No. _____

In the

Supreme Court of the United States

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA; BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION; CALIFORNIA BUILDING INDUSTRY ASSOCIATION; and GREENHORN GRANGE,
Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF INTERIOR; DIRK KEMPTHORNE, in his official capacity as Secretary of Interior; H. DALE HALL, in his official capacity as Director of the United States Fish and Wildlife Service; MATTHEW J. HOGAN, in his official capacity as Acting Director of United States Fish and Wildlife Service,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After or concurrent with the listing of a species as "threatened" or "endangered," the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, mandates that "critical habitat" be designated for a protected species *only* "after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." *Id*. § 1533(b)(2). Any area may be excluded from "critical habitat" if the benefits of exclusion outweigh the benefits of inclusion, unless the exclusion would result in the extinction of the species. *Id.*

The United States Fish and Wildlife Service advocates a "baseline" approach to the "critical habitat" economic impacts analysis. This approach accounts only for the impacts that would not occur "but for" the "critical habitat" designation itself. The analysis ignores the co-extensive economic impacts caused by listing and by other statutes. In *New Mexico Cattle Growers Association v. United States Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), the Tenth Circuit invalidated the "baseline" approach (because it invariably understated overall impacts) and held that a "critical habitat" economic analysis must take into account *all* impacts attributable to the "critical habitat" designation, even if those impacts can also be attributed to other causes.

In this case, however, and in *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (petition for certiorari pending, No. 10-454), the Ninth Circuit rejected *New Mexico Cattle Growers* and held that the analysis need only take into account those impacts *solely* attributable to the designation, and may ignore any and all cumulative economic impacts.

The question presented is:

Under Section 4 of the ESA, must the government analyze all of the economic impacts of "critical habitat" designation (regardless of whether the impacts are co-extensive with, or cumulative of, other causes), as the Tenth Circuit decided, or instead only those impacts for which "critical habitat" designation is a "but for" cause, as the Ninth Circuit decided?

LIST OF ALL PARTIES

Petitioners: Home Builders Association of Northern California; Building Industry Legal Defense Foundation; California Building Industry Association; and Greenhorn Grange.

Respondents: United States Fish and Wildlife Service; United States Department of Interior; Dirk Kempthorne, in his official capacity as Secretary of Interior; H. Dale Hall, in his official capacity as Director of the United States Fish and Wildlife Service; Matthew J. Hogan, in his official capacity as Acting Director of United States Fish and Wildlife Service.

Intervenors: Butte Environmental Counsel; California Native Plant Society; and Defenders of Wildlife.

CORPORATE DISCLOSURE STATEMENT

Home Builders Association of Northern California,[1] Building Industry Legal Defense Foundation, California Building Industry Association, and Greenhorn Grange hereby state that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

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[1] During the pendency of the appeal below, Petitioner Home Builders changed its name to the Building Industry Association of the Bay Area. The former name is retained here for the sake of consistency and clarity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Home Builders Association of Northern California, Building Industry Legal Defense Foundation, California Building Industry Association, and Greenhorn Grange respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 616 F.3d 983 (9th Cir. 2010), and included in Petitioner's Appendix (Pet. App.) at A. The opinion of the district court granting and denying the motions for summary judgment is not published but is included in Pet. App. at C. The opinion of the district court granting in part the motions for clarification, reconsideration, or amendment is not published but is included in Pet. App. at D.

JURISDICTION

On November 1, 2006, the district court denied Petitioners' motion for summary judgment and granted the cross-motions for summary judgment of Respondents United States Fish and Wildlife Service, *et al.*, upholding the Service's designation of "critical habitat" for 15 vernal pool species under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. On January 23, 2007, the district court granted in part the motions for clarification, reconsideration, or amendment, and remanded the designation to the

Service. On May 31, 2007, the Service completed the remand without substantive change to the designation. Following entry of judgment, *see* Pet. App. at B, Petitioners appealed to the Ninth Circuit Court of Appeals. On August 9, 2010, that court issued its decision affirming the judgment of the district court in full. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE[2]

The Endangered Species Act (ESA) provides in pertinent part:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) 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

[2] The provision of the ESA most pertinent to this Petition is set forth above. Other relevant ESA provisions are reproduced at Pet. App. at E & F.

> critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

INTRODUCTION

The issue raised by this petition is whether the United States Fish and Wildlife Service can flout Congress' command that the Service take account of the full economic impact of its actions under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, by putting on blinders and ignoring the real-world effects of its regulations. Here, the Service has designated hundreds of thousands of acres of "critical habitat" for fifteen ESA-protected species, *see* 70 Fed. Reg. 46,924 (Aug. 11, 2005), while grossly underestimating the economic impact of the designation through its failure to consider the designation's cumulative economic impact. The Ninth Circuit Court of Appeals' decision authorizes the Service in this and other designations to assess the economic impact of "critical habitat" designation by looking *only* at the cost of the designation itself, in a vacuum, with *no* regard for the cumulative impact of that cost. *See* Pet. App. at A-18–A-20.

The Ninth Circuit's approval of this truncated analysis conflicts with a decision of the Tenth Circuit Court of Appeals. *Compare id.* at A-20 *with N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284-85 (10th Cir. 2001). Also, the Service likely will "nationalize" the approach approved by the Ninth Circuit, just as the agency has done with other ESA splits between the Ninth and Tenth Circuits. *See infra* Part II.A. Even standing alone, the Ninth Circuit's decision will govern millions of acres of

"critical habitat" throughout the West. *See infra* Part II.B. And, the decision promises to have an especially harsh impact on housing and other land development industries already suffering in these tough economic times. *See infra* Part II.C. For these reasons, more fully explained below, the writ should be granted.

STATEMENT OF THE CASE

"Critical Habitat" and the Endangered Species Act

To be protected under the ESA, a species must be designated as either "endangered" or "threatened." 16 U.S.C. § 1533(a) (imposing duty to list "endangered" and "threatened" species). *See id.* §§ 1532(6) & (20) (defining "endangered" and "threatened" species). Section 9 of the ESA forbids the taking of a listed species.[3] *Id.* 16 U.S.C. § 1538(a)(1)(B). A "take" may include "significant habitat modification." 50 C.F.R. § 17.3(c)(3).

The Service must, concurrent with listing, designate an endangered or threatened species' "critical habitat" "to the maximum extent prudent and determinable." *Id.* 16 U.S.C. § 1533(a)(3). "Critical habitat" is defined in part as "the specific areas . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." *Id.* § 1532(5)(A)(i). The Service may designate "critical habitat" only "after

[3] Although Section 9 applies only to endangered species, the Service has adopted a rule, pursuant to authority under Section 4(c) of the ESA, 16 U.S.C. § 1533(c), that makes illegal the take of a threatened species. 50 C.F.R. § 17.31.

taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." *Id*. § 1533(b)(2). The Service may exclude any area from "critical habitat" if the benefits of exclusion outweigh the benefits of inclusion, provided that the exclusion would not result in the extinction of the species. *Id*.

The Petitioners' Lawsuit

Petitioners are a collection of trade organizations representing the homebuilding, livestock grazing, and agricultural industries in California. In 2005, Petitioners filed suit in the Eastern District of California challenging the Service's designation of "critical habitat" for 15 ESA-protected species[4] found within "vernal pools."[5] Petitioners contended that the designation was inconsistent in several ways with the statutory definition for "critical habitat," including the requirement that "critical habitat" be designated only

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[4] The 15 species comprise four crustaceans—the Conservancy fairy shrimp, Longhorn fairy shrimp, Vernal pool fairy shrimp, and Vernal pool tadpole shrimp—and eleven plants—Butte County meadowfoam, Contra Costa goldfields, Hoover's spurge, Fleshy owl's-clover, Colusa grass, Greene's tuctoria, Hairy Orcutt grass, Sacramento Orcutt grass, San Joaquin Valley Orcutt grass, Slender Orcutt grass, and Solano grass. *See* 70 Fed. Reg. at 46,925.

[5] Vernal pools are a type of ephemeral wetland. 68 Fed. Reg. 46,684, 46,685 (Aug. 6, 2003). Vernal pools typically are found in grasslands, and are fed hydrologically by swales and associated uplands, which themselves are often seasonal wetlands. *Id.* Vernal pools attain their typical "ponding" through a perched water table consisting of impervious or nearly impervious soils. 70 Fed. Reg. at 46,925. Most vernal pool nutrients are derived from detritus, *i.e.*, dead organic matter, that is carried into the pools by water flows, animals, or humans. 68 Fed. Reg. at 46,685-86.

after a comprehensive economic impacts analysis of the designation has been completed. Specifically, Petitioners contended that the Service's failure properly to assess the *cumulative* economic impact of the designation violated the Service's obligation to "tak[e] into consideration the [designation's] economic impact." *See id.* § 1533(b)(2). Although the Service produced an economic impacts analysis for the designation, the Service took into consideration only the *incremental* impact of the designation and did not consider the designation's incremental impact *in combination with* existing economic impacts attributable to other federal, state, and local land-use laws. The district court ultimately ruled for the Service, and did not specifically address Petitioners' cumulative economic impacts argument. *Cf.* Pet. App. at C-47–C-54.

