No. 14-402

IN THE
Supreme Court of the United States

STATE WATER CONTRACTORS, ET AL., *Petitioners*,
v.
SALLY JEWELL, ET AL., *Respondents.*

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.

The California Chamber of Commerce ("CalChamber") is a nonprofit business association with more than 13,000 individual and corporate members, representing virtually every economic interest in California. For over 100 years, CalChamber has been the voice of California businesses, both large and small.

Amici[1] advocate their members' interests before the legislative, executive, and judicial branches of government at both the state and federal levels. To that end, *amici* regularly file *amicus curiae* briefs in cases that raise issues of concern to the business community, such as this case. *Amici*'s members have an interest in the economically responsible application of federal statutes and regulations, including environmental statutes such as the Endangered Species Act ("ESA").

Amici recognize the need to protect certain species threatened with extinction. As required by the ESA, the listing of endangered species and the

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

designation of critical habitats must be based upon sound science and must balance the protection of endangered species with the costs of compliance and the rights of property owners. Prioritizing protection of the 1,500 species already listed as threatened or endangered in the United States, to the exclusion of all other considerations of the public interest, would have enormous negative ramifications for this country's economy. Those ramifications are all the more dire in light of the possible dramatic increase in the number of species that, under a court order, Respondents must decide whether to list as threatened or endangered over the next few years. *Amici* and their members, therefore, have a substantial interest in the resolution of this case.

SUMMARY OF ARGUMENT

A determination by the Secretary of the Interior under Section 7 of the ESA that a Federal agency or licensee action is likely to jeopardize an endangered species could be the death knell for that action or project.[2] Congress, however, amended the ESA to also require the Secretary to propose "*reasonable and prudent*" alternative action that "*can be taken*" by the agency or applicant to implement the project or action *without* jeopardizing the endangered or threatened species or adversely modifying its habitat. 16 U.S.C. § 1536(b)(3)(A) (emphases added).

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[2] Although agencies and license applicants are not technically prohibited from taking action that the Secretary determines could jeopardize a threatened or endangered species, doing so could lead to enormous penalties for harm caused to a protected species or its habitat. See 16 U.S.C. § 1540(a)-(b); *Bennett* v. *Spear*, 520 U.S. 154, 169-70 (1997).

Yet in a feat of counterintuitive interpretation, the Ninth Circuit held that a project "alternative" is "reasonable and prudent" so long as it is merely "possible" or "feasible" for the agency or project applicant to carry out, "whatever the cost" to third parties. Pet. App. 128a-30a. Such an unduly lax reading of Section 1536(b)(3)(A)'s requirements is inconsistent with the plain meaning of the statute, its structure, and its legislative history, and should be rejected.

First, the Ninth Circuit and Respondents' interpretation of Section 1536(b)(3)(A) does not comport with the standard definitions of "reasonable" and "prudent," which commonly refer to judicious decision-making based on all significant factors. Nor does any standard dictionary definition limit "reasonable" or "prudent" to mere "feasibility." In other words, under the definition proposed by the Ninth Circuit and Respondents, an alternative may be "reasonable and prudent" even if it is *anything but* reasonable or prudent.

Second, the Ninth Circuit's holding that "reasonable and prudent alternatives"—"RPAs"—include all those that are merely "feasible" or "possible" robs the requirement of any meaning, because "feasibility" is already addressed elsewhere in § 1536(b)(3)(A). The statute requires that alternatives not only be "reasonable and prudent," they must also be alternatives that "*can be taken*" by a Federal agency or project applicant—language that independently contemplates a "feasibility" analysis.

Third, in the event that any ambiguity remains about the meaning of "reasonable and prudent," the legislative history of Section 1536(b)(3)(A) and related provisions confirms that Congress intended

the Secretary to consider broader public policy considerations, including third-party impacts. Indeed, in 1978, Congress added the "reasonable and prudent" language in Section 1536(b)(3)(A), and added similar language throughout the Act to counteract this Court's decision that the ESA required the protection of species "whatever the cost." *TVA* v. *Hill*, 437 U.S. 153, 184 (1978).

