Nos. 06-340, 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae address the following questions only:

Did the court of appeals correctly hold that the Environmental Protection Agency's decision to transfer pollution permitting authority to Arizona under the Clean Water Act, *see* 33 U.S.C. § 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973?

If so, should the court of appeals have remanded to the Environmental Protection Agency for further proceedings without ruling on the proper interpretation of Section 7(a)(2)?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.

In particular, WLF devotes a significant portion of its resources to supporting private property rights from encroachment based on overly broad interpretations of the Endangered Species Act of 1973. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). WLF has also regularly appeared in this and other federal courts to ensure that primary responsibility for interpreting ambiguities in a federal statute is entrusted to the administrative agency charged by Congress with enforcing the statute, not to the federal courts. *See, e.g., National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on national security-related issues on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Amici are concerned that the Ninth Circuit's decision has transformed the Endangered Species Act (ESA) into a "super" statute whose provisions should be interpreted in all instances to trump all other federal laws. Unless it is overturned, the Ninth Circuit's decision has the potential to disrupt large portions of the activities of governments at all levels. As Judge Kozinski pointed out in his dissent from the denial of rehearing *en banc,* "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." Pet. App. 78a n.4 (emphasis in original).[2] *Amici* do not believe that anything in the text or history of the ESA supports such a broad interpretation.

Moreover, *amici* are concerned that the Ninth Circuit reached out to decide the underlying ESA issues in a manner that did not demonstrate sufficient deference to the role of the applicable federal agencies to interpret their own statutory mandates. This brief focuses solely on deference-related concerns. While *amici* agree with Petitioners that the Ninth Circuit misinterpreted the ESA, this brief only addresses our belief that the Ninth Circuit erred in arriving at that interpretation without deferring to the views of the federal agencies charged with carrying it out.

Amici are filing this brief with the consent of all parties. Respondents Defenders of Wildlife, *et al.*, and the non-government Petitioners have submitted letters to the Court providing blanket consent to the filing of *amicus* briefs. *Amici* have lodged with the Court letters of consent from the federal government and Respondent State of Arizona.

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[2] References herein to the Petition Appendix ("Pet. App.") are to the appendix in No. 06-549.

STATEMENT OF THE CASE

This case is a challenge to a decision by the U.S. Environmental Protection Agency (EPA) to transfer to the State of Arizona authority to grant permits for discharges into navigable waters in the State. The Clean Water Act (CWA), which establishes the permitting system, also provides for the transfer of permitting authority from EPA to the States when certain conditions are met. 33 U.S.C. § 1342(b). Moreover, the CWA uses mandatory language in describing EPA's approval of such transfers: it states that EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. *Id.*; *see also* 33 U.S.C. § 1342(b)(1)-(9). As the Ninth Circuit recognized, it is uncontested that Arizona satisfied each of those nine criteria. Pet. App. 31a & n.11.

Rather, Respondents Defenders of Wildlife, *et al.* (collectively, "Defenders") challenge EPA's approval of Arizona's application for permitting authority based on alleged violations of EPA's obligations under the Endangered Species Act (ESA). Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), imposes certain requirements on "each Federal agency" with respect to actions "authorized, funded, or carried out by such agency." In particular, each agency is required – in consultation with those federal agencies designated by Congress to enforce the ESA – to ensure that the continued existence of endangered or threatened species is not jeopardized by actions attributable to the agency. *Id.*[3]

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[3] Section 7(a)(2) of the ESA requires that:

> Each Federal agency shall, in consultation with the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an (continued...)

Defenders contends that in approving Arizona's application, EPA did not comply with its § 7(a)(2) responsibilities to ensure that its actions did not jeopardize the continued existence of relevant species.

When initially considering Arizona's application, EPA officials recognized that transfer of permitting authority would entail at least one change in the way in which discharge permit applications within that State would be considered. Permit applications considered by EPA are subject to § 7(a)(2)'s consultation and "not likely to jeopardize" requirements, while applications considered by Arizona would not be – because § 7(a)(2) applies to "each Federal agency," not to State agencies. Based on concern that elimination of the mandatory consultation/no jeopardy process might result in State approval of discharge permits that might (at least indirectly) jeopardize endangered species, EPA consulted with FWS officials regarding Arizona's transfer application. Indeed, based on that concern, EPA had begun a practice in 1993 of consulting with FWS on all CWA transfer applications filed by States.[4]

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[3](...continued)

"agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species.

