

No. 14-377

In the
Supreme Court of the United States

STEWART & JASPER ORCHARDS, a California corporation; ARROYO FARMS, LLC, a California limited liability company; and KING PISTACHIO GROVE, a California limited partnership,

Petitioners,

v.

SALLY JEWELL, Secretary of the Interior, *et al.*,

Respondents.

**On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

***Amicus Curiae* of Brief of the
AMERICAN CIVIL RIGHTS UNION
In Support of
PETITION FOR WRIT OF CERTIORARI**

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INTEREST OF THE *AMICUS CURIAE*¹

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant

¹ Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned that America be governed under a reasoned rule of law.

STATEMENT OF THE CASE

California's San Joaquin Valley, and the more extended Central Valley, contain some of the most fertile and agriculturally productive land on the planet. Appendix (App.) at A-17. The bountiful harvests from that land help feed people across America and around the world. Agricultural operation of the land is a central pillar of the economy of California, and is one of the jewels of the American economy.

That agricultural operation employs millions of Americans, in California and derivatively across the entire nation. That includes many from disadvantaged families, for whom the available agricultural work is a lifeline of hope. It includes many others who have built up serious business enterprises over several generations of hard work and major investment capital.

Federal and state taxpayers have also invested billions over the years in the construction and operation of the Central Valley Project and the State Water Project, including over twenty dams and reservoirs and hundreds

of miles of aqueducts. App. at A-18 – A-19. Those projects provide irrigation water to the farms of the San Joaquin and Central Valleys. That reflects bipartisan judgment over many years of the crucial importance of these agricultural lands.

Does the law really preclude any further inquiry into whether there is reasoned, sound justification for shutting down these California agricultural paradises, by denying them irrigation water, even in the midst of the worst drought in California in decades?

The result of that has been predictably disastrous for the human element in these rural farmlands. As the court recognized in *Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021 (E.D. Cal. 2010), “The record evidence has established a variety of adverse impacts to humans and the human environment from reduced [water deliveries], including irretrievable resource losses (permanent crops, fallowed lands, destruction of family and entity farming business)....” *Id.* at 1052. The court added, “It is undisputed that farm employees and their families have faced devastating losses due to reductions in the available water supply.” *Id.* at 1055.

Columnist Victor Davis Hanson similarly reports the layoffs of thousands of farmworkers, the idling of hundreds of thousands of acres of farmlands, and the loss of \$350 million each year in state agricultural land revenue. Victor Davis Hansen, *California’s Water Wars*, City Journal (Summer, 2011).

These federal policies hostile to California agriculture were imposed through the United States Fish and Wildlife Service (FWS), which is the federal agency primarily responsible for administering the Endangered Species Act. The agency had found that the survival of a small fish known as the Delta smelt was threatened by the irrigation pumps drawing in water for the Central Valley Project, and the State Water Project, which drew in many of the small fish as well. 58 Fed. Reg. 12,854 (Mar. 5, 1993). That finding triggered the protections of the Endangered Species Act for the Delta smelt. Those protections were the foundation of the policies restricting the irrigation flow to the San Joaquin Valley and Central Valley farmlands, which were based on a Fish and Wildlife Service “biological opinion” regarding the Delta smelt.

In 2009, Stewart and Jasper Orchards, owners of almond, pistachio, and walnut orchards in the San Joaquin Valley, filed suit challenging the biological opinion and other findings of the Fish and Wildlife Service regarding the Delta smelt, as well as the resulting water and irrigation policies. Other growers and local water districts followed in suits of their own, which were later consolidated.

The district court below partially invalidated the biological opinion and other findings of the Fish and Wildlife Service. The court found that the agency’s own regulations require it to follow a “reasonable and prudent alternative” to continued policies that threaten the protected species, and that alternative must be “economically feasible.” The court concluded that the FWS had violated both the Endangered Species Act and the

Administrative Procedures Act by failing to explain how its reasonable and prudent alternative, which included the irrigation water restrictions, was economically feasible. App. at B-216 – B-219.

But a Ninth Circuit panel majority reversed the district court’s judgment, and upheld the FWS. That was ultimately based on this Court’s now outdated decision in *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153 (1978), which held that under the then Endangered Species Act (since amended), species protection was the highest priority, regardless of cost. *Id.* at 174.

The Ninth Circuit agreed with the FWS that the Endangered Species Act does not require a discussion of a proposed alternative’s economic feasibility. App. A-102 – A-111. The court reasoned that to consider economic feasibility broadly would require the FWS to weigh the life of the Delta smelt against the economic impact of the water restrictions. The court believed that would be inconsistent with the Endangered Species Act, which “reflects a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies,” and which requires the FWS “to halt and reverse the trend towards species extinction, *whatever the cost*,” App. A-109 – A-110 (emphasis added by Ninth Circuit).