Furthermore, the instant case presents the Court with a timely and ideal vehicle to settle the meaning of "reasonable and prudent alternatives," for several reasons:

First, the Ninth Circuit and Respondents' interpretations of both the ESA and of Respondents' implementing regulation, 50 C.F.R. § 402.02, are inconsistent with the approach suggested by the Fourth Circuit in *Dow AgroSciences LLC* v. *National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013), creating a conflict of authority that can be resolved only by this Court.

Second, the Ninth Circuit improperly anchored its reasoning in this Court's decision in *Hill*. As the legislative history confirms, this Court's determination in *Hill* that species must be protected "whatever the cost" prompted Congress to pass the very amendments at issue in this case. This case presents the Court with an opportunity to clarify that *Hill* no longer prohibits consideration of third-party impacts under the ESA.

Third, any answer to the pure legal question raised by the petition will have profound practical impacts not only in California but also across the country. Prioritizing the protection of the delta smelt to the exclusion of all other public

considerations will directly and adversely impact the consumers, including businesses, who depend on two of California's largest water projects.[3] Should the Ninth Circuit's interpretation requiring species to be protected "whatever the cost" prevail, the consequences of that holding, as troubling as they are for California individuals and businesses, will be dwarfed by the enormous ramifications for this country's economy. More than 1,500 species are currently listed as threatened or endangered in the United States,[4] and that number could explode in the near future, given a court order mandating the Federal government to consider listing another 700 species by 2018. *Infra* at 22-24.

The Court therefore should grant the petition for certiorari and reverse the decision below.[5]

ARGUMENT

I. TRADITIONAL TOOLS OF STATUTORY INTERPRETATION CONFIRM THAT "REASONABLE AND PRUDENT" INCLUDES THE CONSIDERATION OF THIRD-PARTY IMPACTS

Respondents argued below, and the Ninth Circuit agreed, that under the ESA RPA's need only be

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[3] The relevant water projects are the State Water Project and the Central Valley Project (together, the "Projects").

[4] Summary of Listed Species, Listed Populations, and Recovery Plans, U.S. Fish & Wildlife Service (Oct. 29, 2014, 4:09 PM), http://ecos.fws.gov/tess_public/pub/boxScore.jsp.

[5] The same issue is raised in a separate petition from the decision below, *Stewart & Jasper Orchards* v. *Jewell*, No. 14-377. Given the overlap in issues presented by both petitions, it would be appropriate for this Court to consider both petitions together.

financially "feasible" for the implementing agency or project applicant, and that economic impacts on third parties such as consumers and businesses dependent on the project not only need not, but *cannot*, be considered. This reading of the ESA is irreconcilable with the plain meaning of "reasonable and prudent," the statutory structure of Section 1536(b), the use of these terms throughout the ESA, and the legislative history of the 1978 Amendments.

A. Ordinary Dictionary Definitions Of "Reasonable" And "Prudent" Support Petitioner's Interpretation

Proper interpretation of Section 1536(b)(3)(A) begins with its plain language. *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). The ESA states that the Secretary "shall" propose alternatives that are "reasonable and prudent." "Prudent" commonly refers to the use of "wisdom" or "judiciousness," and being "shrewd in the management of *practical* affairs," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1828 (1986) (emphasis added), while "reasonable" refers to decision-making that "remain[s] within the bounds of reason" and does not "demand[] too much," and therefore is "not extreme" and "not excessive," but instead is "well balanced" and "sensible," *id.* at 1892.[6] On the face of the ESA, therefore, it is difficult to see how the Secretary can conclude that

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[6] See also WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1996 (2nd ed. 1958) (defining "prudent" to include "cautious, circumspect, or discreet, as in conduct, choice of ends, or business management; not rash or ill-advised; highly sensible; often, frugal"); *id.* at 2074 (definition of "reasonable" includes "just," "fair-minded," and "[n]ot more or less than reason dictates within due or just limits").

an RPA is "reasonable and prudent"—"judicious[]" and "well balanced," and not "extreme" or "excessive"—without taking into account *all* of the significant implications of that RPA, including those affecting the public.

