No. 15-1350

In the Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
ROBERT H. OAKLEY
DAVID C. SHILTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 4(b)(2) of the Endangered Species Act of 1973 requires the Secretary of Commerce or of the Interior to designate critical habitat for species that are listed as threatened or endangered under the Act "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). Section 4(b)(2) also provides that the relevant 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 * * * that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Ibid.* The question presented is:

Whether the Secretary's decision *not* to exclude particular areas from a critical-habitat designation is not subject to judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. 701(a)(2), because such a decision is committed to agency discretion by law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statute—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 15-1350

BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 792 F.3d 1027. The opinion of the district court (Pet. App. B1-B16) is not published in the *Federal Supplement*, but is available at 2012 WL 6002511.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2015. A petition for rehearing was denied on January 6, 2016 (Pet. App. C1-C2). On March 15, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 5, 2016. The petition was filed on May 3, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to the Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, the Secretary of Commerce (Secretary), acting through the National Marine Fisheries Service (the Service or NMFS), designated critical habitat for the Southern distinct population segment (DPS) of the North American green sturgeon, which is a threatened species for purposes of the ESA.[1] Petitioners challenge the Secretary's decision not to exclude from the critical-habitat designation certain areas determined to be of high conservation value for the recovery of the green sturgeon. Pet. App. A15-A17. The court of appeals rejected petitioners' challenge, holding in relevant part that the Secretary's discretionary decision not to exclude areas of high conservation value from the critical-habitat designation is unreviewable because the ESA provides no legal standards by which to judge such a non-exclusion decision. *Id.* at A15-A19.

1. Congress enacted the ESA in 1973 to, *inter alia*, conserve species that the Secretary of the Interior or Commerce (depending on the species) has determined are either endangered or threatened. See 16 U.S.C. 1531(b), 1532(6), (15), and (20), 1533. The ESA requires the Secretaries to maintain a list of all endangered or threatened species. 16 U.S.C. 1533(c). When one of the Secretaries lists a species as threatened or endangered, Section 4 of the ESA requires that she

---

[1] Under the ESA, "[t]he term 'species' includes * * * any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. 1532(16). Thus, distinct population segments are separately eligible for listing under the ESA. All references to the green sturgeon in this brief are to the Southern DPS of the green sturgeon.

also designate the species' critical habitat. 16 U.S.C. 1533(a)(3). The ESA defines critical habitat to include "specific areas within the geographical area occupied by the species * * * 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." 16 U.S.C. 1532(5)(A)(i).[2] Section 4(b)(2) of the ESA provides:

> The Secretary shall designate critical habitat, and make revisions thereto, under [16 U.S.C. 1533(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 areas as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. 1533(b)(2).

---

[2] "Conserve," "conserving," and "conservation" are defined to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. 1532(3). "'Conservation' is a much broader concept than mere survival," because "'conservation' speaks to the recovery of a threatened or endangered species." *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 441-442 (5th Cir. 2001).

Once an area is designated as critical habitat, Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires each federal agency, in consultation with the relevant Secretary, to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of a listed species' designated critical habitat. *Ibid.* If consultation on the action with the Secretary reveals that the agency action is likely to destroy or adversely modify designated critical habitat, the Secretary will recommend reasonable and prudent alternatives to the action, if any are available. 16 U.S.C. 1536(b)(3)(A).[3]

2. The green sturgeon is a long-lived fish species that occupies coastal estuaries and coastal marine waters from Mexico to Alaska. Department of Commerce, *Final Rulemaking to Designate Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon*, 74 Fed. Reg. 52,300, 52,301 (Oct. 9, 2009) (*Final Rule*). The green sturgeon is anadromous, meaning it travels upstream through freshwater rivers to spawn. *Ibid.* Despite the extent of its range, the spawning area for the green sturgeon is limited to the Sacramento River. *Ibid.*; Pet. App. A5. The species faces a variety of threats from dams and other habitat alterations that have negatively affected the species' spawning success, as well as from pesticides, fishing bycatch,

[3] The assertion of the amici States (States Amicus Br. 12) that, when making decisions about critical-habitat designation, "the Secretary is exercising the coercive power of the government over private property," is incorrect because such a designation restricts the authority of federal agencies only.

poaching, and the introduction of exotic species. Pet. App. A5-A6.

