No. 10-454

In the Supreme Court of the United States

ARIZONA CATTLE GROWERS' ASSOCIATION,
PETITIONER

v.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, 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

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QUESTIONS PRESENTED

The Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, permits the Secretary of the Interior to designate certain areas as "critical habitat" for an endangered species or a threatened species. 16 U.S.C. 1533(a)(3). In making such a designation, the Secretary must "tak[e] into consideration" (among other things) "the economic impact * * * of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The questions presented are:

1. Whether the Secretary must consider any economic impact of listing a species as an endangered species or a threatened species as part of the "economic impact" he must consider in designating critical habitat.

2. Whether the Secretary's designation of critical habitat for the Mexican spotted owl was arbitrary and capricious.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Amoco Prod. Co. v. *Village of Gambell*, 480 U.S. 531 (1987) 10

Cape Hatteras Access Pres. Alliance v. *United States Dep't of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004) 15, 16

Center for Biological Diversity v. *Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006) 15

Center for Biological Diversity v. *Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003) 5

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 9

Gifford Pinchot Task Force v. *United States Fish & Wildlife Serv.*, 378 F.3d 1059, amended on other grounds, 387 F.3d 968 (2004) 15

Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 19

Motor Vehicle Mfrs. Ass'n of the United States v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) . . 17

National Cable & Telecomm. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 16

Cases—Continued: Page

New Mexico Cattle Growers Ass'n v. *United States Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001) 6, 14, 15, 16

Sierra Club v. *United States Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001) 15

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 13

Statutes and regulations:

Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 2

16 U.S.C. 1531(b) 2

16 U.S.C. 1532(5)(A)(i) 3, 8

16 U.S.C. 1532(5)(A)(ii) 3, 20

16 U.S.C. 1532(6) 2

16 U.S.C. 1532(20) 2

16 U.S.C. 1533(a)(1) 2, 11

16 U.S.C. 1533(a)(3) 11, 13

16 U.S.C. 1533(a)(3)(A)(i) 3

16 U.S.C. 1533(b)(1)(A) 3, 8, 12

16 U.S.C. 1533(b)(2) 4, 8, 11, 12

16 U.S.C. 1533(b)(3)(A) 13

16 U.S.C. 1533(b)(6)(C)(ii) 11

16 U.S.C. 1533(c)(1) 2

16 U.S.C. 1533(f)(1) 5

16 U.S.C. 1536(a)(2) 2, 3

16 U.S.C. 1538(a) 2

50 C.F.R. 402.02 14

Miscellaneous: Page

Endangered and Threatened Wildlife and Plants:
Determination of Critical Habitat for the Mexican Spotted Owl, 60 Fed. Reg. 29,914-29,915 (1995) 4
Final Designation of Critical Habitat for the Mexican Spotted Owl, 66 Fed. Reg. (2001):
p. 8530 4
p. 8532 4
Final Designation of Critical Habitat for the Mexican Spotted Owl, 69 Fed. Reg. 53,185 (2004) 5
Final Rule To List the Mexican Spotted Owl as a Threatened Species, 58 Fed. Reg. 14,248 (1993) 4
Industrial Economics, Inc., *Final Economic Analysis of Critical Habitat Designation for the Mexican Spotted Owl*, Aug. 19, 2004, http://www.fws.gov/southwest/es/Documents/R2ES/Mexican_Spotted_Owl_FINAL_Critical_Habitat_Economic_Analysis_8-19-04.pdf 6, 7
Memorandum from the Solicitor to the Deputy Secretary, The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act, Oct. 3, 2008, http://www.doi.gov/solicitor/opinions/M-37016.pdf . . . 13
United States Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook* (1998) 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 606 F.3d 1160. The opinion of the district court (Pet. App. 35-81) is reported at 534 F. Supp. 2d 1013.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2010. On July 30, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 1, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, provides "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. 1531(b). The Act carries out its purposes, in part, by directing the Secretary of the Interior (Secretary), who administers the Act through the United States Fish and Wildlife Service, to designate certain species, and their habitats, for federal protection.