In fact, there are *no* standard definitions of "reasonable" or "prudent" limited to mere feasibility. See *id.* at 1828, 1892; WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1996, 2074 (2nd ed. 1958). Adopting an interpretation of Section 1536(b)(3)(A) that comports with *none* of the standard definitions of the statutory terms would be irrational. See *Dist. of Columbia* v. *Heller*, 554 U.S. 570, 586 (2008) (declining to accept a definition of "bear arms" that "[n]o dictionary has ever adopted").

B. "Reasonable And Prudent" Must Mean Something More Than "Feasible" Because Section 1536(b)(3)(A) Includes A Separate Requirement That Alternatives Be Feasible

The Ninth Circuit's holding that "reasonable and prudent alternatives" are limited to those that are merely "feasible" or "possible" robs the phrase "reasonable and prudent" of any meaning, because "feasibility" is already addressed elsewhere in § 1536(b)(3)(A). Alternatives must not only be "reasonable and prudent," they must also be alternatives that "*can be taken*" by a Federal agency or applicant. *Id.* (emphasis added).

The Court of Appeals itself noted that issues of economic and technical feasibility "go to whether the [alternative] '*can be taken* by the Federal agency . . . in implementing the agency action.'" Pet App. 129a (emphasis added by court) (quoting 16 U.S.C.

§ 1536(b)(3)(A)); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 831 (defining "feasible" to mean "capable of being done, executed, or effected : possible of realization"). If feasibility already is addressed by the separate "can be taken" requirement, then "reasonable and prudent" must mean something more than feasibility. Otherwise, the Ninth Circuit's holding would violate "one of the most basic interpretive canons": that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004)); see also *Am. Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 513 (1981) ("Adoption of petitioners' interpretation would effectively write § 6(b)(5) out of the Act . . . thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect").

Indeed, as this Court already recognized in interpreting other conservation-focused statutes, "feasible" and "prudent" carry distinct meanings and require consideration of different factors. In *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), *abrogated in part on other grounds by Califano* v. *Sanders*, 430 U.S. 99 (1977), the Court examined Section 4(f) of the Department of Transportation Act of 1966 and Section 18(a) of the Federal-Aid Highway Act of 1968, which "prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a 'feasible and prudent' alternative route exists." 401 U.S. at 404 (footnote omitted). The Court acknowledged the separate inquiries mandated by this statutory phrase: For the feasibility requirement to be met,

"the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route," while the prudence requirement directs the Secretary to consider factors such as "cost" and "community disruption." *Id.* at 412 ("Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary." (footnote omitted)); see also *Comm. to Pres. Boomer Lake Park* v. *Dep't of Transp.*, 4 F.3d 1543, 1549-50 (10th Cir. 1993) ("The term 'prudent' . . . involves a common sense balancing of practical concerns . . . .").

While the Ninth Circuit's interpretation of the "reasonable and prudent alternatives" requirement renders the phrase "reasonable and prudent" inoperative, Petitioner's interpretation not only gives that phrase meaning, it gives it meaning consistent with its plain language. Adopting the Petitioners' interpretation would therefore fulfill this Court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

C. The Legislative History Of Section 1536(b)(3)(A) And The Use Of The Terms "Reasonable" and "Prudent" In Related Provisions Confirm That Congress Intended The Secretary To Consider Third-Party Impacts

The plain language of Section 1536(b) alone requires a conclusion that Respondents consider more than an RPA's feasibility, including the RPA's impacts on third parties. That conclusion is only strengthened by the history of the phrase "reasonable and prudent" in that Section, and

Congress's use of that and similar language elsewhere in the Act.

1. Congress Amended Section 1536(b) To Counteract The Supreme Court's Restrictive Interpretation Of The ESA In *TVA* v. *Hill*