On October 9, 2009, the Service promulgated a final rule designating critical habitat for the Southern DPS green sturgeon. *Final Rule*, *supra*. The Rule was based on the work of a critical habitat review team made up of nine federal biologists. See Department of Commerce, *Proposed Rulemaking to Designate Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon,* 73 Fed. Reg. 52,084, 52,087 (Sept. 8, 2008). The review team used the best available scientific data to determine the relative conservation value of each specific area occupied by the green sturgeon. *Id.* at 52,097. The review team assigned one of four conservation values to each of the areas it considered—high, medium, low, or ultra-low. *Final Rule*, 74 Fed. Reg. at 52,332-52,333. Areas determined to "have a high likelihood of promoting the conservation of the Southern DPS" were rated as "high" in conservation value. *Id.* at 52,332. The review team ultimately found a likelihood that the "exclusion of areas with a High conservation value would significantly impede conservation of the species." *Id.* at 52,334.

In addition to considering the conservation value of designating particular areas as critical habitat, the Service also considered the effects such a designation would have—and the effects that excluding particular areas from such a designation would have—on economic interests, national-security interests, and Indian lands. *Final Rule*, 74 Fed. Reg. at 52,333-52,339. To assist in assessing potential economic effects, the Service commissioned a report from an independent consulting organization, which analyzed various eco-

nomic activities that might be affected by a critical-habitat designation and assigned a value of high, medium, or low to the projected economic cost of designating each unit. Pet. App. B9-B10. Based in part on the analysis in that report, the Service prepared its own "Final ESA Section 4(b)(2) Report," *ibid.*, which examined the types of federal activities that may be subject to ESA Section 7 consultations as a result of a designation and the range of potential changes that could be required for each activity, *Final Rule*, 74 Fed. Reg. at 52,333. Those calculations represented the potential economic savings (*i.e.*, economic benefit) of excluding an area from the designation. *Ibid.* In light of uncertainties in projecting future federal projects, the Service took "a conservative approach" "by assuming that all of the proposed projects would be completed," an approach that the Service recognized likely resulted in an overestimation of the costs associated with designation because the Service did "not expect all of the proposed projects to be completed." *Ibid.*

The Service then weighed the estimated economic costs against the conservation benefits of designating particular areas as critical habitat. *Final Rule*, 74 Fed. Reg. at 52,334-52,337. Because the Service had no means of monetizing the conservation benefits of a designation, the service applied various decisional rules in weighing an area's conservation-value rating and the estimated costs of including that area in the designation of critical habitat. *Id.* at 52,334. The Service determined that areas with a conservation-value rating of "high" would not be eligible for exclusion because it is "likel[y] that exclusion of areas with a High conservation value would significantly impede

conservation of the species." *Ibid.* Second, "areas with a conservation value rating of '[m]edium' were potentially eligible for exclusion if the estimated economic impact exceeded $100,000." *Ibid.* Third, areas with a "low" conservation-value rating "were potentially eligible for exclusion if the estimated economic impact exceeded $10,000." *Ibid.* And fourth, areas with a conservation-value rating of "ultra-low" "were potentially eligible for exclusion if the estimated economic impact exceeded $0." *Ibid.* The Service explained that "the ESA provides NMFS the discretion to consider exclusions where the benefits of exclusion outweigh the benefits of designation, as long as exclusion does not result in extinction of the species." *Ibid.* And the Service further explained that the specified "dollar thresholds and decision rules provided a relatively simple process to identify, in a limited amount of time, specific areas warranting consideration for exclusion." *Ibid.*

Of the 41 areas that were considered for potential critical-habitat designation, the Service initially identified 18 areas as eligible for exclusion. *Final Rule*, 74 Fed. Reg. at 52,334. After analyzing whether exclusion would result in the extinction of the species, the Service ultimately excluded 14 areas based on the economic benefit of exclusion. *Id.* at 52,334-52,337. As a result of those exclusions, the estimated total potential economic effect of the designation was substantially reduced. *Id.* at 52,300-52,301. The Service also excluded several other areas from the designation after considering potential effects on national security and on Indian lands. *Id.* at 52,337-52,339. In the end, the areas designated as critical habitat (*i.e.*, the areas that were not excluded) represent the range of habi-

tats needed to support the conservation of the green sturgeon, encompassing habitats critical for the species' spawning, rearing, feeding, and migration. *Id.* at 52,335-52,337.