The Act instructs the Secretary to "determine," according to certain specified factors, "whether any species is an endangered species or a threatened species." 16 U.S.C. 1533(a)(1). An "endangered species" is "any species" (except for certain insect pests) "which is in danger of extinction throughout all or a significant portion of its range"; a "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(6) and (20). The Secretary is required to publish a list of all endangered species and threatened species in the *Federal Register*, 16 U.S.C. 1533(c)(1), and the act of designating a species as an endangered species or a threatened species is therefore frequently referred to as "listing." Endangered species and threatened species receive certain statutory protections. See, *e.g.*, 16 U.S.C. 1536(a)(2), 1538(a).

The Act further instructs that, in conjunction with designating an endangered species or a threatened species, the Secretary should, subject to certain qualifiers and exceptions, "designate any habitat of such spe-

cies which is then considered to be critical habitat." 16 U.S.C. 1533(a)(3)(A)(i). A species' "critical habitat" includes "the specific areas within the geographical area occupied by the species, at the time" it is designated an endangered species or a threatened species, "on which are found those physical or biological features * * * essential to the conservation of the species and * * * which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). The "critical habitat" also includes "specific areas outside the geographical area occupied by the species at the time" it is designated as endangered or threatened, "upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii).

The sole consequence under the Act of designating an area as critical habitat is that it becomes subject to 16 U.S.C. 1536(a)(2). That provision requires federal agencies to consult with the Secretary to ensure that any action they take "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption." 16 U.S.C. 1536(a)(2).

The Secretary's decision to classify a species as an endangered species or a threatened species must be made "solely on the basis of the best scientific and commercial data available to him." 16 U.S.C. 1533(b)(1)(A). Thus, economic impact is not a factor in considering whether to list a species. The Secretary's decision to designate critical habitat, on the other hand, must be made "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." 16 U.S.C. 1533(b)(2). 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 exclusion will result in the extinction of the species. *Ibid.*

2. a. In 1993, the Secretary listed the Mexican spotted owl as a threatened species. *Endangered and Threatened Wildlife and Plants; Final Rule To List the Mexican Spotted Owl as a Threatened Species*, 58 Fed. Reg. 14,248. The owl commonly inhabits forested canyon and mountain areas in the southwestern United States. *Ibid.* The agency stated in its rule that "[d]esignation of critical habitat is prudent, but is not determinable at this time." *Ibid.*

Following a lawsuit by environmental organizations and other plaintiffs, the Secretary, after a notice-and-comment period, issued a final rule in 1995 designating approximately 4.6 million acres of critical habitat for the owl. Pet. App. 37; *Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Mexican Spotted Owl*, 60 Fed. Reg. 29,914-29,915. Further litigation ensued, and, after additional notice and comment, the agency promulgated a new rule in 2001, which also designated approximately 4.6 million acres of critical habitat for the owl. Pet. App. 37-38; *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl*, 66 Fed. Reg. 8530, 8532. That 2001 rule was then itself challenged in court by an environmental group, which claimed that the Secretary should have designated an

additional nine million acres of critical habitat. Pet. App. 38-39; *Center for Biological Diversity* v. *Norton*, 240 F. Supp. 2d 1090, 1091 (D. Ariz. 2003). In 2004, after still further notice and comment, the Secretary issued the final critical-habitat designation at issue here. *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl*, 69 Fed. Reg. 53,185, reprinted at Pet. App. 82-338.

b. The 2004 designation covers approximately 8.6 million acres, all on federal lands, in Arizona, Colorado, New Mexico, and Utah. Pet. App. 83. The Secretary determined, based on "analysis of the best available scientific and commercial data," that "all areas included in this designation are essential for the conservation of the species and within the geographical area occupied by the species." *Id.* at 135; see, *e.g.*, *id.* at 121, 219.

All of the areas designated as critical habitat had been previously identified as "protected" or "restricted" land in the "Recovery Plan" that the Secretary adopted for the owl in 1995. Pet. App. 114, 121; see 16 U.S.C. 1533(f)(1) (requiring Secretary generally to prepare "recovery plans" "for the conservation and survival of * * * threatened species"). Protected land includes (1) Protected Activity Centers (PACs) that are a minimum of 600 acres located at known or historical nest and/or roost sites; (2) pine-oak forests with greater than 40% slopes where timber harvest has not occurred in the past 20 years; and (3) administratively reserved lands, such as Wilderness Areas or Research Natural Areas. Pet. App. 88, 100-101, 218. Restricted land consists of areas adjacent to PACs that are used by territorial owls for foraging, by juvenile owls for dispersing, and by nonterritorial owls. *Id.* at 88, 100-101, 218-220. These areas "are essential to the conservation of the species

because they encompass habitat that is required by the owl to complete its life cycle and are needed for recovery." *Id.* at 219; see *id.* at 121 (areas were listed as critical habitat "based on information contained within the Recovery Plan that finds them to be essential to the conservation of the species because they currently possess the essential habitat requirements for nesting, roosting, foraging, and dispersal").