16 U.S.C. § 1536(a)(2). The ESA assigns responsibility for protection of certain marine species to the Secretary of the Commerce (and his designate, the National Marine Fisheries Service). The ESA assigns responsibility for other species to the Secretary of the Interior (and his designate, the Fish and Wildlife Service (FWS)). All of the species at issue here are the responsibility of FWS.

[4] That practice was memorialized in a February 2001 Memorandum of Understanding (MOA) signed by EPA and FWS. *See* 66 Fed. Reg. 11,202 (Feb. 22, 2001). The MOA made clear, however, that while the agencies would work together to encourage protection of (continued...)

Following consultation between FWS and EPA, FWS issued a Biological Opinion which concluded that EPA approval of Arizona's transfer application would have no effect – either direct or indirect – on endangered or threatened species. Pet. App. 10a. FWS said that absence of "section 7-related conservation benefits" when States possess CWA permitting authority cannot be deemed an "indirect effect" of EPA's approval of a transfer application, but rather is solely attributable to Congress's mandate that States are to be granted the permitting authority whenever they meet the nine criteria set forth in the CWA. *Id.* Based on that Biological Opinion, EPA approved the transfer of CWA permitting authority to Arizona in December 2002. *Id.* 12a.

Defenders thereafter filed a petition for review of EPA's transfer decision in the Ninth Circuit. It simultaneously filed a suit in federal district court in Arizona, alleging that FWS's Biological Opinion did not comply with ESA requirements. Finding that the Ninth Circuit possessed exclusive jurisdiction over the challenge to the Biological Opinion, the district court transferred that challenge to the appeals court for consolidation with Defenders' petition for review.

In a 2-1 ruling, the Ninth Circuit vacated EPA's decision to approve Arizona's transfer application and remanded the matter to EPA. *Id.* 1a-63a. It also transferred back to the district court Defenders' challenge to the Biological Opinion, "for proceedings consistent with this opinion." *Id.* 63a. The appeals court initially determined that EPA's approval of

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[4](...continued)
endangered species, States that otherwise met the CWA criteria for transfer of permitting authority would not have their applications denied if they declined to commit to consultation with FWS on future discharge permit applications. *Id.* at 11,206.

Arizona's transfer application was arbitrary and capricious (in violation of the APA) "because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." *Id.* 23a. The court held that EPA's determination during administrative proceedings that § 7(a)(2) of the ESA required it to consult with FWS regarding effects of transfer of CWA permitting authority on endangered/threatened species, was inconsistent with its simultaneous determination that such a transfer – when undertaken in compliance with the CWA's directive that transfers "shall" be granted to States that meet nine specified prerequisites – could not be deemed a cause of any effect on endangered species. *Id.* 23a-28a.

The Ninth Circuit did not, however, simply remand the matter to EPA to provide the agency with an opportunity to provide "a plausible explanation for its decision, based on a single, coherent interpretation of the statute." *Id.* 28a. Rather, it went on to address the merits of EPA's "no jeopardy" determination. It determined, contrary to the views of EPA and FWS, that the absence of a consultation requirement when States are administering CWA permit applications must be deemed an effect of an EPA decision to approve a transfer application – and thus that § 7(a)(2) requires EPA to ensure that such a transfer is not likely to jeopardize the continued existence of any endangered/threatened species. *Id.* 28a-48a. In arriving at that determination, the appeals court rejected an argument that an FWS regulation (40 C.F.R. § 402.03) directs that permit transfer decisions should be classified as non-discretionary decisions to which ESA § 7(a)(2) is inapplicable. *Id.* 38a-44a.[5]

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[5] That argument was advanced by intervening parties only. The federal defendants declined throughout the appeals court proceedings (continued...)

Judge Thompson dissented. *Id.* 63a-67a. He argued that under the CWA, EPA lacked discretion to deny transfer of permitting authority to Arizona and therefore that its decision was not "agency action" within the meaning of § 7 of the ESA. *Id.* 65a.