3. Petitioners represent property owners and builders who contend that they are adversely affected by the Service's designation of critical habitat for the green sturgeon. Pet. App. A9, B4. Petitioners filed suit in the United States District Court for the Northern District of California. They alleged that the Secretary's final rule designating critical habitat for the green sturgeon violated the ESA, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and they sought declaratory and injunctive relief. Pet. App. A10, B1, B4-B5. As relevant here, petitioners argued that the Service failed to comply with Section 4(b)(2) of the ESA in two respects. First, petitioners argued that the first sentence of Section 4(b)(2) requires the Service to take into consideration the economic impacts of critical-habitat designation in the high-conservation-value (HCV) areas—and that the Service failed to do that. *Id.* at B4, B7-B10. Second, petitioners argued that the second sentence of Section 4(b)(2) "prescribes the manner in which the duty to consider economic impacts mandated in the first sentence must be performed"—*i.e.*, they contended that it "direct[s] the government to conduct the assessment of economic impacts specifically by a balancing-of-the-benefits methodology." *Id.* at B8.

The district court granted summary judgment to the government. Pet. App. B1-B16. The district court agreed with both parties that "the text of section

4(b)(2) is clear in requiring NMFS to 'consider' the economic impact of designation." *Id.* at B11. But the court agreed with the government that "the administrative record, especially NMFS' 'Final ESA Section 4(b)(2) Report,' shows that NMFS did satisfy its duty to consider economic impacts." *Id.* at B11-B12. The court also rejected petitioners' second argument, concluding that Section 4(b)(2) "does not specify any particular methodology that must be used" in considering the economic effects of designation. *Id.* at B11. The court explained that "the second sentence of section 4(b)(2) shows that the entire 'exclusion' process itself is discretionary." *Ibid.* The court went on to conclude that the Service's ultimate determination of whether to exclude certain areas under Section 4(b)(2) of the ESA is committed to agency discretion by law within the meaning of 5 U.S.C. 701(a)(2), and therefore is not subject to judicial review. *Id.* at B14.

4. The court of appeals affirmed. Pet. App. A1-A21.

The court first rejected petitioners' argument that Section 4(b)(2) of the ESA requires the Service "to follow a specific 'balancing-of-the-benefits' methodology when considering the economic impact of designating critical habitat." Pet. App. A12; *id.* at A12-A15. The court "read the statute to provide that, after the agency considers economic impact, the entire exclusionary process is discretionary and there is no particular methodology that the agency must follow." *Id.* at A13. The court explained that the inclusion of "[t]he term 'outweigh' in the second sentence limits the agency's discretion to exclude areas from designation," but "does not require the agency to weigh the economic benefits of exclusion against the conserva-

tion benefits of inclusion at the first step of the analysis." *Id.* at A14.

The court of appeals also concluded that the Service considered the economic effects of a critical-habitat designation in all of the areas considered for designation, including the HCV areas. Pet. App. A15-A17. Relying on the administrative record, the court explained that the record "demonstrates that NMFS considered the economic impacts of designation in HCV areas, but ultimately determined that the HCV areas were critical to the recovery of the Southern DPS of green sturgeon and could not be excluded from designation." *Id.* at A16.

Finally, as relevant here, the court of appeals agreed with the district court that the Service's decisions *not* to exclude certain areas from critical habitat are unreviewable under the APA because they are committed to agency discretion by law. Pet. App. A17-A19. The court explained that the second sentence of Section 4(b)(2), "with the use of the word 'may,' establishes a discretionary process by which the Secretary *may* exclude areas from designation, but does not set standards for when areas *must* be excluded from designation." *Id.* at A18. The court clarified that, "[w]hen deciding whether to designate, the agency must follow certain procedures" and the agency's compliance with those procedures is reviewable; "only the ultimate decision not to exclude a certain area from designation as critical habitat is committed to agency discretion." *Id.* at A19. Because the Service "adequately followed the first part of section 4(b)(2) in considering economic and other impacts and did not act in an arbitrary or capricious manner or otherwise abuse its discretion in excluding areas from

critical habitat," the court held that the Service's ultimate decisions not to exclude particular areas are unreviewable. *Ibid.*