The history of Section 1536, and in particular the history of the addition of the "reasonable and prudent" standard to that section, further supports Petitioners' reading of the Act. Specifically, in *TVA* v. *Hill*, 437 U.S. 153 (1978), this Court interpreted the ESA to require the Secretary to ignore the practical effects of Section 7's requirements and instead "halt and reverse the trend toward species extinction, *whatever the cost*." 437 U.S. at 184 (emphasis added). Congress added the "reasonable and prudent" language in Section 1536(b)(3)(A) after *Hill* with the expressed intent to *counteract* what Congress believed to be an inflexible and overly stringent interpretation of the statute to protect endangered species above all else. See H.R. Rep. No. 95-1757, at 822 (1978) (Rep. Murphy) ("[T]he U.S. Supreme Court interpreted this provision to require Federal agencies to avoid adverse impacts on endangered species—no matter what the cost. The Supreme Court decision may be good law, but it is very bad public policy."); *id.* at 975 (Sen. Baker) ("The recent decision of the U.S. Supreme Court concerning Tellico underscores the need for Congress to address the issue and inject some additional flexibility into the act.").[7]

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[7] Thus, while the Ninth Circuit and the Secretary invoked *Hill* and its "at any cost" language in support of their reading of the Act as precluding consideration of third-party impacts, that

2. Congress Added Similar Language In Sections 1533 And 1536(g)-(h) To Require The Consideration Of Third-Party Impacts

The Ninth Circuit's unduly cramped reading of the law also cannot be squared with similar language throughout the ESA that Congress included at the same time it added the "reasonable and prudent" requirement in Section 1536(b)(3)(A). For instance, Congress created an Endangered Species Committee and application process through which an agency can obtain an exemption from Section 7 of the ESA. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3753-58 (codified at 16 U.S.C. § 1536(e)-(h). Section 1536(g) provides that when considering whether an agency should grant an exemption, the Committee must consider whether the exemption applicant has made a good faith effort to "fairly consider modifications or reasonable and prudent alternatives to the proposed agency action." 16 U.S.C. § 1536(g)(3)(A)(i). An exemption is permitted only if the Committee decides that "there are no reasonable and prudent alternatives to the agency action." *Id.* § 1536(h)(1)(A)(i).

Members of the Senate expressly discussed the meaning of "reasonable and prudent" alternatives in Section 1536(g)-(h) when the 1978 Amendments were being debated. Senator Baker initially proposed using the term "feasible and prudent" alternatives,

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cannot be right, for the phrase "reasonable and prudent" was added in Section 1536(b)(3)(A) *after*, and in an effort to pare back, *Hill*.

but Senator Nelson explained that using "reasonable and prudent" would require the Endangered Species Committee to consider a broader range of factors, including third-party "environmental and community impacts" as well as economic implications far beyond "only engineering 'feasibility.'" 124 Cong. Rec. 21,590 (1978) (expressing the view of the Environment and Public Works Committee that the "term 'reasonable' gives more flexibility to the Endangered Species Committee"). Thus, Congress intended the Committee to consider the broader economic impacts of an alternative on third parties affected by the agency action in determining whether reasonable and prudent alternatives exist under Section 1536(g)-(h). Then, in deciding whether to grant an exemption, Congress directed the Committee to analyze whether "there are no reasonable and prudent alternatives," the benefits of the action "clearly outweigh" the harms, the "action is in the public interest, and "the action is of regional or national significance." 16 U.S.C. § 1536(h)(1)(A). Those broad factors too support and require consideration of impacts on third parties.

Section 4 of the ESA provides further confirmation that third-party impacts are among the factors that should be considered in making a "prudent" decision with respect to protection of endangered species. This section requires the Secretary to make a determination of any "critical habitat" for endangered and threatened species. See 16 U.S.C. § 1533(a)(3)(A)(i). The Secretary must, "to the maximum extent *prudent* and determinable," designate "critical habitat[s]" of listed species and revise those designations from time to time as appropriate. *Id.* § 1533(a)(3)(A) (emphasis added).

This section identifies the factors that should "tak[en] into consideration" in designating critical habitat under section (a)(3) "on the basis of the best scientific data available": "the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id*. § 1533(b)(2). Notably, this requirement also was added to the ESA in the Endangered Species Act Amendments of 1978—the exact same amendment in which the "reasonable and prudent alternatives" requirement was added to Section 7. Pub. L. No. 95-632, § 11, 92 Stat. at 3764.

