No. 13-1244

In the Supreme Court of the United States

DRAKES BAY OYSTER COMPANY AND KEVIN LUNNY,

Petitioners,

v.

SALLY JEWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I. INTRODUCTION

A. Jurisdiction

Petitioners identified the mother of all circuit splits: Nine circuits have split five ways on whether courts have jurisdiction to hear challenges to agency actions when there is "no law to apply". Respondents do not dispute that this split exists, that it affects a fundamental issue of administrative law, or that it is of national importance. Nor do Respondents dispute that the issue can readily be resolved by using Supreme Court precedent in the way Petitioners suggest.

Respondents try to distinguish this case from those on which the circuits have split. They argue that the Ninth Circuit's holding should be interpreted as a statement about something other than jurisdiction. But the Ninth Circuit indisputably held that it lacks *jurisdiction*. It used the words "we lack jurisdiction" and "a federal court lacks…jurisdiction", and relied on the *Ness* case, which said that "a federal court does not have jurisdiction" over a challenge to agency action. This case squarely presents the jurisdiction question.

Respondents also argue that this case is not a "no law to apply" case. But it is. The Ninth Circuit quoted the phrase, applied it, and relied on the *Ness* case, which considered the concept at length.

Respondents insist that, regardless of what the Ninth Circuit said about jurisdiction, it decided every issue in the case. It did not. By holding that it lacked jurisdiction, the majority avoided the question of whether the agency abused its discretion, in violation of the Administrative Procedure Act ("APA"), by relying on a misinterpretation of a key statute.

B. National Environmental Policy Act ("NEPA")

Petitioners observed that there are splits between the Ninth and Tenth Circuits on the question of whether NEPA applies to "conservation efforts", and among the Fifth, Ninth, Eleventh, and District of Columbia Circuits on the closely related question of whether NEPA applies to actions that have solely beneficial effects.

Respondents do not dispute that these splits exist, or that they are important. Instead, they argue that the NEPA discussion in this case is dictum. But in the Ninth Circuit a considered statement of the law is a holding even if it is not strictly necessary to the result. Any doubt has been removed by a recent case treating the discussion as a holding.

Respondents also argue that the NEPA issue is not outcome-determinative because the Ninth Circuit has provided an alternate analysis. But that alternate analysis, involving prejudicial error, is the subject of the third question in the petition.

C. Prejudicial Error

Petitioners argued that this case splits in principle with a decision of the D.C. Circuit. In both cases, the agency argued that there was no prejudice because it was aware of the errors identified by plaintiffs, and that correcting those errors would not affect its decision. The D.C. Circuit rejected this argument, but the Ninth Circuit accepted it.

Respondents argue that there are differences in the two cases. But they are not significant. The key point is that NEPA would be gutted if an agency could escape liability for making false statements in an EIS simply by saying that correcting the statements would not change its decision. NEPA creates

procedural rights that allow plaintiffs to enforce that statute (which requires an agency to disclose environmental consequences regardless of the decision it makes), even if the agency later reaffirms its original decision.

The petition for certiorari should be granted.

II. THE CIRCUITS ARE IN DISARRAY OVER "NO LAW TO APPLY"

A. Respondents Do Not Dispute That Nine Circuits Have Split Five Ways

The most notable aspect of Respondents' brief is its tacit acknowledgement of the circuit split identified by Petitioners. An undisputed split of this magnitude should be resolved, especially when it concerns a fundamental issue of administrative law.

B. The Issue Is Nationally Important

Respondents try to characterize this case as one involving a statute of "unique and limited scope" that "does not implicate any asserted conflict about the application of APA review" to other statutes, and that does not "have any obvious prospective importance for APA review of decisions under other statutes." Brief For Respondents In Opposition ("BIO") 16, 14. Respondents are wrong.