ARGUMENT

Petitioners challenge the court of appeals' conclusion that the Service's determination *not* to exclude certain areas determined to have a high conservation value from the designation of critical habitat for the green sturgeon is not subject to judicial review. Review of that issue is unwarranted because the court of appeals has already provided the type of substantive review petitioners seek and petitioners do not challenge the court of appeals' substantive conclusions. In addition, the court of appeals' conclusion about reviewability is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioners challenge (Pet. 7-10) the Service's decision not to exclude from the critical-habitat designation certain areas the Service determined to have a high conservation value to the green sturgeon. When the designation of such an area is likely to impose a significant cost, petitioners argue (Pet. 3, 12-18), the Service must exclude the area if the expected conservation benefit does not outweigh the expected cost. The district court and court of appeals concluded that such non-exclusion decisions by the Service are not subject to judicial review under the APA because they are committed to agency discretion by law, Pet. App. A17-A19, B13-B14, and petitioners ask this Court to review that conclusion. But review of that question would not change the outcome of this case, regardless of how this Court might rule on that issue, because both the district court and the court of appeals *also* held that the Service's decision not to exclude any

high-conservation-value areas from the designation for economic reasons was justified under the ESA. *Id.* at A15-A17, B11-B13.

As the court of appeals explained, the Service determined that certain areas within the proposed critical-habitat designation had a high conservation value because the areas were necessary for such vital functions as spawning and migration to and from spawning areas, and because the exclusion of such areas from the critical-habitat designation would "significantly impede" conservation of this species or lead to its extinction. *Final Rule*, 74 Fed. Reg. at 52,333-52,337; see Pet. App. A8. The court of appeals further determined that the Service considered the economic effects of a critical-habitat designation in *all* areas considered for designation, including the high-conservation-value areas. Pet. App. A15-A17. Relying on the administrative record, the court explained that the Service "considered the economic impacts resulting from critical habitat designation, including impacts on dredging, in-water construction, agriculture, bottom trawl fisheries, dams, commercial shipping, power plants, desalination plants, tidal wave/energy projects and liquefied gas projects." *Id.* at A16. The court emphasized that the Service "estimated the annualized economic impact of critical habitat designation for each area under consideration, *including all of the HCV* areas, by assessing the level of economic activity and the level of baseline protection afforded to the Southern DPS of green sturgeon by existing regulations for each economic activity for each area proposed for designation." *Ibid.*

The court of appeals also held that the Service's decision not to exclude HCV areas from the critical-

habitat designation (after considering the economic effects of such a designation in those areas) was consistent with the ESA. Pet. App. A16-A17. The court concluded that "[t]he record thus demonstrates that NMFS considered the economic impacts of designation in HCV areas, but ultimately determined that the HCV areas were critical to the recovery of the Southern DPS of green sturgeon and could not be excluded from designation"—and held that the Service's "approach is within NMFS's powers under the statute because 'without critical habitat areas,' the Green Sturgeon was 'unlikely to survive.'" *Ibid.* (quoting Final Biological Report). "Because NMFS is precluded by statute from excluding an area if the 'failure to designate such area as critical habitat will result in the extinction of the species concerned,'" the court explained, "the text of the ESA itself supports NMFS's decision not to exclude the HCV areas from designation." *Id.* at A17 (quoting 16 U.S.C. 1533(b)(2)).[4]

---

[4] The district court and court of appeals' careful review of the Service's consideration of economic costs refutes petitioners' charge (Pet. 16-17) that the decision below permits the Service to blind itself to economic costs. As noted, the court of appeals concluded after reviewing the Service's economic analysis that "[t]he record thus demonstrates that NMFS considered the economic impacts of designation in HCV areas," Pet. App. A16, and that "NMFS thoroughly justified its decision to include all HCV areas in the designation of critical habitat" notwithstanding those economic impacts, *id.* at A17. This case is thus a far cry from *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015) (cited at Pet. 2, 17, 21), in which this Court struck down an Environmental Protection Agency rule authorizing regulation of certain sources of air pollution when found to be "appropriate and necessary" because the rule "preclude[d] the Agency from considering *any* type of cost." *Id.* at 2707.

In their petition for a writ of certiorari, petitioners do not challenge the court of appeals' finding that the Service did consider the economic effects of a critical-habitat designation in *every* area under consideration. Nor do petitioners challenge the court of appeals' conclusion that the Service's decision not to exclude HCV areas was consistent with—and perhaps required by—the ESA. Petitioners contest only the conclusion that any challenge to the ultimate decision not to exclude a particular area from a critical-habitat designation pursuant to the second sentence of Section 4(b)(2) is unreviewable. Resolution of that question would not change the outcome of this case even if this Court were to agree with petitioners and disagree with the government and the courts below, because those courts have already substantively reviewed the challenged no-exclusion decisions and upheld them. See Pet. App. A12-A17, B7-B13.

