890-10910, 10903-04 (daily ed. July 17, 1978) (statement of Sen. Scott) ("Of course, in every reasonable way we want to protect fish, wildlife and plants as provided in the [ESA], but the law we passed was rigid – so rigid that the Supreme Court indicated the courts have no discretion under the [ESA] and appeared to invite Congress to make amendments."); 124 CONG. REC. H13357-59, 13359 (daily ed. Oct. 13, 1978) (statement of Rep. Beard) ("As the Supreme Court ruled in the Telleco [sic] Dam case, it is totally inflexible with the law. They threw the ball back into the court where it belongs, and that is this Congress."); 124 CONG. REC. H12868-12905, 12891 (daily ed. Oct. 14, 1978) (statement of Rep. Lloyd) ("In affirming that lower court ruling, the Supreme Court made note that interpretation of the [ESA] which precluded completion of the Tellico Dam was good law, but poor legislation."); 124 CONG. REC. S10890-10910, 10909 (daily ed. July 17, 1978) (statement of

[4] Ironically, after *TVA*, new populations of the snail darter were found. *See* 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). These discoveries contributed to the downgrading of the snail darter to threatened status and withdrawing its critical habitat designation. *See* 49 Fed. Reg. 27,510 (July 5, 1984).

Sen. Stennis) ("If there ever has been anything thrown back into the laps of Congress with force, it is this opinion of the Supreme Court of the United States. I can hear the bells ringing now that we had better do something about this. . . ."); *id*. at 10904 (statement of Sen. Scott) ("If, as the Court suggests, this is a rigid law, protecting animals but denying protection to the human species, it seems reasonable that it should be amended to provide for consideration of human factors."); 124 CONG. REC. S9533-34, 9533 (daily ed. June 22, 1978) (statement of Sen. Garn) ("This is a decision which will have serious repercussions in the future, particularly if it is not overturned by congressional action.").

TVA demonstrated that Section 7, as worded, would lead to more harsh results in the future. To prevent another *TVA*, Congress sought to amend Section 7. *See* 124 CONG. REC. S19160-67, 19163 (daily ed. Oct. 14, 1978) (statement of Sen. Hansen) ("The Supreme Court has already made it clear that even though Congress may not have intended to stop programs and projects at midpoint, as with the Tellico fiasco . . . it nevertheless duly enacted a law that very clearly can be used to bring about just such a consequence. The law needs to be changed[.]"); 124 CONG. REC. E3448 (daily ed. June 23, 1978) (statement of Rep. Ruppe) ("I do not quarrel with the Court's interpretation of the law . . . I do, however, take issue with the underlying law . . . Since the Congress is responsible for the writing of the [ESA], I believe it should take the initiative to amend that law."); 124 CONG.

REC. S10970-74, 10971 (daily ed. July 18, 1978) (statement of Sen. Stennis) ("I think the conclusion by the Court is the only one it could have reached under the wording of the law . . . This magnifies the situation and demands that despite the good purposes and high motives of preserving endangered species – animal life, plant life, whatever it is – in spite of all the good points in favor of it, the law, as a practical matter, is just impossible and must be amended."). From this history, it is apparent that members of Congress felt strongly that Section 7 was poorly worded, dictated an absurd result, and needed to be amended.

B. Congress Sought To Introduce Flexibility Into The ESA Through Its 1978 Amendments.

Congress specifically amended Section 7 in the wake of *TVA* to instill flexibility into the ESA and to prevent a listed species from having exclusive priority. *See* 124 CONG. REC. S10970-74, 10974 (daily ed. July 18, 1978) (statement of Sen. Culver) ("It came to our attention . . . the rigidity and the inflexibility of [the ESA], whereby the endangered species, once designated, in every case was to be given exclusive priority against any other offsetting factors in public interest. . . ."); H.R. REP. NO. 95-1625, at 3 (1978) (Congress's stated purpose for amending Section 7 was "to introduce some flexibility into the [ESA]."). Indeed, the House Report is replete with references to "flexibility" as the primary purpose for amending Section 7. *See, e.g.*, H.R. REP. NO. 95-1625, at 13 ("All of

these facts, considered together, convinced the committee that some flexibility is needed in the act to allow consideration of those cases where a federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of section 7."); *id*. ("The fact that the very administrators of the act have apparently determined that the act is insufficiently flexible is evident itself of the necessity for amendment."). The Senate Report echoed the same need for flexibility. *See* S. REP. NO. 95-874, at 3 (1978) ("The committee believes that these circumstances clearly illustrate the need for an amendment to the act which will provide flexibility in its administration, while maintaining protection for threatened and endangered species.").