The Ninth Circuit denied rehearing *en banc*, with six judges dissenting. *Id.* 68a-69a. In his dissenting opinion (joined by five other judges), Judge Kozinski faulted the panel for, *inter alia*, finding an "inconsistency" in EPA's position when the *final* EPA position was internally consistent, *id.* 71a-74a; and in any event, a finding of "inconsistency" should have been the end of the case – such a finding obligated the panel to remand the case to provide EPA an initial opportunity to resolve any inconsistency. *Id.* 72a. Judge Kozinski also disagreed with the panel's interpretation of § 7(a)(2) and faulted the panel for failing to defer to the FWS's reasonable interpretation thereof. *Id.* 74a-76a. In an opinion concurring in the denial of rehearing *en banc*, Judge Berzon (the author of the panel decision) responded to Judge Kozinski's arguments. *Id.* 83a-92a. She asserted *inter alia* that while "EPA wants to decide the issue *again*, explaining its reasoning once more, . . . [case law governing administrative action] does not require that an agency have *two* chances to consider a factual or legal

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[5](...continued)
to take a firm position on the meaning of § 402.03. *Id.* 43a n.19. Rather, the federal defendants took the position that that issue was not before the court. They asked that if the court felt its decision hinged on whether § 402.03 absolved EPA of any obligation to consult with FWS (on the grounds that granting a transfer application is not a "discretionary" act), it should remand to the agency for an interpretation of the regulation. *Id.* They insisted that whether EPA was absolved of its consultation obligations by § 402.03 was irrelevant because "EPA did consult. The only issue before this Court is the adequacy of that consultation." *Id.* (citing July 27, 2005 EPA letter to court, submitted pursuant to Fed.R.App.P. 28(j)).

question before appellate review, only one." *Id.* 85a n.1 (emphasis in original).

SUMMARY OF ARGUMENT

The court of appeals ruled that EPA's decision to transfer permitting authority to Arizona under the CWA was arbitrary and capricious because it was based on inconsistent interpretations of ESA § 7(a)(2). As Judge Kozinski explained in his dissent from denial of rehearing *en banc,* that ruling was based on a faulty understanding of how EPA went about its decision-making process. The FWS's Biological Opinion provided EPA with a reasoned basis for concluding that approving transfer of permitting authority was "not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). The Administrative Procedure Act's (APA) requirement that the transfer decision not be "arbitrary" or "capricious" is fully satisfied by that reasoned basis. *See* 5 U.S.C. § 706(a)(2).

In arriving at a contrary conclusion, the court of appeals was unable to cite any instance in which EPA had concluded that transferring permitting authority to Arizona (or to any other State) would be likely to jeopardize the continued existence of any species. Rather, all the Ninth Circuit could point to were statements made be various EPA officials throughout the administrative process that they deemed EPA bound to *consult* with the FWS regarding the transfer decision.[6] The court stated that such statements were inconsistent with the interpretation of ESA § 7(a)(2) that led

[6] EPA and FWS did not, of course, adhere to that position during proceedings before the Ninth Circuit; as noted above, they took no position on the issue in the appeals court. Moreover, they contend before *this* Court that § 7(a)(2) does *not* require consultation.

the FWS and EPA to arrive at their "no jeopardy" conclusion. Pet. App. 25a-27a. But any such inconsistent statements do not render the ultimate "no jeopardy" conclusion either arbitrary or capricious. Statements by EPA officials at various levels of the agency that they would consult and/or that they deemed EPA bound to consult with the FWS were at most tangentially related to the decision-making process that led EPA to its "no jeopardy" conclusion. Moreover, EPA took no actions that conflicted with those statements: it did, indeed, consult with the FWS, and Defenders does not contend otherwise. An agency action is not rendered arbitrary or capricious simply because the agency has made statements arguably inconsistent with the rationale underlying its action, when such statements were neither a part of the decision-making process nor the basis for prior, inconsistent actions.