The Secretary expressly excluded certain areas from the designation of critical habitat. Some areas were excluded as non-essential to the owl's conservation, because they were known to have widely scattered owl sites, low owl population densities, or marginal habitat quality. Pet. App. 18-19, 115, 120-121, 234. Other areas were excluded for other reasons, including a consideration of the economic impact of designating them as critical habitat. *Id.* at 294-295.

c. To analyze the economic impact of its actions, the agency commissioned an outside consultant to prepare an economic analysis. See Industrial Economics, Inc., *Final Economic Analysis of Critical Habitat Designation for the Mexican Spotted Owl*, Aug. 19, 2004, http://www.fws.gov/southwest/es/Documents/R2ES/Mexican_Spotted_Owl_FINAL_Critical_Habitat_Economic_Analysis_8-19-04.pdf (*Final Economic Analysis*). The agency provided public notice when a draft of that analysis became available and invited public comment on that draft. Pet. App. 98.

The Secretary stated in response to comments that "the economic analysis complies with direction from [*New Mexico Cattle Growers Ass'n* v. *United States Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001)] that, when deciding which areas to designate as critical habitat, the economic analysis informing that decision

should include 'co-extensive' effects." Pet. App. 161; see *id.* at 163-165; *Final Economic Analysis* ES-1 & n.1, 1-1 & n.10. In other words, the "economic analysis considers all impacts that result from efforts to protect the owl and its habitat." Pet. App. 163-164 (brackets omitted). These include "impacts related to listing" the owl as a threatened species. *Id.* at 162; see *Final Economic Analysis* 1-6 ("This analysis attempts to quantify economic effects of the [critical-habitat designation], as well as any protective measures taken as a result of the listing or other Federal, State, and local laws that aid habitat conservation in the areas proposed for designation."). Such impacts, the Secretary explained, "are relevant for understanding the full impact of the proposed critical habitat." Pet. App. 164 (quoting *Final Economic Analysis* ES-1).

The Secretary went on to conclude that "no significant economic impacts"—*i.e.*, impacts above $100 million annually—"are expected from critical habitat designation above and beyond that already imposed by listing the owl." Pet. App. 309. The Secretary explained that the "economic effects already in place due to the listing of the owl as threatened is the baseline upon which we analyzed the economic effects of the designation of critical habitat," *id.* at 308, and that this resulted in an estimate of $72,000 to $238,000 in additional administrative costs associated with added agency consultation and documentation requirements, *id.* at 309.

3. Petitioner, an association of cattle growers, filed suit against the Secretary in 2006 in the United States District Court for the District of Arizona, challenging the critical-habitat designation as too broad. The district court granted summary judgment for the Secretary. Pet. App. 35-81.

As relevant here, the district court held that the Secretary's analysis of economic impacts complied with the requirements of the Act. Pet. App. 70-81. While the agency submitted that it had, at least to some extent, considered "co-extensive" economic impacts—that is, the economic impacts resulting from both listing the owl as endangered and designating certain areas as critical habitat—the court held that the agency need not have considered such impacts at all. *Id.* at 71, 79. The court observed that the Act forbids consideration of economic factors in deciding whether to list a species as an endangered species or a threatened species, and directs the agency to consider economic impacts only in connection with a critical-habitat designation. *Id.* at 77-78 (citing 16 U.S.C. 1533(b)(1)(A) and (2)). "Consideration of coextensive impacts," the district court reasoned, "simply amounts to a backhanded method of recognizing costs which could not legally be examined during listing." *Id.* at 78. The court thus approved the use of an approach that calculates the incremental costs of critical-habitat designation above and beyond a baseline that includes listing of the species. *Id.* at 72, 79. The court declined to follow the Tenth Circuit's decision in *New Mexico Cattle Growers*, which required consideration of co-extensive impacts, noting that the "primary rationale" for that decision had been "undermined" by subsequent changes to the regulatory framework implementing the Act. *Id.* at 76.