Senator Culver and Senator Baker, who sponsored the Culver-Baker amendment that laid the groundwork for passage of the 1978 amendments, also stressed the importance of adding flexibility to the ESA. *See* 124 CONG. REC. S10890-10910, 10894 (daily ed. July 17, 1978) (statement of Sen. Culver) (the amendment "preserves the integrity of the [ESA] and yet provides the flexibility which will be needed in the coming years"); *id*. at 10900 (statement of Sen. Baker) ("The recent decision of the U.S. Supreme Court concerning Tellico [Dam] underscores the need for the Congress to address the issue and inject some additional flexibility into the act."). Several other congressmen also recognized the importance of rendering *TVA* a nullity. *See, e.g.*, 124 CONG. REC. S9533-34, 9534 (daily ed. June 22, 1978) (statement of Sen.

Garn) ("[W]e now have an obligation to tackle the [ESA], and to bring its plain language in line with our intention, an intention to provide reasonable flexibility in an important statute."); 124 CONG. REC. S10890-10910, 10897 (daily ed. July 17, 1978) (statement of Sen. Randolph) ("[T]he recent Supreme Court decision in Tennessee Valley Authority against Hill demonstrates that the 1973 law is not flexible enough. . . ."); *id*. at 10908 (statement of Sen. Stennis) ("I want to point out that the committee and I are in agreement that an amendment to the [ESA] is needed to provide some flexibility in its administration."); 124 CONG. REC. H13579-80, 13579 (daily ed. Oct. 14, 1978) (statement of Rep. Murphy) ("[The amendment] introduces significant flexibility into the [ESA]. But we have not gutted the act in the process.").

After Congress introduced flexibility through its 1978 amendments, Section 7 looked entirely different. *Compare* Pub. L. No. 93-205, 87 Stat. 884, 892 (Dec. 28, 1973) *with* Pub. L. No. 95-632, 92 Stat. 3751, 3752-60 (Nov. 10, 1978); *see* H.R. REP. NO. 95-1625, at 31 ("existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic[,] existing law in which no change is proposed is shown in roman"); *id*. at 45-51 (showing Section 7 entirely in *italics*). In fact, Representative Bowen stated that the ESA was written with the purpose of adding flexibility. *See* 124 CONG. REC. H12868-12905, 12868 (daily ed. Oct. 14, 1978) (statement of Rep. Bowen) ("[W]e have rewritten that legislation this year, and we have made a diligent effort to take into consideration more

accurately the development needs of this Nation."). This complete overhaul of Section 7 underscores the need to revisit *TVA* because its interpretation of Section 7, pertaining to "whatever the cost," has been abrogated by the 1978 amendments.

C. Congress Introduced "Reasonable And Prudent Alternatives" To Add Flexibility To Section 7 And Depart From The Rigidity Of *TVA*'s Ruling.

In amending Section 7, Congress introduced "reasonable and prudent alternatives" to abrogate *TVA*'s "whatever the cost" language. The amendment provides, "[t]he Secretary *shall suggest those reasonable and prudent alternatives* which he believes would avoid jeopardizing the continued existence of any endangered or threatened species or adversely modifying the critical habitat of such species, and which can be taken by the Federal agency or the permit or license applicant in implementing the agency action." 92 Stat. at 3752-53 (emphasis added). The House Report indicates that "[t]he search for alternatives in the consultation process should be limited to those that are 'reasonable and prudent.'" H.R. REP. NO. 95-1625, at 20. The House Report also specifies that the "reasonable and prudent alternatives" to be suggested during Section 7 consultation are "intended to focus attention on the *agency action*, *its objectives*, and the aspects of the agency action which gave rise to the problem initially." *Id*. at 22 (emphasis added).