On appeal, Petitioners renewed their arguments against the "critical habitat" designation, including their challenge to the Service's failure to consider the designation's cumulative economic impacts. The Ninth Circuit, however, affirmed the district court's decision in full. Pet. App. at A-20. With respect to Petitioners' cumulative economic impacts argument, the panel held that the argument was foreclosed by *Arizona Cattle Growers*, *id.*, which itself conflicts with the Tenth Circuit. Accordingly, the panel held that the Service has no obligation to consider cumulative economic impacts when designating "critical habitat." *Id.* The panel thereby confirmed and exacerbated a conflict between circuits.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN CIRCUITS OVER WHETHER THE GOVERNMENT MUST CONSIDER THE CUMULATIVE ECONOMIC IMPACTS OF "CRITICAL HABITAT" DESIGNATIONS

In ruling that the Service is required to conduct a cumulative economic impacts analysis when designating "critical habitat," the Ninth Circuit panel, relying on *Arizona Cattle Growers*, diverged from the Tenth Circuit's decision in *New Mexico Cattle Growers*.

In *New Mexico Cattle Growers*, the Tenth Circuit addressed the issue of whether the Service, when conducting a "critical habitat" economic impacts analysis, must take into account all the impacts attributable to the designation, or instead only those impacts that are *solely* attributable to designation. Prior to the Tenth Circuit's decision, the Service routinely excluded from consideration those impacts attributable to designation but also attributable to some other cause. *See* 248 F.3d at 1283. This approach became known as the "baseline" analysis, because it purported to assess only the incremental difference between a world with the designation and a world without the designation. *Id*. The problem with this baseline approach, as argued in *New Mexico Cattle Growers*, was that it routinely resulted in economic analyses that ascribed *zero* economic impact to

designations.[6] *See id*. at 1283-84. For, at that time, the Service took the position that designation provided few if any protections that were not already provided by other ESA provisions, primarily the listing provision.[7] *See id*. at 1283. Thus, the Service reasoned, the economic impact from the designation was virtually nonexistent. *See id*. at 1283-84.

The Tenth Circuit rejected the Service's approach, concluding that it would entirely undercut the ESA's requirement that the Service first assess the designation's economic impacts before imposing "critical habitat" restrictions on any area. *See id*. at 1285. The court therefore prescribed a new method to "critical habitat" economic analyses. Specifically, the court adopted a cumulative approach, whereby the Service must take into account *all* economic impacts attributable to the designation, even those impacts that are "co-extensive" with other causes, such as the listing of a species. *See id*. at 1284-85.

Since *New Mexico Cattle Growers*, no circuit court had addressed the "baseline" versus "co-extensive"

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[6] The *New Mexico Cattle Growers* petitioners' interest was far more than academic. For example, in discussing the petitioners' standing to sue, the Tenth Circuit observed that cattlemen had to fence off "critical habitat" rivers to prevent livestock from wading into them, a practice that produced significant inconvenience and financial harm. *See New Mexico Cattle Growers*, 248 F.3d at 1284 n.3.

[7] The Ninth Circuit subsequently overturned the Service's minimalist interpretation of critical habitat protections in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004), which held that those protections are intended not just to stave off extinction (as the Service had contended), but also to promote a species' recovery and delisting.

debate until this year,[8] when the Ninth Circuit, in *Arizona Cattle Growers*, diverged from the Tenth Circuit to hold that the ESA does not require the co-extensive approach, and that the Service's previous baseline approach is permissible. *See* 606 F.3d 1160, 1173-74 (9th Cir. 2010). The *Arizona Cattle Growers* panel reached that conclusion in part based on the Service's post-*New Mexico Cattle Growers* shift in interpreting the nature and scope of the protections afforded by "critical habitat." Specifically, the Ninth Circuit noted that the Service now, in contrast to the *New Mexico Cattle Growers* era, interprets "critical habitat" as adding another layer of regulation separate and distinct from other ESA provisions. *See id*. at 1173. Consequently, because it is possible now for the Service to produce a baseline "critical habitat" analysis that does not come out to *zero*, the Service can properly use the baseline approach without undercutting its statutory obligation to assess the economic impact of proposed "critical habitat." But the Service's shift in approach was nominal at best, and still in conflict with *New Mexico Cattle Growers*.