The district court also rejected petitioner's contention that the Secretary had erroneously designated certain areas as "within the geographical area *occupied* by the species," 16 U.S.C. 1532(5)(A)(i) (emphasis added), for purposes of critical-habitat designation. Pet. App. 60-66. The court held that the Secretary's determina-

tion reflected a reasonable interpretation of the Act, which was entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984). Pet. App. 63-66.

4. The court of appeals affirmed. Pet. App. 1-34. It rejected petitioner's contention that the Secretary was required to consider the economic impact of listing the owl as a threatened species in deciding whether to designate certain areas as critical habitat. *Id.* at 27-33. The court reasoned that the "very notion of conducting a cost/benefit analysis" for the critical-habitat decision "is undercut by incorporating in that analysis costs that will exist regardless of the decision made." *Id.* at 30. The court additionally deemed it "strange" that the Secretary would be precluded from considering the economic impact of listing in making the listing decision itself, but would nevertheless be required to consider those "previously irrelevant costs" in designating critical habitat. *Id.* at 30-31. The court saw no great difficulty in separating out the costs of listing from the costs of designating critical habitat, even when the two actions occurred simultaneously, because "listing the species is a necessary antecedent to designating habitat." *Id.* at 32. And the court of appeals, like the district court, declined to follow the Tenth Circuit's approach in *New Mexico Cattle Growers*, in light of changes to the legal landscape since that case had been decided. *Id.* at 29-30.

The court of appeals also upheld the Secretary's determination that the designated critical habitat is "occupied" by the owl. Pet. App. 6-27. The court observed that "[t]he word 'occupied,' standing alone, does not provide a clear standard for how frequently a species must use an area before the agency can designate it as critical habitat." *Id.* at 9. The court explained that "[d]etermining whether a species uses an area with sufficient reg-

ularity that it is 'occupied' is a highly contextual and fact-dependent inquiry," and that "[s]uch factual questions are within the purview of the agency's unique expertise and are entitled to the standard deference afforded such agency determinations." *Id.* at 10. The court was persuaded by an agency handbook that defined the term "occupied critical habitat" to include habitat that is occupied by a species (such as a migratory species) only at certain times. *Id.* at 11 (citing United States Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook* (1998)). That definition, the court of appeals concluded, made practical sense; furthered the conservation purposes of the Act; and was consistent with this Court's broad definition of the term "occupied" in *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 548 n.14 (1987).

The court of appeals then upheld the Secretary's conclusion that area beyond PACs (the 600-plus acres surrounding a nest) could permissibly be designated as occupied critical habitat. The court stated that the Secretary's "process for designating critical habitat gives us a strong foundation for our conclusion that the agency did not arbitrarily and capriciously treat areas in which owls are not found as 'occupied.'" Pet. App. 19. The court noted that PACs "reflect only *known* owl sites" and that the record supported the conclusion that there might be additional owls elsewhere; that the Secretary had specifically excluded from the critical habitat certain areas "with evidence of few or no owls"; that where the Secretary did include areas in which owl presence was uncertain, he "did so after thoughtful consideration of owl occupancy"; and that the Secretary had "excluded the vast majority of critical habitat units that contained

no PACs and refined the boundaries of the critical habitat units to exclude large areas that are distant from PACs." *Id.* at 18-19. The court further noted that the record supported a conclusion that owls may use habitat within a mile around the PACs; that PACs are underinclusive in that they do not reflect areas used by nonterritorial owls or used for intermittent activities like dispersal or migration; that some owls migrate up to 12-31 miles in the winter; and that other owls shift habitat use in the winter. *Id.* at 20-21, 25.

ARGUMENT

Petitioner renews (Pet. 19-37) its contentions that the Secretary was required to consider the economic impact of listing the owl as a threatened species in making his critical-habitat designations and that the Secretary improperly designated certain areas as "occupied." Those contentions lack merit. The court of appeals' decision is correct, and there is no conflict among the courts of appeals that warrants this Court's review.

1. a. Petitioner's argument (Pet. 19-31) that the Secretary must consider the economic impact of listing a species in making a critical-habitat designation cannot be squared with the text of the statute. The only "economic impact" that the Secretary must consider in designating critical habitat is "the economic impact * * * *of specifying any particular area as critical habitat*." 16 U.S.C. 1533(b)(2) (emphasis added). Listing of a species as threatened or endangered is an action separate from the further action of "specifying any particular area as critical habitat." Compare 16 U.S.C. 1533(a)(1) (listing), with 16 U.S.C. 1533(a)(3) (critical-habitat designation); cf. 16 U.S.C. 1533(b)(6)(C)(ii) (permitting Sec-

retary to designate critical habitat up to a year after listing, in certain circumstances).