During debate, Senator Nelson sought to "clarif[y] the phrase 'reasonable and prudent[.]'" 124 CONG. REC. S11111-49, 11146 (daily ed. July 19, 1978) (statement of Sen. Nelson). He worried that "reasonable and prudent alternatives" lacked any "legal meaning" and had not been "clearly litigated and defined," unlike the phrase, "feasible and prudent." *Id*. at 11145. Senator Baker explained that "reasonable and prudent" permitted consideration of "a wide range of factors" including "environmental and community impacts, economic feasibility and, other relevant factors." *Id*. The purpose behind using "reasonable" instead of "feasible" was to "give[ ] more flexibility[.]" *Id*. (statement of Sen. Baker). In the case at bar, "environmental and community impacts" and "economic feasibility" clearly include consideration of the impact of decreased water supply on the community. Thus, the alternative's impact on water delivered by the water projects for domestic and agricultural uses must be part of the FWS's proposal of alternatives to be reasonable and prudent. The Ninth Circuit's use of *TVA* to hold that the economic feasibility factor only pertains to implementation of the alternative directly contradicts the plain language of Section 7 and its legislative history in the 1978 amendments.[5]

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[5] Not to be overlooked is that the Ninth Circuit's ruling created a split with the Fourth Circuit. In *Dow AgroSciences LLC v. National Marine Fisheries Serv.*, 707 F.3d 462, 474 (4th Cir. 2013), the Fourth Circuit held that the FWS's regulation, defining "reasonable and prudent alternatives," explicitly required the FWS to evaluate the economic feasibility factor in the definition

(Continued on following page)

In conclusion, *TVA* is ripe for reconsideration by this Court, at least as it pertains to protecting listed species "whatever the cost," because Congress clearly abrogated that ruling by passing the 1978 amendments to Section 7 of the ESA. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238 (1970) (overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), because it "was erroneously decided and subsequent events have undermined its continued validity"); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("Although we are normally and properly reluctant to overturn our decisions construing statutes, we have done so . . . to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation[.]"). It is time for this Court to recognize what Congress recognized when it amended Section 7: *TVA* was an anomaly brought about by a poorly-worded section of the ESA that is no longer on the books.

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and was not trumped by *TVA*'s "whatever the cost" ruling. The Ninth Circuit simply dismissed the reasoning of the Fourth Circuit in a footnote. *San Luis*, 747 F.3d at 636 n.42.

II. THE NINTH CIRCUIT'S DECISION PRESENTS THIS COURT WITH AN OPPORTUNITY TO CLARIFY THE DEFERENCE, IF ANY, THAT SHOULD BE ACCORDED AN AGENCY'S INTERPRETATION OF ITS SEEMINGLY UNAMBIGUOUS REGULATION.

To effectuate Congress's 1978 amendments to Section 7, the FWS, along with the National Marine Fisheries Service and National Oceanic and Atmospheric Administration, promulgated a regulation defining "reasonable and prudent alternatives." *See* 51 Fed. Reg. 19,926-01 (June 3, 1986) (final rule). This case hinges on that unambiguous regulation. Instead of relying on the unambiguous language of the regulation, the Ninth Circuit accorded *Skidmore* deference to the FWS's ESA Consultation Handbook, which supplies an informal interpretation of the regulation. *See San Luis*, 747 F.3d at 634-35. This Court should grant the Petition to review whether *Skidmore* applies to an agency's informal interpretation of an unambiguous regulation.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court "considered the limits of *Chevron* deference owed to administrative practice in applying a statute[,]" and explained that a different form of deference extended to informal interpretations of statutes than applied to formal, rule-making interpretations under *Chevron*. *Id*. at 226; *see* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 18 (1996) (discussing the necessity of settling whether

Chevron applies to informal interpretations). For an agency's statutory interpretation to qualify for *Chevron* deference, Congress must have expressly or implicitly "delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference [must be] promulgated in the exercise of that authority." *Mead*, 533 U.S. at 227, 229. "Delegation of authority may be shown . . . by an agency's power to engage in adjudication or notice-and-comment rulemaking. . . ." *Id*. at 227. However, when an agency's statutory interpretation does not fall within *Chevron*, then such an "interpretation may merit some deference" under *Skidmore*. *Id*. at 234 ("*Chevron* did nothing to eliminate *Skidmore*[.]").

Mead clarified that even if an agency's interpretation of a statute does not fall within the *Chevron* framework, then it may still receive some deference under *Skidmore*. *See id*. at 227 (Though the "Customs ruling letters do not fall within *Chevron*," it does not "place them outside the pale of any deference whatever."). For instance, "'interpretations [of statutes] contained in policy statements, agency manuals, and enforcement guidelines' . . . are beyond the *Chevron* pale." *Id*. at 234 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). Nonetheless, these interpretation formats, although not promulgated through formal rulemakings, may receive some deference under *Skidmore*.