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[8] Two district courts have rejected the *New Mexico Cattle Growers* approach. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt*., 422 F. Supp. 2d 1115, 1151-53 (N.D. Cal. 2006); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 129-30 (D.D.C. 2004). One district court has determined that the Service's adoption of the baseline approach is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Otay Mesa Prop. L.P. v. U.S. Dep't of Interior*, No. 08-383 (RMC), 2010 U.S. Dist. LEXIS 52233, at *39-*40 (D.D.C. May 27, 2010), *appeal pending*, No. 10-5204 (D.C. Cir. June 22, 2010.

Relying expressly on *Arizona Cattle Growers*, the panel below rejected Petitioners' challenge to the Service's failure to conduct a full cumulative impacts analysis of the vernal pool species' "critical habitat."

> Home Builders's position is contrary to *Arizona Cattle Growers*, where the court rejected the notion that "FWS was required to attribute to the critical habitat designation economic burdens that would exist even in the absence of that designation." That opinion also expressly approved the baseline approach to economic analysis, under which "any economic impacts of protecting the [listed species] that will occur regardless of the critical habitat designation . . . are treated as part of the regulatory 'baseline' and are not factored into the economic analysis of the effects of the critical habitat designation."

Pet. App. at A-20 (quoting *Arizona Cattle Growers*, 606 F.3d at 1172) (citation omitted)). Thus, the panel confirmed the conflict between the Ninth and Tenth Circuits on the statutorily required economic impacts analysis of "critical habitat" designations.

Moreover, the panel likely exacerbated the existing conflict by extending *Arizona Cattle Growers* to preclude the assessment of co-extensive, or cumulative, economic impacts beyond the listing. In *Arizona Cattle Growers*, the appellants did not argue that the Service must take into account the non-ESA-related costs of existing federal, state, and local land use controls. *Cf.* 606 F.3d at 1172. Rather, the appellants simply argued that the Service must take into account the co-extensive economic impacts that

are fairly attributable to the designation itself as well as to listing. *See id*. In contrast, Petitioners in this case argue that the Service cannot know the true impact of "critical habitat" designation unless and until it assesses the incremental impact of such designation *in combination with* the economic regulatory baseline. Below, the panel rejected that argument, concluding that it is enough for the Service to assess a designation's incremental impact (using the baseline method), without giving any heed to how that impact, when added to existing land-use controls, might affect a community.[9] *See* Pet. App. at A-18–A-20. The panel's rejection of the cumulative impacts assessment obligation heightens the conflict between the Ninth and Tenth Circuits, a conflict that encompasses a sizable portion of the nation's land mass. This Court's review is required to resolve the conflict.

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[9] The panel observed in a footnote that the vernal pool species' economic analysis *did* "include consideration of compliance with other regulations." Pet. App. at A-19 n.6. The panel misunderstood either Petitioners' argument or the Service's economic analysis. To be sure, that analysis assessed the impacts of other land-use controls, but only to exclude those impacts from consideration as part of the regulatory baseline. The Service used that baseline to assess the separate *incremental impact* of the critical habitat designation. *See* Pet. App. at G (discussing federal, state, and local land-use laws as part of the "baseline burden"). The government never undertook the *cumulative* analysis (*i.e.*, baseline + incremental effect) that the ESA requires.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT

The panel's decision below allows the Service largely to ignore the economic impacts of designating "critical habitat." The purpose of the ESA's economic impacts assessment obligation, revealed by the statute's plain meaning, is twofold: (1) to make sure that the Service is aware of the economic consequences of its actions; and (2) to provide the Service with the information necessary to determine whether areas should be excluded from designation on the grounds of excessive economic impacts. *See* 16 U.S.C. § 1533(b)(2). *Cf. Bennett v. Spear*, 520 U.S. 154, 176-77 (1997) (noting that one ESA objective "is to avoid needless economic dislocation" and that "economic consequences are an explicit concern of the Act"). The panel's decision frustrates these purposes and promises to have a significant negative effect on land use throughout the nation and in the West especially.