The Ninth Circuit compounded its error when, despite having determined that EPA acted arbitrarily and capriciously, it proceeded to provide what it deemed a definitive interpretation of § 7(a)(2) and the FWS regulations implementing that provision. Under those circumstances, the appeals court should have remanded the case to EPA for further clarification, as EPA explicitly requested the panel to do in the event that the panel attached significance to whether § 7(a)(2) required EPA to consult with the FWS. This Court on several occasions has summarily reversed the Ninth Circuit for failing to remand cases for clarification by the agency under similar circumstances.

The mandatory remand requirement is an outgrowth of this Court's recognition that federal courts should defer to a reasonable interpretation of a federal statute rendered by the agency delegated by Congress with responsibility for administering the statute, as well as to the agency's reasonable interpretation of its own regulations. This Court recently made

clear that an agency is not bound by a federal appeals court's contrary interpretation of a statute it is charged with enforcing, even when the appeals court arrived at its interpretation before the agency announced its views. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005). Thus, a remand is a necessity in cases, as here, where an appeals court has vacated agency action as arbitrary and capricious for reasons unrelated to a claim that the agency has acted in clear violation of its statutory authority. If appeals courts were to eschew a remand and instead to proceed to interpret the underlying statutory provisions, one could reasonably expect agencies to begin exercising their discretionary authority to "overrule" the decision of the appeals courts. Enforcing the mandatory remand policy is the only means of avoiding that anomaly.

The only exception to that rule arises in those situations in which an appeals court can fairly determine that the statute at issue is so clear on its face that there is no room for agency discretion in its interpretation. But any such determination presupposes that the appeals court recognizes the normal rule of deference and has concluded, after undertaking an explicit *Chevron* analysis, that the statute leaves no room for agency discretion. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the absence of any such analysis by the Ninth Circuit panel, its only proper response after determining that EPA had acted arbitrarily and capriciously was to remand the case to provide the agency with an opportunity to provide a more reasoned justification for its action.

ARGUMENT

I. EPA'S ALLEGEDLY INCONSISTENT INTERPRETATIONS OF § 7(a)(2) DID NOT

RENDER ITS TRANSFER DECISION ARBITRARY AND CAPRICIOUS

Section 7(a)(2) of the ESA imposes two distinct requirements on a federal agency: (1) it must ensure 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"; and (2) it must do so "in consultation with" the FWS and/or the National Marine Fisheries Service (depending on the species at issue). 16 U.S.C. § 1536(a)(2). At issue here is whether those requirements are triggered by a EPA decision to transfer CWA permitting authority to a State. The Ninth Circuit ruled that EPA's transfer decision in this case was arbitrary and capricious because it was based on an EPA determination that the transfer to Arizona implicated the second of these two § 7(a)(2) requirements but not the first. Pet. App. 23a-28a. The court reasoned that the two requirements are "triggered" by the same event: "any action authorized, funded, or carried out" by a federal agency. *Id.* 26a. Thus, the court reasoned:

> The two propositions that underlie the EPA's action . . . cannot both be true. Because the agency's decisionmaking was based on contradictory views of the same words in the same statutory provision, the ultimate decision was not the result of reasoned decisionmaking.

Id. 26a-27a.

As Judge Kozinski explained in his dissent from denial of rehearing *en banc, id.* 71a-74a, the appeals court's ruling was based on a flawed understanding of how EPA went about its decision-making process. First, the ruling is based on the erroneous assumption that the agency's "no jeopardy" determination was based on a finding that the transfer decision

was not an "action authorized, funded, or carried out" by EPA. EPA made no such finding.[7] Rather, EPA determined that any indirect effects of a transfer (such as the absence of a requirement that State officials consult with the FWS) were solely attributable to Congress's mandate that States are to be granted the permitting authority whenever they meet the nine statutory criteria – and not attributable to EPA's non-discretionary decision to adhere to Congress's directive. Thus, the "trigger" for EPA's "no jeopardy" determination was a statutory provision (33 U.S.C. § 1342(b), the CWA's mandatory transfer provision) with no obvious connection to § 7(a)(2)'s consultation requirement.