3. The Terms "Reasonable" And "Prudent" Must Be Consistently Interpreted Throughout Sections 1533, 1536(b), And 1536(h) To Require The Consideration Of Third-Party Impacts

The Ninth Circuit's interpretation of "reasonable and prudent" in Section 1536(b) is fundamentally at odds with the clear meaning of similar language throughout the ESA, and thus cannot be squared with the Court's admonition that "identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005); *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (referring to this principle as "one of the most basic interpretive canons"). This canon has particular force where, as here, the identical statutory phrases were added (1) by the same Congress, and (2) in the same set of amendments to an earlier bill. *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 231-32 (2007) (deeming this canon "doubly appropriate" where the disputed "phrase 'subject matter

jurisdiction' was inserted into § 1447(c) and § 1447(e) at the same time"). Any assumption that the same words in a statute have different meanings should be disfavored. *See Sec. Indus. Ass'n* v. *Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 207, 219 (1984) ("Because §§ 32 and 20 contain identical language, were enacted for similar purposes, and are part of the same statute, the long-accepted interpretation of the term 'public sale' to exclude brokerage services such as those offered by Schwab should apply as well to § 20."); *Northcross* v. *Bd. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam) ("The similarity of language in § 718 and § 204(b) is, of course, a strong indication that the two statutes should be interpreted *pari passu*.").[8]

Congress cannot have intended Section 1536(h) to *require* the Committee to consider third-party impacts when determining whether "reasonable and prudent alternatives" exist for purposes of exemption eligibility, while at the same time *prohibiting* the Secretary from considering third-party impacts when suggesting "reasonable and prudent alternatives" for purposes of consultation under Section 1536(b). Nor

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[8] The Toxic Substances Control Act (TSCA), Pub. L. No. 94-469, 90 Stat. 2003 (1976), which was enacted shortly before the 1978 ESA Amendments, also provides helpful guidance about the meaning Congress ascribes to "reasonable and prudent." The TSCA permits EPA to regulate "chemical substances and mixtures which present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2601(b)(2). It requires the EPA Administrator to exercise this authority "in a reasonable and prudent manner," which includes "consider[ation of] the environmental, economic, and social impact of any action the Administrator takes or proposed to take under this chapter." *Id.* § 2601(c).

could Congress have intended "prudent" decision-making under Section 4 to include consideration of third-party impacts, but "prudent" decision-making under Section 7 to ignore such impacts entirely.

In summary, the statutory structure of Section 1536(b), the plain meaning of "reasonable and prudent," the use of these terms through the ESA, and the legislative history of the 1978 Amendments all demonstrate that the "reasonable and prudent" requirement is not a mere feasibility test, but rather, an affirmative requirement that the Secretary must consider all significant factors, to avoid the inflexible outcomes Congress sought to avoid after this Court's decision in *TVA* v. *Hill*. *Supra* at 10.

II. THIS CASE IS AN APPROPRIATE VEHICLE TO CLARIFY THE MEANING OF "REASONABLE AND PRUDENT ALTERNATIVES"

For several reasons, this case presents an appropriate vehicle for settling the question whether the Secretary must consider third-party impacts in determining whether a potential alternative agency action is "reasonable and prudent." (The same topic also is presented in a separate petition from the decision below, *Stewart & Jasper Orchards* v. *Jewell*, No. 14-377).

A. The Ninth Circuit's Decision Conflicts With The Fourth Circuit's Decision In *Dow AgroSciences* v. *National Marine Fisheries Service*

In *Dow AgroSciences*, EPA consulted with the National Marine Fisheries Service ("NMFS")

regarding the potential impact that reregistering certain pesticides would have on protected species of Pacific salmonids and their critical habitat. 707 F.3d 462, 465 (4th Cir. 2013). NMFS's biological opinion concluded that reregistration of certain pesticides would jeopardize salmonids and their habitat, and it suggested several RPAs that would avoid this harm, including a requirement that EPA impose "buffer zones" in which pesticides could not be used. *Id.* at 466. As the Fourth Circuit noted, the suggested prohibitions were extraordinarily broad, effectively banning pesticide applications within the aforementioned distances "of any waterway that is connected, *directly or indirectly*, at *any* time of the year, to *any* water body in which salmonids *might be* found at *some point*." *Id.* at 475 (emphases in original).