A. The Panel's Decision Will Be "Nationalized"

The Service will likely use the Ninth Circuit's decision as authority to adopt the defective baseline approach—and to ignore cumulative impacts—for *all* "critical habitat" designations outside of the Tenth Circuit. The Service has taken precisely such a nationalized approach with respect to an existing Ninth and Tenth Circuit split concerning the interplay of ESA "critical habitat" designations and the requirements of the National Environmental Policy Act

(NEPA), 42 U.S.C. § 4321, *et seq*. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit held that NEPA does not apply to "critical habitat" designations. In *Catron County Board of Commissioners v. United States Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), the Tenth Circuit held that NEPA *does* apply to "critical habitat" designations. The Service, however, has opted to do no NEPA analysis for "critical habitat" designations outside of the Tenth Circuit. *See, e.g.*, 70 Fed. Reg. at 46,955 ("It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act . . . . This assertion was upheld in the courts of the Ninth Circuit."). There is every reason to believe that the Service will, in the same manner, "nationalize" the Ninth Circuit's decision below.

B. The Panel's Decision Will Have a Broad Effect Within the Ninth Circuit

The panel's decision will have broad application just within the Ninth Circuit, where the geographic jurisdiction includes over 900 listed species, of which 162 have designated "critical habitat" covering millions of acres. For example:

- The vernal pools "critical habitat" designation covers over 850,000 acres in California. 70 Fed. Reg. at 46,924.
- The Northern spotted owl designation covers over 5 million acres in Washington, Oregon, and California. 73 Fed. Reg. 47,326, 47,351 (Aug. 13, 2008).

- The Mexican spotted owl designation covers nearly 4 million acres in Arizona. 69 Fed. Reg. 53,182, 53,213 (Aug. 31, 2004).
- The Canada lynx designation covers over 7.6 million acres in Montana, Idaho, and Washington. 74 Fed. Reg. 8616, 8642 (Feb. 25, 2009).[10]
- The California red-legged frog designation covers over 1.6 million acres in California. 75 Fed. Reg. 12,816, 12,816 (Mar. 17, 2010).
- The California gnatcatcher designation covers nearly 200,000 acres of prime land in coastal Southern California. *See* 72 Fed. Reg. 72,010 (Dec. 19, 2007).

Just 6 designations (fewer than 5% of the designations within the Ninth Circuit) cover well over 18 million acres, an area roughly equivalent to the combined land mass of Massachusetts, New Jersey, Connecticut, Delaware, and Rhode Island. The Ninth Circuit's decision will affect millions of acres throughout the West.

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[10] A small portion of the designation in Washington has been vacated by court order. *See Wyo. State Snowmobile Ass'n v. U.S. Fish & Wildlife Serv.*, No. 09-cv-00095-F, 2010 U.S. Dist. LEXIS 102550, at *61 (D. Wyo. Sept. 10, 2010).

C. The Panel's Decision Will Produce Significantly Negative Cumulative Economic Consequences for the Already Languishing Homebuilding Industry

The decision below will have a deep and painful impact on western communities, especially in California, that have been devastated by a perfect storm of economic downturn, budget crises, and draconian environmental regulation. It is not simply that the vernal pools "critical habitat" designation has adverse economic impacts; it is that the designation's negative economic impacts could not possibly have come at a worse time for the homebuilding and related industries. And ironically, it is precisely the adverse effects of these *cumulative* economic impacts that the decision below allows the Service to ignore.

With respect to economic downturn, California naturally suffers now with the rest of the country.[11] But the national economic malaise is exacerbated in California by the lingering effects of the state's just

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[11] *See* State of Emergency—Unemployment Proclamation (Apr. 17, 2009) (proclamation of California Governor Arnold Schwarzenegger noting, *inter alia*, that "many businesses are shutting their doors in this difficult economy, and other employers are laying off workers, eliminating jobs or reducing employee hours and income in an effort to stay in business" and "these conditions are causing a loss of livelihood for hundreds of thousands of people, an inability to provide for families, and increased harm to the communities that depend on them"), *available at* http://gov.ca.gov/proclamation/12041/ (last visited Oct. 19, 2010); Paul Sonne, *Tesco Signals It Will Push Ahead in U.S.*, Wall St. J., Oct. 6, 2010 (observing that in "inland California, . . . the economic downturn has proven particularly severe").