Second, it simply is not true, as the Ninth Circuit asserted (Pet. App. 27a), that EPA's decision-making (*i.e.*, its decision to approve Arizona's transfer application after making its "no jeopardy" determination) was in some way "based on" its views that it was required to consult with the FWS regarding the transfer application. EPA approved the application based solely on its determinations that Arizona had met the nine CWA prerequisite and that its decision could not be deemed to have any effects (and certainly no existence-jeopardizing effects) on endangered species. There is nothing to suggest that the approval decision was affected in any way by EPA's views on the consultation requirement; the decision would have been the same regardless whether EPA deemed itself bound to consult with the FWS.

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[7] In his dissent from the panel decision, Judge Thompson opined that EPA's transfer decision was not "agency action" within the meaning of § 7(a)(2). *Id.* 65a. That was not EPA's rationale for its "no jeopardy" determination, and EPA has at most given a lukewarm endorsement to Judge Thompson's view. *See* Federal Petition at 13 n.4.

Even if one accepts the Ninth Circuit's conclusion that there was an inconsistency between EPA's two determinations – § 7(a)(2) required consultation with the FWS regarding transfer applications, yet approval of such applications should not be deemed the cause of subsequent adverse impact on endangered species – that inconsistency does not render the transfer decision arbitrary and capricious, given that the decision was based solely on the "no jeopardy" determination, not the consultation determination. An agency action is not rendered arbitrary or capricious simply because the agency has made statements arguably inconsistent with the rationale underlying its action, when such statements were neither a part of the decision-making process nor the basis for prior, inconsistent actions.

None of the cases cited by the Ninth Circuit in support of its contrary conclusion are on point. For example, the court cited *General Chemical Corp. v. United States*, 817 F.2d 844 (D.C. Cir. 1987), for the proposition that agency action is arbitrary and capricious when its reasoning is "internally inconsistent and inadequately explained." Pet. App. 22a, 23a (citing *General Chemical*, 817 F.2d at 857). But the "internal inconsisten[cies]" at issue in *General Chemical* all related to a legal conclusion that the Interstate Commerce Commission adopted as the basis for its ruling that certain railroads were not "market dominant." Nothing in the D.C. Circuit's opinion suggests that agency action is arbitrary or capricious simply because the agency has made determinations that, while arguably inconsistent with the legal rationale for the action, played no role in the decision-making process.

The Ninth Circuit's reliance on *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), is similarly misplaced. Pet. App. 21a. *Motor Vehicle Mfrs.* addressed adoption of agency policies that are inconsistent

with prior policies, not (as here) alleged inconsistencies between the rationale underlying an agency policy and other positions adopted by the agency. *Motor Vehicle Mfrs*. requires that "an agency changing its course must supply a reasoned analysis" that explains its change of course. *Id.* at 57. Nothing in *Motor Vehicle Mfrs.* suggests that an agency's reasoned analysis is impugned because, in statements that played no part in the decision-making process, the agency adopted positions that are to some degree at odds with the rationale underlying the agency's decision.

This Court recently rejected an arbitrary and capricious claim under similar circumstances. The respondents in *Nat'l Cable* argued that the FCC acted arbitrarily and capriciously in exempting cable modem service providers from common-carrier regulation while not extending a similar exemption to DSL providers – even though the rationale for providing such an exemption applied with similar force to both groups. The Court denied the respondents' claim that this somewhat inconsistent regulatory position rendered arbitrary and capricious the FCC's decision to grant an exemption to cable modem service providers. *Nat'l Cable*, 545 U.S. at 1000-1002. The Court said that any inconsistency with prior decisions involving DSL providers was unobjectionable because the FCC had provided a reasoned explanation regarding why changed conditions in the telecommunications industry warranted granting an exemption for cable modem service providers. *Id.* The less-favored treatment afforded DSL providers was not deemed a reason to overturn the exemption for cable modem service providers. The Court deemed it sufficient that the FCC had pledged to reconsider its treatment of DSL providers, stating, "Any inconsistency between the order under review and the Commission's treatment of DSL service can be adequately addressed when the Commission fully reconsiders its treatment of DSL service." *Id.* at 1002.