Furthermore, as the court of appeals recognized, considering the economic impact of the listing decision to be part of the economic impact of the critical-habitat designation would be inconsistent with the "cost/benefit" analysis that the statute contemplates for critical-habitat designations. Pet. App. 30; see 16 U.S.C. 1533(b)(2) (critical-habitat designations must take "economic impact * * * of specifying any particular area as a critical habitat" into account, and 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"). The Secretary must make the listing decision itself without regard to any economic impact that the listing decision might have. 16 U.S.C. 1533(b)(1)(A) (listing decision is based "solely on the basis of the best scientific and commercial data available"). And once the Secretary has made the listing decision, the economic impact of that decision will be felt irrespective of whether (or how) critical habitat is designated. Because the Secretary cannot avoid the economic impact attributable to the listing at the critical-habitat-designation stage, it makes little sense to consider it to be an impact of his critical-habitat decision.

Finally, to the extent there is any ambiguity in the statute, the Secretary's interpretation is entitled to deference. The procedure followed here, which was subject to (multiple rounds of) notice and comment, was consistent with agency guidance. Memorandum from the Solicitor to the Deputy Secretary, The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act 20-

21, Oct. 3, 2008, http://www.doi.gov/solicitor/opinions/M-37016.pdf. Petitioner does not dispute the Secretary's authority to interpret the Act, and the Secretary's interpretation exhibits sufficient "fairness and deliberation" that deference is warranted. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001).

b. Petitioner's substantive objections (Pet. 27-31) to this interpretation of the statute lack merit. Petitioner first contends that the Secretary's approach fails to account for the possibility that an area may remain critical habitat, and thus impose "a regulatory burden on land users," even after the particular endangered species or threatened species no longer inhabits it. Pet. 28. To begin with, the premise of petitioner's argument is flawed, since critical-habitat designations can be revised if circumstances—such as the habitation patterns of the endangered species or threatened species—change. See 16 U.S.C. 1533(a)(3). Furthermore, it is not clear how petitioner's proposed reading of the statute would address petitioner's complaint. Petitioner's complaint about burdens that persist even when the protected species is no longer present asserts an economic impact of critical-habitat designation that goes *beyond* the impact of listing; including the impact of the listing itself as *part* of the economic impact of critical-habitat designation would not capture that asserted additional impact.

Petitioner next points out (Pet. 28-29) that the Act generally requires that critical-habitat designation occur concurrently with listing (see 16 U.S.C. 1533(b)(3)(A)), and suggests that when this happens it will be impossible to separate out the economic impact of the critical-habitat designation from the impact of listing. But as the court of appeals explained, even when the two actions occur concurrently, listing is a necessary anteced-

ent to designation of critical habitat. Pet. App. 32. There is no reason to believe that the Secretary needs actually to perform the listing first in order to compare the state of the world with the critical-habitat designation to the state of the world without. The Secretary can instead perform an analysis that compares the expected result of listing alone with the expected result of listing combined with a critical-habitat designation.

Petitioner finally asserts (Pet. 30) that it is "absurd" for the Secretary to conclude that a critical-habitat designation has little or no economic impact. That is not so. If the critical-habitat designation has in fact a limited incremental effect beyond the antecedent act of listing the species as an endangered species or a threatened species, it is proper for the Secretary to recognize that fact. For reasons explained above, it makes much less sense for the Secretary to attribute to the critical-habitat designation itself effects that would exist even in its absence.