The question presented is whether courts lack jurisdiction, under the APA, to review agency actions that are arbitrary and capricious or an abuse of discretion *when the statute authorizing the action does not impose specific requirements governing the exercise of discretion*. Many statutes fit within this category because they provide a broad grant of authority without a "measuring stick" (*see* BIO 13) to evaluate claims of arbitrary and capricious decision-

making—e.g. the statutes considered in the cases on which the nine circuits have split. PET. 14-20.

The statute at issue here is short and simple. APP. 170-171. Because of that simplicity, this case provides an unusually good opportunity to consider the APA question free of statutory clutter.

The four amicus briefs filed in support of Petitioners refute Respondents' argument that this case is of limited importance.

Amici Pacific Legal Foundation and California Cattlemen's Association explain that "[g]ranting the petition…will resolve the split between the Ninth and Tenth Circuits on whether renewal decisions on more than 18,000 grazing permits, regulating 155-million acres of federal land, are subject to APA review." Amici Br. of Pacific Legal Foundation et al. ("PLF Brief") 4-5. The Ninth Circuit's decision here extends earlier decisions holding (in direct conflict with the Tenth Circuit) that courts lack jurisdiction to review an agency's arbitrary and capricious refusal to renew an existing grazing permit. *Id*. at 14-15. This "circuit split…results in a type of second-class citizenship for grazing permit holders in the Ninth Circuit" and gives persons in the Tenth Circuit "a more useful and valuable First Amendment right to petition their government". *Id*. at 16.

This case is also important to scientists, who are concerned that it "is likely to result in more scientific misconduct in government decisions". Amici Br. of Drs. Goodman and Houser ("Scientists' Brief") 25. The agency's especially blatant scientific misconduct here has been criticized by Dr. Goodman, the National Academy of Sciences, and the agency's own internal reviewer. *Id*. at 8-12. The case is important to historic preservationists concerned about "the disastrous impact of [the case] on historic

preservation in federal wildlands". Amicus Br. of The Monte Wolfe Foundation 3 n.3. And the case is important to an unusually broad coalition of Californians, consisting of elder environmentalists (including the co-author of the Endangered Species Act), restaurateurs, and agriculturalists. Amici Br. of William T. Bagley et al. 1-5.

C. The Ninth Circuit Squarely Held That It Lacks Jurisdiction To Review Some Abuses Of Discretion

Respondents accuse Petitioners of "misunderstanding…the court of appeal's decision", and of being "mistaken" when arguing that "the court of appeals 'held that it lacked jurisdiction'" over the APA claim. BIO 10. Petitioners are not mistaken.

The Ninth Circuit specifically held that "we lack jurisdiction to review the Secretary's ultimate discretionary decision on whether to issue a new permit." APP. 14. It relied on the *Ness* case for its distinction between compliance with "legal mandates and restrictions", which it has jurisdiction to review, and "an informed judgment", which it does not have jurisdiction to review. APP. 14-15, citing *Ness Inv. Corp.* v. *Department of Agriculture,* 512 F.2d 706, 715 (9th Cir. 1975). Because this case and *Ness* specifically held that federal courts do not have *jurisdiction* under the APA to review challenges to some discretionary decisions, Respondents are wrong when they argue otherwise.

Respondents would rewrite the Ninth Circuit's decision. They insist that the holdings on jurisdiction "are best interpreted" as referring to something else. BIO 12. But, as Chief Justice John Marshall said about the Framers, the Ninth Circuit "must be understood…to have intended what they have said." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824).

By suggesting a rewrite, Respondents implicitly concede that the Ninth Circuit's holding, taken at face value, is in conflict with the other circuits.[1]

D. This Case Is A "No Law To Apply" Case

Respondents argue that this case *is not* a "no law to apply" case: "Far from being central to this case, that standard is mentioned in the decision below only in a parenthetical". BIO 15. Respondents are wrong.