Pesticide manufacturers challenged the RPAs, arguing that NMFS never considered that the proposed buffer zones would substantially threaten the value of their products to growers and thus adversely impact their sales. 821 F. Supp. 2d 792, 807 (D. Md. 2011). The district court disagreed, concluding that the RPA requirement properly focused on "the abilities of EPA to implement the buffers," rather than "the ability of pesticide manufacturers to absorb the costs." *Id.* at 808 (citing *Hill*, 437 U.S. at 184). The court cited several cases (mostly within the Ninth Circuit) holding that third-party impacts are immaterial under Section 7. See*, e.g.*, *Greenpeace* v. *Nat'l Marine Fisheries Serv.*, 55 F. Supp. 2d 1248, 1268 (W.D. Wash. 1999) ("The guiding standard for determination of RPAs is jeopardy, not economic impact on third parties such as the fishing industry.").

The Fourth Circuit reversed, expressly disagreeing with NMFS's position that the agency was not required, under 50 C.F.R. § 402.02, to consider "the potential economic consequences of such a requirement." 707 F.3d at 474. The Fourth Circuit's decision was clearly focused on the economic consequences of the buffer zones on third parties—there, pesticide manufacturers. EPA was the agency to which the RPAs were directed, and for EPA, implementing buffer zones fell well within EPA's capabilities, as the district court found. 821 F. Supp. 2d at 808-09. Of greater concern to the Fourth Circuit were the "economic consequences" of the RPA's "broad prohibition" on pesticide applications by third parties. 707 F.3d at 474.

The Fourth Circuit's reading of Section 402.02 and the ESA directly conflicts with the Ninth Circuit's reading in this case. Compare Pet. App. 128a ("Section 402.02 is only concerned with . . . whether [the Secretary's] proposed alternative is financially and technologically possible." (emphasis omitted)), and Pet. App. 129a-30a (RPA requirement "does not address the downstream economic impacts" (citing *Hill*, 437 U.S. at 184-185)), with *Dow AgroSciences*, 707 F.3d at 475 (stating that it "cannot agree with" NMFS's position that the RPA requirement is "simply a limitation that the reasonable and prudent alternative be economically *possible*"), and *id.* (noting the "potential economic consequences" of the RPA and disagreeing with NMFS's reliance on *Hill*).

B. The Misplaced Reliance On *TVA* v. *Hill* By The Ninth Circuit And By The Respondents Warrants Correction By This Court

In their briefing before the Ninth Circuit, Respondents took the position that under the Department of the Interior's interpretive regulation, 50 C.F.R. § 402.02, the Secretary may consider only the feasibility of proposed alternatives for the Projects and cannot consider the economic impacts that proposed alternatives will have on any entity but the Projects themselves. In turn, the Ninth Circuit deferred to that litigation position in reaching its decision. That decision was wrong for at least two reasons.

First, Section 402.02 defines "reasonable and prudent alternatives" as follows:

> Reasonable and prudent alternatives refer to alternative 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 is 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.

50 C.F.R. § 402.02. There is nothing in the regulation limiting consideration of economic

feasibility to feasibility for the federal agency or applicant, rather than feasibility for all of those directly impacted by the alternative; for the reasons given by Petitioners, "economically . . . feasible" within the meaning of Section 402.02 must be read to include feasibility for the broader economy. Pet. 21-28. Moreover, in many cases, third-party impacts will be clearly encompassed within the regulatory requirement that the Secretary consider whether a suggested alternative "can be implemented *in a manner consistent with the intended purpose of the action*." The purpose of the Projects' proposed action in this case is to provide much-needed water to their constituents—California consumers in drought-stricken communities, such as farmers who suffer crippling losses when their water supply is reduced. If the Secretary ignores the impacts of water reductions on the third-party constituents of the Projects, she is not fulfilling her regulatory requirement to consider whether her proposed alternatives are consistent with the intended purpose of the Projects' proposed action.[9]

Second, the Government's litigation position here does not reflect a reasoned analysis of the meaning of its interpretive regulations based on careful consideration of the statutory and regulatory regime.