Several parties petitioned for rehearing *en banc*, which the Ninth Circuit denied on July 23, 2014, without opinion.

SUMMARY OF ARGUMENT

This case presents important, crucial questions of federal law, whether agency interpretation of its own regulations is entitled to deference, and consequently, in the present matter, whether the Endangered Species Act requires the Fish and Wildlife Service to consider the economic impacts of the “reasonable and prudent alternatives” it mandates in federal law.

The ruling of the Ninth Circuit’s panel majority below also plunges the Nondelegation Doctrine to new depths, approving effective delegation of legislative powers, and judicial powers, to executive branch agencies. So the agency in this case would have executive, legislative, and judicial power all combined. The founders recognized that literally as tyranny. So we should not be surprised that the agency has used that power to decide that they don’t have to consider at all the economic effects of what they are doing.

The ruling of the Ninth Circuit panel majority below directly conflicts with the decision of the Fourth Circuit in *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013). That creates a split among the circuits on these issues.

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should grant the Writ of Certiorari requested in this case.

REASONS FOR GRANTING THE WRIT

- I. **THIS CASE PRESENTS AN IMPORTANT, INDEED MOMENTOUS, QUESTION OF FEDERAL LAW.**
 - A. **The Ruling of the Ninth Circuit Panel Majority Below Would Constitute Another Enormous Downhill Slide in the Nondelegation Doctrine.**

Whether Congress could delegate broad rulemaking powers to Executive Branch regulatory agencies at all was originally highly controversial. That goes back to Locke, Montesquieu, and the Founding Fathers' original grounds for the Constitution's fundamental doctrine of Separation of Powers.

Article One, Section 1 of the United States Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States....” The original question was whether Congress in granting broad rulemaking powers to regulatory agencies of the Executive Branch was, in fact, delegating its own legislative powers. *Panama Refining v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States* (1935).

Locke explained the problem in 1690:

“The Legislature cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have

it, cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them. The power of the Legislature being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislature can have no power to transfer their Authority of making laws, and place it in other hands."

John Locke, Second Treatise of Civil Government
(1690).

Have not those who were concerned about these questions long ago now been proved right? For today we are discussing a regulatory agency shutting down water to some of the most fertile and productive farmland on the planet, throwing thousands and thousands out of work and into abject poverty, consigning formerly prosperous, thriving communities to the destiny of ghost towns, rendering carefully cultivated properties for generations of families into dustbowls.

And they are doing that in the name of the supposed possible extinction of a variety of sardine fish for which no one anywhere has any count, whose survival is supposedly threatened by irrigation pumps financed by taxpayers for the good of the nation for generations. Those suffering today under the

depredations of this extremist ideological frolic rightly do not feel that they are governed by a democracy where they can hold their representatives accountable.

But we are not even discussing today whether the regulatory agency has the Constitutional power to issue its regulations. We are not even discussing whether to give the agency deference regarding the substance of those regulations, as in *Chevron*.² We are discussing whether to give the agency deference over the *interpretation* of its regulations.

In other words, we are not even discussing delegation of legislative power to the agency. We are discussing delegation of a judicial power as well, interpretation of the law. So the agency in this case will have executive, legislative, and judicial power all combined. The founders recognized that literally as tyranny. So we should not be surprised that the agency has used that power to decide that they don't have to consider at all the economic effects of what they are doing.

B. The Core Question of Law In This Case Is Whether Deference Must Be Given to the Agency's Interpretation of Its Regulations, and Consequently Whether It Must Consider the Economic Effects of Its Regulations Under the Endangered Species Act.

² *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)

The statutory language of the Endangered Species Act mandates the Fish and Wildlife Service to require federal agencies to pursue “reasonable and prudent alternatives” to their policies to ensure protection for endangered species under the Act. 16 U.S.C. Section 1536(b)(3)(A). By regulation, the Fish and Wildlife Service defines “reasonable and prudent alternatives” to mean, *inter alia*, those that are “economically and technologically feasible.” 50 C.F.R. Section 402.02.

But the Service does not interpret “economically feasible” to include the economic effects of its “reasonable and prudent alternative.” It interprets economically feasible to mean only whether the agency subject to the Service’s reasonable and prudent alternative has the funds to carry out, or execute, the alternative. But the general public must comply with the requirements of that reasonable and prudent alternative, whatever the costs of the economic effects of that alternative, which the Service does not interpret “economically feasible” as requiring it to even consider.

The Ninth Circuit panel majority below simply deferred without any question to the agency’s interpretation of the meaning of the words of the regulation at issue. But the meaning in English of the words “economically feasible” would appear to refer first and foremost to the cost of the economic impact on the general economy of the supposed reasonable and prudent alternative at issue. And agencies must comply with their own regulations just as much as with the statutes that authorize those regulations.