2. In any event, the court of appeals' determination that the Service's decision not to exclude areas pursuant to the second sentence of Section 4(b)(2) is not subject to judicial review is correct, and the court's decision is consistent with a decision of the only other court of appeals to consider the question.[5]

a. The court of appeals correctly concluded that the Service's decision not to exclude particular areas from the critical-habitat designation pursuant to Section 4(b)(2) of the ESA is not judicially reviewable under the APA because it is committed to agency

---

[5] Amicus Cato Institute raises (Cato Amicus Br. 3-23) various objections to the manner in which the government assesses the economic impact of designating critical habitat. In addition to being misguided, those objections raise issues that are beyond the scope of the question presented in the petition for a writ of certiorari.

discretion by law within the meaning of 5 U.S.C. 701(a)(2). See Pet. App. A17-A19. An agency action is committed to agency discretion by law when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" and when "no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

As the court of appeals explained, the *first* sentence of Section 4(b)(2) does provide judicially manageable standards for determining what areas to *include* in a critical-habitat designation because it specifies that an agency "shall designate critical habitat," based on the "best scientific data available," after taking into consideration a number of factors.[6] Pet. App. A18; 16 U.S.C. 1533(b)(2); see *Bear Valley Mut. Water Co.* v. *Jewell*, 790 F.3d 977, 989-990 (9th Cir. 2015), cert. denied, 136 S. Ct. 799 (2016). That sentence specifies the manner in which the Service designates critical habitat, and the final rule designating such habitat is reviewable for compliance with those proscriptions. See *Bennett* v. *Spear*, 520 U.S. 154, 172 (1997) (suggesting that the "categorical *requirement*" in the first sentence of Section 4(b)(2) "that, in arriving at [critical-habitat-designation] decision, [the Secretary] 'tak[e] into consideration the economic impact, and

---

[6] Amici Alabama *et al.* err in arguing (States Amicus Br. 4-8) that the court of appeals' decision eliminates judicial review of whether an agency considered the economic effects of a critical-habitat designation. The court of appeals specifically held that that question is reviewable—and it reviewed the Service's consideration of economic factors, concluding that the Service's actions were not arbitrary or capricious. Pet. App. A15-A18.

any other relevant impact,' and use 'the best scientific data available,'" makes the Secretary's compliance with those procedural requirements reviewable).[7]

As the court of appeals correctly held, however, the *second* sentence of Section 4(b)(2) does not provide judicially manageable standards. That sentence gives

---

[7] Amici Alabama *et al.* err in arguing (States Amicus Br. 8-10) that the court of appeals' decision conflicts with this Court's decision in *Bennett*. As amici correctly state, the question considered and decided in *Bennett* was whether a determination pursuant to Section 4(b)(2) "is *wholly* discretionary," States Amicus Br. 8 (emphasis added)—a question the Court considered only for purposes of determining whether the ESA's citizen-suit provision (not the APA) applied, see 520 U.S. at 171-172. This Court held that such a determination is not wholly discretionary because the first sentence of Section 4(b)(2) provides that the "Secretary *shall* designate critical habitat, and make revisions thereto, . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." *Bennett*, 520 U.S. at 172 (quoting 16 U.S.C. 1533(b)(2)). The court of appeals in this case faithfully applied that holding. Pet. App. A15-A18. Moreover, as the court of appeals noted, the Court in *Bennett* was not considering whether decisions about "exclusion[s] from critical habitat" were reviewable. *Id.* at A15. Rather, the Court was considering whether a claim that the Service failed to "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" was reviewable pursuant to the citizen-suit provision of the ESA applicable to non-discretionary duties. 520 U.S. at 172 (quoting 16 U.S.C. 1533(b)(2) (brackets in original). Because the Court was not presented with the question whether the Secretary's decision not to exclude particular areas from a designation pursuant to the second sentence of Section 4(b)(2) is reviewable under the APA, the Court's statement that "the Secretary's ultimate decision" to designate critical habitat under Section 4(b)(2) "is reviewable only for abuse of discretion," *ibid.*, does not directly speak to that question and is in any event properly regarded as dictum.

the Service discretion to exclude an area from a critical-habitat designation if it "determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless it determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. 1533(b)(2). Because that sentence provides standards governing when the Service *may not* exclude an area from a designation (*i.e.*, when the benefits of inclusion outweigh the benefits of exclusion or when exclusion would result in extinction of the species), decisions to exclude an area from a designation are reviewable. But that sentence does not require the Service to exercise its exclusion discretion with respect to *any* area and provides no standards that a court could use to judge when the Service should exercise such discretion. See *Bear Valley*, 790 F.3d at 990 (concluding that "the statute cannot be read to say that the [agency] is ever obligated to exclude habitat" that it has found to be critical habitat because "[s]uch a decision is always discretionary").