Any inconsistency between the rationale underlying EPA's "no jeopardy" determination and its view that CWA permitting authority transfer applications trigger § 7(a)(2)'s consultation requirement is similarly unobjectionable. Just as in *Nat'l Cable*, any inconsistency in agency positions is largely attributable to EPA's and the FWS's changing interpretations of the statutes they are charged with administering. The Biological Opinion issued by the FWS in this case provided EPA with a reasoned basis for concluding that approving transfer of permitting authority was "not likely to jeopardize the continued existence of any endangered or threatened species." 16 U.S.C. § 1632(a)(2). The APA's requirement that the transfer decision not be "arbitrary" or "capricious," 5 U.S.C. § 706(a)(2), is fully satisfied by that reasoned basis. Any inconsistency between the Biological Opinion's rationale and EPA's views on consultation was likely a product of the time lag that often accompanies adoption of new agency positions. Indeed, recent correspondence between EPA and the FWS confirms that those agencies now recognize that the rationale underlying the Biological Opinion suggests that the ESA does not *require* EPA to consult with the FWS on CWA permitting authority transfer applications. *See* Pet. App. 93a-116a. As *Nat'l Cable* demonstrates, the fact that the agencies' position on the consultation requirement did not change until some months after the FWS set forth its position on the "not likely to jeopardize" requirement does not render EPA's Arizona transfer decision arbitrary or capricious.

Finally, *amici* note that regardless whether EPA was required by § 7(a)(2) to consult with the FWS, it did in fact consult – just as it said it would. Indeed, although both EPA and the FWS have now taken the position that consultation is not mandatory in connection with CWA transfer applications, the agencies plan to continue their cooperative relationship in such cases for the benefit of endangered species. Such

consultation and cooperation is generally to be commended; but the fact that agencies have chosen to consult with one another should not render arbitrary and capricious a logically distinct determination that approvals of CWA transfer applications cannot be deemed the cause of any adverse impacts on endangered species.

II. HAVING DETERMINED THAT EPA ACTED ARBITRARILY AND CAPRICIOUSLY, THE NINTH CIRCUIT SHOULD HAVE PROVIDED EPA ANOTHER OPPORTUNITY TO CONSTRUE § 7(a)(2)

The Ninth Circuit compounded its error when, despite having determined that EPA acted arbitrarily and capriciously, it proceeded to provide what it deemed a definitive interpretation of § 7(a)(2) and the FWS regulations implementing that provision. Under those circumstances, the appeals court should have remanded the case to EPA for further clarification, as EPA explicitly requested the panel to do in the event that the panel attached significance to whether § 7(a)(2) required EPA to consult with the FWS. This Court on several occasions has summarily reversed the Ninth Circuit for failing to remand cases for clarification by the agency under similar circumstances.

In *Immigration and Naturalization Service v. Ventura*, 537 U.S. 12 (2002), the Ninth Circuit determined that the Bureau of Immigration Appeals (BIA) had erred in declaring an alien ineligible for asylum in this country on the basis of claims that he had been persecuted in Guatemala on account of his political opinions. The federal government, however, had raised alternative grounds for denying asylum, and those grounds had not yet been addressed by the Immigration Judge and the BIA. Over the government's objections, the Ninth

Circuit addressed (and ultimately rejected) that alternative claim. This Court summarily reversed, ruling that the Ninth Circuit should have remanded the case to the Immigration Judge to allow him to consider the alternative claim in the first instance. The Court cautioned:

> A court of appeals "is generally not empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.* . . . Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.

Ventura, 537 U.S. at 16.

The Court summarily reversed the Ninth Circuit yet again last spring in another immigration case in which the appeals court declined to remand a case for initial administrative consideration of a legal issue but instead addressed the issue on its own. *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006). The Court held that the Ninth Circuit violated the "ordinary remand rule" and that its error was "obvious in light of *Ventura*." *Id.* at 1614. The Court said that requiring remand "except in rare circumstances" has numerous advantages:

> "The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."

Id. at 1615 (quoting *Ventura*, 537 U.S. at 17).