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[9] In reviewing an agency determination regarding the existence of "feasible and prudent" alternatives to constructing a highway through parklands pursuant to the Department of Transportation Act, courts similarly hold that "an alternative is not prudent if it does not meet the transportation needs of a project." *Neighborhood Ass'n of the Back Bay, Inc.* v. *Fed. Transit Admin.*, 463 F.3d 50, 65 (1st Cir. 2006); accord *Citizens for Smart Growth* v. *Sec'y of Dep't of Transp.*, 669 F.3d 1203, 1217 (11th Cir. 2012); *City of Bridgeton* v. *FAA*, 212 F.3d 448, 461 (8th Cir. 2000).

See *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011). Instead, the Government's interpretation of Section 402.02 is premised on one thing and one thing only: the Government's erroneous belief that this Court's decades-old decision in *Hill* requires the agency to ignore the economic impacts of proposed alternatives. Gov't C.A. Br. 50-51 ("FWS *Cannot* Balance Harms to Economic Interests in Water Exports Against Protection of the Delta Smelt" because "*TVA* is law of the land." (emphasis added)).

But as discussed above, *Hill* cannot bind the agency or the court as to the proper scope of Section 1563(b)(3)(A) because the "reasonable and prudent" language was added to the ESA to counteract *Hill*. Without *Hill*, the Secretary is left with an entirely unsupported interpretation of the ESA and Section 402.02 that is inconsistent with the plain meaning of the statute, the legislative history, and the statutory structure. Such an interpretation, which is anything but "fair and considered," is entitled to no deference. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

C. The Petition Presents A Pure, Legal Question With Enormous Practical Consequences For California And For The Entire Country

The Ninth Circuit explicitly acknowledged "the enormous practical implications of this decision," but determined that such a result was compelled by the ESA and this Court's decision in *Hill*. Pet. App. 28a. This case therefore presents a ripe and clear record on which to decide the role of third-party impacts on

the Secretary's proposal of alternative agency actions during ESA consultation. This clarification is essential given the enormous practical consequences of the Ninth Circuit's decision.

1. Reversal Of The Decision Below Could Avoid Enormous, Direct Impacts On Businesses, Farms, And Individuals In California

A decision by this Court that the ESA's "reasonable and prudent alternatives" determination requires consideration of third-party impacts is likely to change the outcome below. As Petitioners note, California currently faces an unprecedented and extreme drought affecting the more than twenty million farmers, businesses, state agencies, and individual consumers who rely on the Projects for a sufficient and reliable source of water. Pet. App. 25a; Pet. 4, 7-8. Were the Secretary to consider the economic impacts of potential alternatives on third parties who rely on the Projects, her RPA determination likely would be different in one of two ways.

First, taking into account the impact of any proposed alternatives on third parties the Secretary could permit the Projects to pump additional water for agricultural, industrial, municipal, and other uses yet still provide adequate protection to the delta smelt.

Second, if the Secretary determined that the delta smelt could not be adequately protected while also permitting the Projects to provide sufficient water to meet consumers' needs, the Secretary would be required to conclude that *no* reasonable and prudent alternatives exist. The Projects could then seek an

exemption from the Endangered Species Committee, which would determine whether the harm caused to the three-inch delta smelt is outweighed by the benefit to the public of providing sufficient water to meet the needs of consumers during this exceptional drought. In any event, to come to the same conclusion previously reached, the Secretary would need to justify any decision in light of the third-party impacts of the proposed action, which she likely cannot do.

2. The Ninth Circuit's Decision Could Have Enormous National Implications Due To The 1,500 U.S. Species Currently Listed And The 1,000 Species Now Under Consideration

In addition to the tremendous consequences for Californians if this decision is left to stand, the Ninth Circuit's approach—which no doubt will be embraced by Respondents in other jurisdictions—will have tremendous adverse consequences throughout the country.