Petitioners err in arguing (Pet. 19, 22-23) that the court of appeals held that the use of the word "may" in a statute "necessarily grants an unreviewable discretion under the Administrative Procedure Act." Pet. 19 (capitalization altered). That contention is contradicted by the court of appeals' opinion, which recognized that the Service's decision to exclude any area from a critical-habitat designation—an action permitted by the same use of the word "may" at issue here—is subject to judicial review. *Ibid.*; see *Bear Valley*, 790 F.3d at 990 ("The decision to exclude otherwise essen-

tial habitat is thus properly reviewable because it is equivalent to a decision not to designate critical habitat."). Petitioners are thus incorrect that the court of appeals held that a statute's use of the word "may" always grants unreviewable discretion.

Even a cursory reading of the court of appeals' opinion in this case reveals, moreover, that the court relied on a number of factors beyond Congress's use of the permissive verb "may" in concluding that non-exclusion decisions are committed to agency discretion by law. In addition to considering the statutory context (in particular the contrast between the use of the word "shall" in the first sentence of Section 4(b)(2) and the use of the word "may" in the second sentence), Pet. App. A19, the court noted that the legislative history of the 1978 amendments that added Section 4(b)(2) to the ESA confirmed that the Service would have complete discretion in considering the weight to be given to economic impacts, *id.* at A14 (citing H.R. Rep. No. 1625, 95th Cong., 2d Sess. 17 (1978) (House Report)).[8] The court also relied, *id.* at A19, on a proposed "Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act," published jointly by the Secretaries of Commerce and of the Interior, see 79 Fed. Reg. 27,052 (May 12, 2014), which concluded after substantial analysis that

[8] In that report, the House Committee on Merchant Marine and Fisheries explained that "[e]conomics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. * * * The consideration and weight given to any particular impact is completely within the Secretary's discretion." House Report 17.

the decision to exclude under Section 4(b)(2) is wholly discretionary.[9]

b. Petitioners also err in contending (Pet. 19) that the court of appeals' interpretation of 5 U.S.C. 701(a)(2) conflicts with the "more generous" view of the D.C. Circuit. Petitioners' argument is premised entirely on their incorrect assertion that the court of appeals held that a statute's use of the word "may" alone grants unreviewable discretion to an agency. See Pet. 19-25. Understood correctly, the court of appeals' decision does not conflict with any decision of another court of appeals. Indeed, the only other court of appeals to consider the issue presented agreed with the Ninth Circuit in a decision issued after petitioners filed their petition for a writ of certiorari. *Markle Interests, LLC* v. *United States Fish & Wildlife Serv.*, No. 14-31008, 2016 WL 3568093, at *12 (5th Cir. June 30, 2016) ("The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct."), pet. for reh'g filed (July 29, 2016).[10] As

---

[9] The Secretaries published their final policy on exclusions from critical-habitat designations on February 11, 2016, see 81 Fed. Reg. 7226, confirming again the highly discretionary nature of decisions not to exclude, *id.* at 7227-7230.

[10] Every district court to consider the question has also reached the same conclusion. See *Aina Nui Corp.* v. *Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("[t]he Court does not review the Service's ultimate decision not to exclude * * * , which is committed to the agency's discretion"); *Cape Hatteras Access Pres. Alliance* v. *United States Dep't of Interior*, 731 F. Supp. 2d 15, 28-29 (D.D.C. 2010) (while acknowledging the "strong presumption that agency action is reviewable," finding that "[t]he plain reading of the statute fails to provide a standard by which to judge the Ser-

the Fifth Circuit explained, Section 4(b)(2) "establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation." *Id.* at *13.