"No law to apply" has been used as a way of determining whether a decision is "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2). PET. 14. Here, Respondents raised the issue, and the Ninth Circuit explained that § 701(a)(2) is applicable when there is "no meaningful standard" or "no law to apply". *Id*. The Ninth Circuit cited to *Ness*, which quoted the "no law to apply" phrase and decided that the statute at issue was "drawn in such broad terms that there is no law to apply." *Ness* at 713, 715. The Ninth Circuit concluded that "[h]ere, as in *Ness*…, there are 'no statutory restrictions or definitions prescribing precise qualifications'"—in other words, that there is no law to apply. APP. 15, quoting *Ness* at 715. This case is indisputably a "no law to apply" case.

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[1] Respondents argue that the Ninth Circuit's holding "substantially accords with the arguments that petitioners themselves had made". BIO 11. It does not. Petitioners had argued that the court has jurisdiction to review *all* of Petitioners' claims, not only some of them.

E. Because The Ninth Circuit Held That It Lacked Jurisdiction, It Did Not Resolve The Key APA Issue

Respondents also argue that the holding on jurisdiction is dictum, and that the Ninth Circuit decided every issue in the case. BIO 11. Respondents are wrong.

As the dissent explained, an agency decision is arbitrary and capricious if the agency "bases its decision on a legally erroneous interpretation of the controlling statute" or if it "relied on factors which Congress has not intended it to consider". APP. 47, 49. The dissent would have ruled in favor of Petitioners because Respondents based their decision on a legally erroneous interpretation of the controlling statute, and relied on factors Congress did not intend it to consider. APP. 38-39, 47-48, 49.

As the dissent noted, "the majority never attempts to argue that [agency's] interpretation of the [relevant statute] was *correct*". APP. 48. "Nor", the dissent concluded, "could it make that argument with a straight face". *Id*. Because of its holding on jurisdiction, the majority avoided this issue. *See* APP. 25 (reasoning that Secretary's reliance on interpretation of the relevant statute "was a matter of his discretion", without considering whether Secretary's interpretation was correct).

The petition, therefore, identifies an extreme circuit split on a fundamental issue of administrative law. The issue is of national significance, and it directly affects tens of thousands of permit holders in the West. This case clearly presents the issue, and provides an excellent opportunity to resolve it. The petition for certiorari should be granted.

III. THE CIRCUITS ARE SPLIT ON THE APPLICABILITY OF NEPA, AND THE NEPA HOLDING IN THIS CASE IS NOT DICTUM

Petitioners identified a direct split between the Ninth and Tenth Circuits on the question of whether NEPA applies to "conservation efforts", and another split among the Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits on the closely related question of whether NEPA applies to actions that have solely beneficial environmental effects. PET. 27-31. Respondents do not deny that these splits exist, or that the issues are nationally important. *See* PLF Brief 12-13 (explaining importance of issue to 18,000 permit holders). Instead, Respondents argue that the holding is dictum. BIO 16. Respondents are wrong.

In the Ninth Circuit, a reasoned analysis is considered a holding, even if it was not necessary to the result. *United States* v. *Johnson*, 256 F.3d 895, 915-916 (9th Cir. 2001)(en banc)("[w]here…it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law of the circuit and can only be overturned by an en banc court or by the Supreme Court"). Statements of the law are not holdings when they are "made casually and without analysis". *Id*. Here the NEPA discussion is not casual and without analysis; it is a deliberate statement of the law. It is a holding.

Any doubt was removed by a recent Ninth Circuit decision that, as Respondents admit, "referred to the discussion of NEPA's applicability in the decision below without suggesting it was dictum." BIO 16 n.3, citing *San Luis & Delta Mendota Water*

Auth. v. *Jewell*, 747 F.3d 581, 652 (9th Cir. 2014). In *San Luis*, the majority distinguished the decision below, and the dissent would have applied it. *San Luis* at 655, 661-662. Both treated the NEPA discussion as a holding. *Id.*

Respondents also argue that the NEPA holding is not outcome-determinative because the Ninth Circuit provided an alternate analysis. BIO 17-18. But that analysis is the subject of the third question presented, as discussed in the next section below.[2]

There are direct and important splits on two closely related NEPA issues. This case presents one split, and implicates the other. These splits should be resolved.