Roughly 1,500 U.S. species are currently listed under the ESA. Yet that number may very well balloon at a dramatic rate in the very near future, radically amplifying the implications of the Ninth Circuit's decision for the national economy. In the past five years, Respondents have been petitioned to list an additional 1,230 species; and in 2011, Respondents settled a lawsuit, brought by environmental advocacy groups, by agreeing to consider adding an additional 757 species as new candidates to the list of endangered or threatened

species under the ESA.[10] By court order in two consent decrees, Respondents must make final decisions on 251 pending candidate species, and these listing decisions must be completed by Respondents no later than 2018.[11] In other words, within four years, Respondents may increase the number of listed species by nearly 70%.[12]

If, as the Ninth Circuit held, agency and licensee projects must protect the 1,500 currently

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[10] *Examining the Endangered Species Act: Hearing Before the House Comm. on Oversight and Gov't Reform*, 113th Cong. (2014), https://www.uschamber.com/sites/default/files/documents/files/2.27.14-%20Testimony%20to%20House%20Oversight%20on%20ESA%20Hearing.pdf (statement of the U.S. Chamber of Commerce).

[11] *Id.*; Stipulated Settlement Agreement, *In re Endangered Species Act Section 4 Deadline Litig.*, No. 10-377 (EGS) (D.D.C. July 12, 2013), *available at* https://www.uschamber.com/sueandsettle/pleadings/In%20re%20ESA%20Section%204%20Deadline%20Litigation/SettlementAgreement%207.12.2011.pdf; Stipulated Settlement Agreement, *In re Endangered Species Act Section 4 Deadline Litig.*, No. 10-377 (EGS) (D.D.C. May 10, 2011), *available at* https://www.uschamber.com/sueandsettle/pleadings/In%20re%20ESA%20Section%204%20Deadline%20Litigation/FWS_ESA_Settlement_Agreement_As_Filed_5.10.11.pdf.

[12] The workload imposed on Respondent by these consent decrees is nothing short of staggering. Given that a court-imposed deadline for the biological opinion in this case resulted in what the Ninth Circuit called "a ponderous, chaotic document, overwhelming in size, and without the kinds of signposts and roadmaps that even trained, intelligent readers need in order to follow," Pet. App. 57a, one might expect that an additional 1,000 similar opinions between 2013 and 2018 will impose enormous strains on the Agency's resources. On this point, at least, the Ninth Circuit was correct: in matters of "such consequence," no one is "well-served" by the imposition of artificial "tight deadlines." Pet. App. 57a.

listed species—not to mention the additional 1,000 that may soon be listed—"whatever the cost" and without any consideration of impacts on the public, the consequences will be severe.

One currently proposed listing is illustrative of the potential ramifications of the Ninth Circuit and Respondents' position. Consistent with the 2011 consent decree, Respondents are currently considering whether to list the northern long-eared bat ("NLE bat"), whose range covers 39 states, reaching from Maine west to Montana (and, thus, subject to the Ninth Circuit's decision); south to eastern Kansas, eastern Oklahoma, Arkansas; and east to the Florida panhandle.[13] This range includes some of the country's richest shale gas regions, including the Marcellus Shale in Pennsylvania and Ohio.[14] Under the approach espoused by the Ninth Circuit and the Respondents, the proposed NLE bat

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[13] 6-Month Extension of Final Determination on the Proposed Endangered Status for the Northern Long-Eared Bat, 79 Fed. Reg. 36,698 (proposed June 30, 2014); Northern Long-Eared Bat, U.S. Fish & Wildlife Service (July 16, 2014), http://www.fws.gov/midwest/endangered/mammals/nlba/pdf/QAsPropListNLBA2Oct2013.pdf.

[14] Listing the Northern Long-Eared Bat as an Endangered Species, 78 Fed. Reg. 61,046, 61,061 (Oct. 2, 2013); Public Comment by Pennsylvania Independent Oil & Gas Association and Pennsylvania Chamber of Business and Industry, Listing the Northern Long-Eared Bat as an Endangered Species (Dec. 23, 2013), http://www.regulations.gov/contentStreamer?objectId=0900006481530321&disposition=attachment&contentType=pdf .

listing could halt one of the economic bright spots for the U.S. in recent years—the shale gas revolution.[15]

Due to the national character of this case's potential ramifications, the Court should grant the petition to reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[15] Marcellus Region production continues growth, U.S. Energy Information Administration (Aug. 5, 2014), http://www.eia.gov/todayinenergy/detail.cfm?id=17411&src=email.