Petitioners err in contending (Pet. 19-23) that the court of appeals' decision conflicts with the D.C. Circuit's decisions in *Amador County* v. *Salazar*, 640 F.3d 373 (2011), and *Dickson* v. *Secretary of Defense*, 68 F.3d 1396 (1995). The court in *Amador County* considered whether the APA permitted judicial review of the Secretary of the Interior's approval of an Indian gaming compact when the compact was deemed approved because the Secretary failed to act within the 45-day period set forth in the relevant provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710(d)(8)(C). The government had argued that such an approval was not subject to judicial review because IGRA provides that the Secretary "may disapprove a compact" in certain circumstances, but does not require disapproval. 25 U.S.C. 2710(d)(8)(B); see *Amador County*, 640 F.3d at 380. The D.C. Circuit rejected the government's non-reviewability argument because a neighboring statutory provision limited the circumstances in which *approval* of a compact was

---

vice's decision not to exclude an area from critical habitat"); *Home Builders Ass'n* v. *United States Fish & Wildlife Service*, No. Civ. S-05-0629 WBS-GGH, 2006 WL 3190518, at *20 (E.D. Cal., Nov. 2, 2006) (the ESA "provides a standard by which to measure an agency's choice to exclude an area based on economic or other considerations," but provides "no substantive standards by which to review the FWS's decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion"), modified on other grounds, 2007 WL 201248 (E.D. Cal., Jan. 24, 2007).

permitted to instances in which the compact governs gaming on Indian lands. *Amador County*, 640 F.3d at 381; 25 U.S.C. 2710(d)(8)(A). That limitation on the Secretary's authority to approve a compact provided the requisite "law to apply," *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971) (citation omitted), in a case in which the plaintiff alleged that the Secretary violated IGRA by approving a compact that would govern gaming on lands that were *not* Indian lands. *Amador County*, 640 F.3d at 381. The instant case is not analogous because Section 4(b)(2) of the ESA does not specify any circumstances in which the relevant Secretary would lack the discretion not to exclude a particular area from a critical-habitat designation. The decision in *Amador County* therefore does not conflict with the decision in this case.

The D.C. Circuit's decision in *Dickson* also does not conflict with the decision in this case. In *Dickson*, the court considered a statute providing that the Army Board for Correction of Military Records "may excuse a failure to file [a request for a correction of military records] within three years after discovery if it finds it to be in the interest of justice." 68 F.3d at 1399 (quoting 10 U.S.C. 1552(b)). The court rejected the government's argument that the Board's waiver determinations were not subject to judicial review because the statute's use of the word "may" indicated that such decisions were committed to agency discretion by law. *Id.* at 1401-1405. In so holding, the D.C. Circuit relied primarily on statutory context, including a decision by this Court construing parallel language in the same statute to permit judicial review of the Board's merits decisions. *Id.* at 1402 (discussing *Chappell* v. *Wallace*,

462 U.S. 296 (1983)). No such context with respect to the ESA indicates that non-exclusion decisions are subject to judicial review.

As noted, petitioners' primary submission is that the court of appeals based its non-reviewability determination on the ESA's use of the word "may"—and on that factor alone. That assertion is incorrect. Like the D.C. Circuit in *Amador County* and *Dickson*, the Ninth Circuit considered other factors traditionally used to ascertain congressional intent and to interpret statutory text. No conflict exists between the court of appeals' approach in this case and the approach adopted by the D.C. Circuit in the cases on which petitioners rely.

Petitioners further err in arguing (Pet. 23-25) that the court of appeals' decision conflicts with the D.C. Circuit's rule that denials of petitions for rulemaking are subject to judicial review in at least some instances. The court of appeals' decision in this case has no bearing on questions governing judicial review of denials of petitions for rulemaking. Petitioners again base their argument on the erroneous assertion that the court of appeals' holding relied only on the ESA's use of the word "may." Because that assertion is incorrect, there is no merit to petitioners' assertion of a conflict.[11]

---

[11] The assertion of amicus National Association of Home Builders (NAHB Amicus Br. 8-11) that the court of appeals' decision conflicts with the Third Circuit's decision in *Hondros* v. *United States Civil Service Commission*, 720 F.2d 278 (1983), fares no better because it is also based on the erroneous assertion that, "in the Ninth Circuit's view, when Congress uses the word 'may' it has 'established' that there is no 'meaningful standard against which to judge the agency's exercise of discretion.'" NAHB Amicus Br. 8 (quoting *Chaney*, 470 U.S. at 830).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
ROBERT H. OAKLEY
DAVID C. SHILTON
Attorneys

AUGUST 2016