In *Skidmore*, this Court held that "rulings, interpretations and opinions . . . while not controlling

upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants *may properly resort for guidance*." 323 U.S. at 140 (emphasis added). The persuasive value of an agency's statutory interpretation depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id*. Though these interpretations "are 'entitled to respect'" under *Skidmore*, they are accorded deference "only to the extent that those interpretations have the 'power to persuade.'" *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140).

Under *Mead*, *Christensen*, and *Skidmore*, it is clear that *Skidmore* deference only applies to an agency's interpretation of a statute, not its own regulation, and only if deference is unwarranted under *Chevron*.[6] *See* Michael P. Healy, *The Past, Present and*

[6] This Court also discussed a third category of deference in *Auer v. Robbins*, 519 U.S. 452 (1997) when considering an agency's interpretation of its own ambiguous regulation. *Id*. at 461-63; *see Christensen*, 529 U.S. at 588 (holding *Auer* deference is unwarranted because the regulation is unambiguous). The Ninth Circuit did not apply *Auer*, and that case has been subject to considerable scrutiny and criticism since decided. *See Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency*

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Future of Auer *Deference:* Mead, *Form and Function in Judicial Review of Agency Interpretation of Regulations*, 62 U. Kan. L. Rev. 633, 657-58 (2014) (discussing *Mead*). *Skidmore* thus was properly understood as a clear but narrow standard intended to accord "some" deference to an agency's interpretation of a statute, "given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a *national law* requires." *Mead*, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139-40) (internal citations omitted) (emphasis added).

This case demonstrates the confusion between the *Skidmore* and *Auer* standards of deference. Here, the Ninth Circuit deferred to the FWS's Consultation Handbook, which interpreted the FWS's own regulation defining "reasonable and prudent alternatives" under *Skidmore*, not *Auer*. *San Luis*, 747 F.3d at 634-36; *see* 50 C.F.R. § 402.02 (defining "reasonable and prudent alternatives"). This is problematic because *Skidmore* is the standard of deference used when an agency's interpretation of a *statute* does not warrant deference under *Chevron*. *See Mead*, 533 U.S. at 237; Daniel Mensher, *With Friends Like These: The Trouble with* Auer *Deference*, 43 Envtl. L. 849, 857 (2013) (discussing the applicability of *Skidmore* deference).

Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 638-54 (1996) (explaining how *Seminole Rock*, i.e., *Auer*, deference contradicts the principle of separation of powers).

On the other hand, *Auer* is the standard for reviewing any agency's interpretation of an *ambiguous* regulation.[7] *See Christensen*, 529 U.S. at 588; *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) ("*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation. . . ."); Michael P. Healy, *supra*, at 634 (discussing *Auer*). Where, as here, the agency interprets its own unambiguous regulation, no deference is merited. *See Christensen*, 529 U.S. at 588 (finding *Auer* deference is unwarranted because the regulation is unambiguous); *id.* at 587 (finding the agency's interpretation of a statute unpersuasive under *Skidmore*). As such, the FWS's interpretation of its own regulation was improperly reviewed under *Skidmore*.[8] *See id.* at 587

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[7] Even setting aside *Auer*'s separation of powers concerns, discussed *infra*, *Auer* would not apply in this case because the regulation at issue defining "reasonable and prudent alternatives" is not ambiguous – it plainly requires the FWS to evaluate *all* factors. *See Dow AgroSciences LLC*, 707 F.3d at 474 (ruling the FWS's regulation, 50 C.F.R. § 402.02, explicitly requires the FWS to evaluate all the factors).

[8] Even if this Court determines that an agency's interpretation of its own regulation may be entitled to respect under *Skidmore*, the panel erred by not undergoing the proper *Skidmore* analysis. Rather, the panel relied on the *Skidmore* deference previously accorded to the ESA Consultation Handbook in *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010). *San Luis*, 747 F.3d at 634 ("We have previously afforded *Skidmore* deference to the FWS's *Consultation Handbook*."). *Arizona Cattle Growers' Association* is distinguishable from this case, because the Ninth Circuit was interpreting the FWS's statutory interpretation of "occupied," which appears in the ESA's definition of critical habitat. *Id*. at 635; *see* 16 U.S.C.

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(stating that an agency manual interpreting a *statute*, not a regulation, falls within the *Skidmore* framework) (emphasis added). Because the Ninth Circuit should have accorded no deference to the FWS's informal interpretation of its own unambiguous regulation, this Court should grant the Petition.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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§ 1532(5)(A) ("the specific areas within the geographical area *occupied* by the species") (emphasis added).