Indeed, could an interpretation of the statutory words “reasonable and prudent” holding that those words do not require the agency to consider the economic effects of its regulations be considered a valid reading of the statute? The plain meaning of the words reasonable and prudent would seem to require not only agency consideration of economic effects as dire and costly as those in this case, but, in fact, central agency focus on those effects. How could the economic effects of the regulatory alternative in this case be considered “reasonable and prudent”?

This is all the more so given that Congress added the words “reasonable and prudent” to govern the agency’s actions specifically to require the agency to avoid such costly and extreme outcomes of its regulation as in this case. Pub. L. No. 95-632, Section 3, 92 Stat. 3751, 3752-53 (Nov. 10, 1978); H.R. Conf. Rep. No. 95-1804, at 18-19 (1978). Indeed, Congress appeared to take this action specifically to rein in the agency after this Court’s decision in *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153 (1978), which appeared to approve single minded and heedless agency regulation under the Endangered Species Act, *whatever the cost*, id. at 174.

Finally, judicial deference to an agency’s interpretation of its own regulations runs afoul of the central Constitutional Doctrine of Separation of Powers, as indicated by the discussion above. That would involve delegating to the agency both the power to write a law, and to interpret it. That combination would fundamentally transgress Separation of Powers principles.

As Justice Scalia explained in *Decker v. Northwest Environmental Defense Ctr.*, 133 S. Ct. 1326, 1340 (2013)(dissenting on other grounds), “the power to write a law and the power to interpret it cannot rest in the same hands.” Scalia added that such a combination produces agency aggrandizement of power, for “the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect.” *Id.* at 1341. ACCORD: *Decker* (Roberts, C.J. and Alito, J. concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (Thomas, J., dissenting on other grounds); Richard A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 Admin. L.J. Am. U. 1,11 (1996); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock’s *Domain*, 79 Geo. Wash. L. Rev. 1449, 1454 – 66 (2011).

Moreover, as discussed above, such a combination would involve another, enormous, downhill slide in the nondelegation doctrine, combining delegation of judicial power with delegation of legislative power to Executive Branch agencies. That threatens to recreate within American government the same powers of the British crown that we fought against 250 years ago. Did George Washington fight in vain after all? Even the British long ago freed themselves of such tyranny.

Accordingly, this case presents important, crucial questions of federal law, whether agency interpretation of its own regulations is entitled to deference, and consequently, in the present matter, whether the Endangered Species Act requires the Service to consider

the economic impacts of the “reasonable and prudent alternatives” it mandates in federal law.

II. THE RULING OF THE NINTH CIRCUIT PANEL MAJORITY BELOW CREATES A SPLIT WITHIN THE CIRCUITS.

The ruling of the Ninth Circuit panel majority below directly conflicts with the decision of the Fourth Circuit in *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013).

In that case, pesticide manufacturers challenged a reasonable and prudent alternative because it failed to consider the economic impacts on their businesses.³ The Fourth Circuit ruled for the manufacturers, holding that in deciding on a “reasonable and prudent alternative [under the Endangered Species Act], the Service must consider several factors, including ‘economic feasibility.’” *Id.* at 474 (quoting 50 C.F.R. Section 402.02). That must include the economic impacts of the reasonable and prudent alternative, the Fourth Circuit recognized, because otherwise the economic feasibility requirement would be a dead letter. *See id.* at 474-75.

³ That case involved the Fisheries Service of the Commerce Dept., rather than the Fish and Wildlife Service of the Interior Dept., because the Fisheries Service administers the Endangered Species Act with respect to marine and anadromous species, which includes the salmon populations at issue in that case.

The economic impact of the reasonable and prudent alternative in that case involved prohibiting spraying of pesticides within buffer zones of 500 to 1,000 feet surrounding all salmon-bearing waters. The buffer zones had a negative economic impact because they would put all the acreage within the buffer zones out of production for the pesticide manufacturers. *Id.* at 475. That is perfectly analogous to what the reasonable and prudent alternative has done in the present case to the San Joaquin Valley, except on a much grander, much more broadly damaging scale, putting hundreds of thousands of acres out of production by denying them irrigation water. *Consolidated Delta Smelt Cases*, 717 F. Supp. 2d at 1054. Yet, the Ninth Circuit panel majority held that such an economic impact is irrelevant to whether an alternative is reasonable and prudent. App. at A-108 – A-110.

There is consequently a split among the circuits on these issues, which this Court should resolve in granting the requested Writ of Certiorari in this case.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should grant the Writ of Certiorari requested in this case.

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