IV. AGENCIES SHOULD NOT ESCAPE JUDICIAL REVIEW SIMPLY BY ASSERTING THAT THEY WOULD HAVE MADE THE SAME DECISION ANYWAY

Respondents argue that the prejudicial-error issue is "fact-bound", and that there is no "tension or conflict with the D.C. Circuit's decision in *Gerber* v. *Norton*, 294 F.3d 173 (2002)." BIO 19. Respondents are wrong.

The relevant facts are straightforward. The agency committed violations of NEPA. PET. 32, 7-11.

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[2] Respondents argue that the Secretary's decision is not a "major federal action" because it "did not alter the legal status quo". BIO 17-18. But a "major federal action" includes those that significantly affect the environment. 40 C.F.R. § 1508.18. Here the EIS concluded that eliminating the oyster farm would significantly harm the environment. PET. 30 n.4.

The Ninth Circuit found that "Drakes Bay has shown no prejudice from these claimed violations". APP. 32-33. It reasoned that the Secretary "stated that he did not rely on the 'data asserted to be flawed'", and that "his statement was unambiguous that they did not carry weight in his decision." APP. 34. In fact, Respondents insist, *nothing* in the EIS carried weight in his decision: "neither the draft nor the final EIS had been 'material to the legal and policy factors that provide[d] the central basis' for his decision." BIO 6.

These facts clearly present the third issue in the petition: whether an agency commits prejudicial error when it makes materially false statements in an EIS, and then asserts that it would have made the same decision even if the false statements had been corrected.

The Ninth Circuit's standard of prejudicial error would gut NEPA litigation, because agencies can always say that their errors carried no weight in their decisions. NEPA allows an agency to make whatever decision it chooses, but requires that "the adverse environmental effects of the proposed action [must be] adequately identified and evaluated". *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). If a plaintiff must show that the agency would have changed its decision, NEPA's requirements will never be enforced.

This issue is informed by the *Lujan* case, which considered procedural rights in the context of standing, and noted that "[t]here is this much truth to the assertion that 'procedural rights' are special." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992). *Lujan* explains that a person living next to a dam site "has standing to challenge the licensing agency's failure to prepare an environmental impact

statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered". *Id*.

Just as a person living next to a dam site has a procedural right to an EIS, a plaintiff whose permit application is being evaluated has the procedural right to a fair and honest EIS that does not include false statements about environmental harm.

Here the Secretary said he was "well aware of the controversies", which is exactly what the agency said in *Gerber*. APP. 34, *Gerber* at 182. But the analysis and results were different in the two cases. *Gerber* explained that "'knowing' is not...the same as actually considering the problems" raised by the plaintiff, and found no "decisional documents that addresses any of the three problems". *Gerber* at 183. *Gerber* expressed concern that the agency's approach would "eviscerate" notice requirements of an environmental statute, and ruled against the agency. *Id*. at 184. Here the Ninth Circuit did not require actual consideration of the controversies identified; it showed no concern about gutting an environmental statute; and it ruled in favor of the agency. This case is in tension or conflict with *Gerber*.[3]

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[3] The Government has been criticized many times over the years for making false statements about the oyster farm. Scientists' Brief at 8-12. It is disappointing that the Government continues to assert that "the Secretary was 'well aware' of petitioners' objections *before* he made his decision." BIO 19. As Petitioners reported to the Ninth Circuit, the Secretary could not have been aware, *before* he made his decision, of a major objection that Petitioners did not discover until shortly *after* he made his decision: The EIS falsified the conclusion of Respondents' own harbor-seal expert. Ninth Circuit Dkt. 64:1.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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