c. Contrary to petitioner's contention (Pet. 21-27), the court of appeals' decision does not create a conflict with the Tenth Circuit's decision in *New Mexico Cattle Growers* v. *United States Fish & Wildlife Service*, 248 F.3d 1277 (2001), that would warrant further review. *New Mexico Cattle Growers* addressed a situation in which the agency had concluded that a critical-habitat designation for the Southwestern Willow Flycatcher would have no additional economic impact beyond the listing of the species as an endangered species. *Id.* at 1280. The agency had reached that conclusion based on a regulation, 50 C.F.R. 402.02, that interpreted the Act to make the statutory protections triggered by a critical-habitat designation "virtually identical" to, or at least "subsumed by," the statutory protections triggered by

a listing. *New Mexico Cattle Growers*, 248 F.3d at 1283. As a consequence of that regulation, the critical-habitat designation itself would rarely, if ever, have an incremental economic impact. *Id.* at 1284. To give meaning in that regulatory setting to the statutory directive to evaluate economic impacts, the Tenth Circuit extended the definition of economic impacts to include certain impacts "caused co-extensively by any other agency action (such as listing)," notwithstanding that "those impacts would remain in the absence of the [critical-habitat designation]." *Id.* at 1283.

The regulatory setting has changed since *New Mexico Cattle Growers* was decided. The regulation that the Tenth Circuit deemed to be at the "root" of the problem it perceived (248 F.3d at 1283) was held by the Ninth Circuit to be inconsistent with the Act. See *Gifford Pinchot Task Force* v. *United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1070, amended on other grounds, 387 F.3d 968 (2004). In response to that ruling—as well as a similar ruling by the Fifth Circuit, see *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 443 (2001)—the agency promulgated a guidance document recognizing that the regulation is invalid. FWS Guidance Document, Dec. 9, 2004, reprinted at C.A. Supplemental Excerpts of R. 1-3.

The lower courts in this case correctly recognized (as have other courts) that this regulatory shift undermines the rationale of *New Mexico Cattle Growers*. Pet. App. 29-30, 75-76; see *Cape Hatteras Access Pres. Alliance* v. *United States Dep't of the Interior*, 344 F. Supp. 2d 108, 129-130 (D.D.C. 2004); *Center for Biological Diversity* v. *Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1152 (N.D. Cal. 2006). The Tenth Circuit's interpretation of the statutory language at issue here was in-

formed by the Secretary's then-authoritative regulatory interpretation of other, related, statutory language. See, *e.g.*, *New Mexico Cattle Growers*, 248 F.3d at 1285 ("Because economic analysis done using the [agency's] baseline model *is rendered essentially without meaning by 50 C.F.R. § 402.02*, we conclude Congress intended that the [agency] conduct a full analysis of all the economic impacts of critical-habitat designation, regardless of whether those impacts are attributable co-extensively to other causes.") (emphasis added). The Tenth Circuit made clear that its primary difficulty was with the regulation, but that the procedural posture of the case did not allow it to invalidate the regulation. See *id.* at 1283-1285 & n.2; see also *Cape Hatteras Access Pres. Alliance*, 344 F. Supp. 2d at 129-130 ("Apparently hamstrung by its inability to consider the validity of 50 C.F.R. § 402.02, the Tenth Circuit found another way to require the [agency] to perform a more rigorous economic analysis."). Now that the regulation has been invalidated, and no longer informs the analysis of the statute, the Tenth Circuit might well abandon the conclusion it reached in *New Mexico Cattle Growers*. Cf. *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (agency action may supersede prior judicial interpretation of statute). Especially in the absence of any recent Tenth Circuit cases addressing the question, a grant of certiorari would be premature.

Moreover, even assuming that the Tenth Circuit were likely to adhere to the conclusion in *New Mexico Cattle Growers*, this case would be a poor vehicle for addressing any conflict. Although a portion of the agency's discussion of the critical-habitat designation here declined to look at the economic impact of listing

(Pet. App. 307-311), other portions of the discussion make clear that the agency's economic analysis did, in fact, examine listing. In response to a comment stating in part that "primary economic impacts stem from the listing of the owl, not the designation of critical habitat," the agency responded that "[t]he inclusion of impacts related to listing and provisions of the Act other than section 7 are discussed in Section 1.2" of the economic analysis. *Id.* at 161-162. Furthermore, the agency repeatedly made clear that it was attempting to comply with *New Mexico Cattle Growers*. *Id.* at 161, 164. This is therefore not a case in which the agency completely ignored the impact of listing in analyzing the economic impact of a critical-habitat designation, and any conflict between the Ninth and Tenth Circuits therefore would not be squarely presented on this record. For that reason, also, further review is unwarranted.

2. Petitioner additionally asks (Pet. 31-37) this Court to review the court of appeals' conclusion that the Secretary reasonably determined that the designated critical habitat is "occupied." That fact-bound issue does not merit review.