In defending the Ninth Circuit's decision to set out a definitive interpretation of ESA § 7(a)(2) and the FWS's regulations, Judge Berzon (author of the panel decision) attempted to distinguish *Ventura* and *Thomas* by noting:

> In *Thomas*, the Supreme Court faulted this court for not giving the agency an opportunity to decide an issue in the first instance. Here, in contrast, the EPA did decide that a transfer was appropriate and that it did not have the authority to consider the impact on endangered and threatened species of the transfer decision. We disagreed with both conclusions. Now, the EPA wants to decide the issue *again*, explaining its reasoning once more. *INS v. Ventura*, 537 U.S. 12 (2002), does not require an agency have *two* chances to consider a factual or legal question before appellate review, only one.

Pet. App. 85a (Berzon, J., concurring in denial of rehearing *en banc*).

With respect, Judge Berzon's rationale fails to come to grips with the "ordinary remand rule." That rule does not limit federal agencies to only a single opportunity to articulate a reasoned analysis to justify its actions, with the appeals court free to write on a clean slate if the agency slips up on the first go-round. Rather, an agency deemed to have acted arbitrary and capriciously is still permitted another opportunity to get it right:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the

> record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co., 470 U.S. at 744.

The mandatory remand requirement is an outgrowth of this Court's recognition that federal courts should defer to a reasonable interpretation of a federal statute rendered by the agency delegated by Congress with responsibility for administering the statute, as well as to the agency's reasonable interpretation of its own regulations. *Chevron*, 467 U.S. at 844. Such deference is warranted because Congress is deemed to have implicitly delegated to such an agency the authority to fill any gaps left by the statute. *Id.* *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 740-41 (1996). By remanding proceedings to the agency in those instances in which the agency is determined to have acted arbitrarily or capriciously – rather than arrogating to itself responsibility for interpreting the statute – a court honors Congress's determination regarding how gaps in the statute are to be resolved.

The Court recently made clear that an agency is not bound by a federal appeals court's contrary interpretation of a statute it is charged with enforcing, even when the appeals court arrived at its interpretation before the agency announced its views. *Nat'l Cable*, 545 U.S. at 982-83. As the Court explained:

> A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative construction occurs.

Id. at 983.

Thus, a remand is a necessity in cases, as here, where an appeals court has vacated agency action as arbitrary and capricious for reasons unrelated to a claim that the agency has acted in clear violation of its statutory authority. If appeals courts were to eschew a remand and instead to proceed to interpret the underlying statutory provisions, one could reasonably expect agencies to begin exercising their discretionary authority to "overrule" the decisions of the appeals courts. Enforcing the mandatory remand policy is the only means of avoiding that anomaly.

The only exception to that rule arises in those situations in which an appeals court can fairly determine that the statute at issue is so clear on its face that there is no room for agency discretion in its interpretation. *See id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). But any such determination presupposes that the appeals court recognizes the normal rule of deference

and has concluded, after undertaking an explicit *Chevron* analysis, that the statute leaves no room for agency discretion.

There is no indication that the Ninth Circuit even considered whether § 7(a)(2) contained any ambiguities or whether, alternatively, it was so unambiguous that it left no room for agency discretion.[8] In construing the meaning of a key FWS regulation, 50 C.F.R. § 402.03,[9] the panel gave lip service to the need to defer to "an agency's interpretation of its own regulation," Pet. App. 40a, but then proceeded to divine *EPA*'s interpretation of the FWS regulation despite EPA's repeated insistence in the Ninth Circuit that it was not taking a position on the meaning of that regulation. *Id*. 40a and 43a n.19.

In the absence of any explicit *Chevron* analysis by the Ninth Circuit panel, its only proper response after determining that EPA had acted arbitrarily and capriciously was to remand the case to give the agency an opportunity to provide a more reasoned justification for its action. By instead proceeding to supply a detailed interpretation of EPA's obligations under ESA § 7(a)(2), the Ninth Circuit once again flagrantly disregarded the "ordinary remand rule." *Thomas*, 126 S. Ct. at 1614.

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[8] Any claim that § 7(a)(2) leaves no room for agency discretion seems far-fetched on its face. The statute provides virtually no guidance regarding what environmental effects are sufficiently severe that they might reasonably be deemed "likely to jeopardize the continued existence of any endangered or threatened species," or what steps are sufficient to "insure" that agency actions are not likely to have such effects.

[9] Section 402.03 provides that § 7(a)(2) applies only to actions "in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added).

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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