recently resolved budget crisis,[12] as well as by the enforcement of ESA protections for, among other species, the Delta smelt. *See Consol. Delta Smelt Cases*, No. 1:09-cv-00407 OWW DLB, 2010 U.S. Dist. LEXIS 62006, at *148 (E.D. Cal. May 27, 2010) ("[T]he harms [caused by ESA-imposed water shortages] to the affected [California] human communities [are] great."); Garance Burke, *Judge orders California water pumping limits lifted*, Assoc. Press, May 26, 2010 ("The sweeping San Joaquin Valley grows most of the country's fruits and vegetables, but three years of drought and water cutbacks from the state's freshwater estuary have hammered the region, causing drastic job losses and other economic woes."); Mark Grossi, *Valley conservatives focus on water*, Fresno Bee, Apr. 17, 2010, at A10 ("Thousands of Valley farmland acres have been idled due to drought and water cutbacks to protect fish, leaving cities such as Mendota with up to 40% unemployment.").

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[12] Press Release, Cal. Exec. Order S-12-10 (July 28, 2010) (executive order of Governor Schwarzenegger noting a General Fund deficit of $19 billion and the continuing need to enforce furloughs), *available at* http://gov.ca.gov/press-release/15691/ (last visited Oct. 19, 2010). *See Prof. Eng'rs in Cal. Gov't v. Schwarzenegger*, No. S183411, 2010 Cal. LEXIS 9757, at *2-*6 (Oct. 4, 2010) (upholding mandatory furlough program of state employees); *California budget impasse drags on*, CBC News, Sept. 30, 2010 ("California's budget crisis has gone on for more than two years as tax revenues have been hard hit by the economic downturn, resulting in unemployment reaching 12.2 per cent.").

Many of Petitioners' members working in the home building industry have already suffered acutely.[13] To be sure, part of that suffering is attributable to factors separate from environmental regulation in general, or "critical habitat" designation in particular. But with an economy already in the doldrums, it makes little sense to *increase* that economic distress; such an approach violates the commonsense counsel of the "straw that broke the camel's back." According to the panel's decision, the Service is authorized to weigh the piece of straw, yet ignore all the remaining economic "weight" on the camel's back.

That approach promises to have significant economic consequences, for two interrelated reasons. First, environmental regulation imposes real costs. *See* Francis S. Blake, *The Economic Impact of Environmental Regulation*, 5 Nat. Resources & Env't 23, 23 (Summer 1990) (conservatively estimating national annual cost of environmental regulation to be in the range of $80 billion to $100 billion); Holly Doremus, *Private Property Interests, Wildlife Restoration, and Competing Visions of a Western Eden*, 18 J. Land Resources & Envtl. L. 41, 41 (1998)

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[13] *See* State of Emergency—Unemployment Proclamation, *supra* (noting that "Californians have been hit hard by . . . the downturn in the housing market"); Center for Strategic Economic Research, *The Economic Benefits of Housing in California* at i-ii (July 29, 2010), *available at* http://www.strategiceconomicresearch.org/news-0.html (last visited Oct. 19, 2010) (observing in California "a drop in residential permit activity of close to 83 percent between 2005 and 2009," as well as "a considerable decline in the impacts of new housing construction, [through] an approximately 80 percent drop in output and 84 percent decrease in employment").

("Environmental regulation can have heavy financial consequences.").[14]

Second, the ESA, with its "critical habitat" provisions, significantly increases those costs of compliance and mitigation. Indeed, even by the Service's own faulty baseline analysis, the agency anticipates that the economic impact of just two designations—the California gnatcatcher and the California red-legged frog—will exceed *$1 billion* over the next two decades. *See* 72 Fed. Reg. at 72,066 (estimating gnatcatcher economic impact of $915 million); 75 Fed. Reg. at 12,858 (estimating red-legged frog economic impact of "$159 million to $500 million"). *Cf. Babbitt v. Sweet Home Chapter of*