Petitioner argues (Pet. 33-34, 38) that the court of appeals substituted its own reasoning for that of the agency in order to uphold the agency's decision, and that the court's decision therefore conflicts with general principles governing judicial review of administrative action as set forth in *Motor Vehicle Manufacturers Ass'n of the United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). The court of appeals, however, acknowledged and quoted extensively from that very decision. Pet. App. 6. Petitioner's argument, at bottom, is simply a challenge to the court of appeals' assessment of this particular administrative

record, an issue that does not warrant this Court's intervention.

In upholding the Secretary's determination that the designated habitat is occupied by the owl, the court of appeals relied on factors articulated in the Secretary's decision and supported by the record. For example, the Secretary explained that the designated areas outside PACs are utilized by territorial owls for foraging, by juvenile owls for dispersing, and by nonterritorial owls. See Pet. App. 88, 100-101, 218-220. Consistent with the Secretary's explanation, the court of appeals concluded that petitioner's contention that occupied habitat should be limited to the PACs where known owls "reside" would exclude foraging habitat for residential owls and would exclude habitat necessary for dispersal and utilized by juveniles and nonterritorial owls. *Id.* at 12.[*]

Petitioner's criticism of the court of appeals and the Secretary is primarily based on inaccurate or incomplete characterizations of the agency's decision and record. Seeking to limit the critical habitat mainly to the PACs, petitioner asserts that the Secretary did not state that owls are migratory and instead stated that they rarely move outside of their home range. Pet. 35 (citing Pet. App. 222-223, 226). A home range for a territorial owl is, however, larger than its PAC. Pet. App. 100-101,

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[*] In the lower courts, petitioner argued that the statutory term "occupied" is unambiguous and means that members of the species must "reside" in the area. As the court of appeals explained, in the context of mobile animal species the word "occupied" is ambiguous and replacing "occupied" with the word "resides" does not resolve the statutory ambiguity. Pet. App. 8-12. Petitioner does not raise this statutory argument in its petition. It merely argues that as a factual matter the amount of land designated as critical habitat is excessive given the number of known owls and scope of PACs.

218-220. Moreover, the passage of the administrative record cited by petitioner states that while "[m]ost" owls are considered nonmigratory, "researchers have documented seasonal movements by owls," with "some migrat[ing] considerable distances," such as 12-31 miles. *Id.* at 222. The passage also states that the onset of juvenile dispersal is sudden and occurs in various directions, including movement between islands of suitable habitat, and states that dispersal activity can continue through an owl's second year. *Id.* at 222-223.

Petitioner attempts (Pet. 35) to support its contention that the amount of designated critical habitat is disproportionate to the number of known owls on federal land with a back-of-the-envelope numerical exercise. But as the court of appeals correctly recognized, the Secretary's determination of what is occupied habitat rests on scientific considerations within the agency's area of expertise and must therefore be given substantial deference. Pet. App. 16; *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). The Secretary's decision expressly states that PACs do not include all foraging areas utilized by known territorial owls and that other designated areas are used by resident (*i.e.*, territorial) owls for foraging as well as by nonterritorial owls and dispersing juveniles. Pet. App. 100-101, 218-220.

Petitioner further contends (Pet. 36-37) that the court of appeals erroneously speculated that there may be unknown owl populations occupying some of the designated critical habitat. But petitioner's argument that the overall owl population may be declining does nothing to undermine the court of appeals' reliance on various record sources to conclude that the agency may not be aware of the location of every existing owl. Pet. App.

18. Moreover, possible undercounting of owls was far from the court of appeals' only rationale for upholding the agency's decision. The court focused, among other things, on the Secretary's process for excluding areas, with exhibited "thoughtful consideration of owl occupancy." *Id.* at 19; see pp. 10-11, *supra*.

In any event, this Court's resolution of this fact-bound issue would have little, if any, practical significance. Even assuming owls did *not* occupy all of the relevant areas, the Secretary could still designate them as critical habitat. The Act permits the Secretary to designate even unoccupied areas as critical habitat "upon a determination * * * that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). The Secretary stated in this case that he did not need to make such a formal determination, "[b]ecause the specific areas being designated are within the geographical area occupied by the species." Pet. App. 135. But in promulgating the final rule, he repeatedly expressed his view that these areas were, in fact, "essential to the conservation of the species." *Id.* at 121, 135, 219.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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