[14] *See also* Katherine A. Kiel, *Environmental Regulations and the Housing Market: A Review of the Literature* 21 (Apr. 2004), *available at* http://www.huduser.org/rbc/pdf/Environmental.pdf (last visited Oct. 19, 2010) ("What is clear is that environmental regulations do increase the price of housing."); To Amend the Endangered Species Act of 1973 To Reform the Process for Designating Critical Habitat Under That Act: Hearing on H.R. 2933 Before the H. Comm. on Resources, 108th Cong. 156-58, at 79 (2004) (statement of David L. Sunding, Professor, University of California at Berkeley) ("The Bay Area, the Inland Empire area of Southern California, coastal areas of Southern California, those are three cases where I think you can make a very strong general argument that environmental regulations are both driving up housing prices and also . . . pushing consumers to more and more distant locations, forcing them to commute longer and longer distances to their jobs, which causes all kinds of other regional economic and environmental problems."); Theo S. Eicher, *Housing Prices and Land Use Regulations: A Study of 250 Major US Cities* (Feb. 2008), *available at* http://depts.washington.edu/teclass/landuse/Housing051608.pdf (last visited Oct. 19, 2010) (study of 250 cities throughout the U.S., concluding that the "estimated increase in housing prices associated with regulations is . . . substantially larger than the effects of income and population growth").

Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) (noting that the ESA's habitat protections "on private lands impose[] unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use"); *Catron County*, 75 F.3d at 1436 (observing that "[t]he record in this case [concerning critical habitat for two fishes] suggests that [its] impact will be immediate and the consequences could be disastrous"); To Amend the Endangered Species Act of 1973 To Reform the Process for Designating Critical Habitat Under That Act: Hearing on H.R. 2933 Before the H. Comm. on Resources, 108th Cong. 156-58, at 45 (2004) (statement of David L. Sunding, Professor, University of California at Berkeley) ("[C]ritical habitat designation does have the ability to profoundly impact the development and completion of housing projects. . . . Taken in total, the increase in development costs can easily be in the thousands of dollars per housing unit and can in some cases exceed $10,000."); Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 164 (2004) (observing that a court-ordered vacation to "critical habitat" for the Cactus ferruginous pygmy owl allowed "several major development projects within the former critical habitat area . . . to go forward without the kinds of costly mitigation measures that [the Service] had previously imposed on similar projects within that area"); Jonathan M. Cosco, Note, *NEPA for the Gander: NEPA's Application to Critical Habitat Designations and Other "Benevolent" Federal Action*, 8 Duke Envtl. L. & Pol'y F. 345, 366 (1998) (observing that "the [Service] could not possibly comply with its

statutory duty of considering the 'economic impact' of a critical habitat designation unless that designation had some practical, foreseeable effect on commercial land uses" (footnote omitted)).[15]

Thus, merely stating—as the Service and the Ninth Circuit do—that "critical habitat" designation has an economic impact, without analyzing that impact's *cumulative* effect, makes a farce of the "critical habitat" economic impacts assessment. After all, the addition of thousands of dollars in regulatory fees in Beverly Hills may hardly be noticed, but such an increase in other parts of the country could make the difference between affordable and unaffordable housing.

Yet ultimately, producing an accurate economic assessment means more than just having good information; the Service must use that economic information to determine whether any given unit of "critical habitat" may be excluded from the designation on the basis of excessive economic impacts. *See, e.g.*, 70 Fed. Reg. at 46,948-52 (discussing "economic" exclusions to vernal pools species "critical habitat"). *Cf.* 16 U.S.C. § 1533(b)(2) (authorizing "economic" exclusions to "critical habitat"). By failing to use a cumulative economic impacts analysis, the Service systematically understates the true economic impact of its designations and leaves untold acres of "critical

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[15] *See also* Gov. Sean Parnell, *On thin ice: Habitat designation won't help polar bears, but will kill Alaska's jobs*, Editorial, Wash. Post, Aug. 6, 2010, at A17 ("Whether it's hunting for food, building a sea wall to protect a village from ocean erosion or constructing a septic system to replace unsanitary sewage lagoons, all manner of activity in an area designated as critical habitat gets caught in the regulatory machine of the federal bureaucracy.").

habitat" unjustifiably subject to severe land-use restrictions.

CONCLUSION

A split exists between the Ninth and Tenth Circuits over whether the true and full costs of "critical habitat" designations should be taken into account before "critical habitat" may be designated. Whereas the Tenth Circuit holds that the Service must assess a large array of impacts, the Ninth Circuit holds that the Service may largely ignore the cumulative economic impacts of "critical habitat." The issue of whether the Service must analyze the cumulative economic impacts of "critical habitat" designation is of acute nationwide importance, given the country's current economic distress and such habitat's regularly adverse economic effects.

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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