No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,
Plaintiff-Appellants,

v.

SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. NATIONAL PARK SERVICE; and JONATHAN JARVIS, in his official capacity as Director, U.S. National Park Service,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

MOTION TO STAY THE MANDATE PENDING PETITION FOR CERTIORARI (FRAP 41(d)(2)(A))

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I. RELIEF REQUESTED

An order staying issuance of the mandate for 90 days pending the filing and disposition of a petition for certiorari by Plaintiff-Appellants Drakes Bay Oyster Company and Kevin Lunny (together "Drakes Bay").

II. SUMMARY OF GROUNDS FOR MOTION

This case presents three circuit splits, and touches on a fourth split, on important issues: jurisdiction over agency actions, applicability of the National Environmental Policy Act ("NEPA"), and prejudicial error under the Administrative Procedure Act ("APA"). There is a reasonable probability that the Supreme Court will want to resolve these disputes, and that it will reverse.

A stay is needed while the Supreme Court considers whether to grant certiorari, because the injunction issued by the motions panel will be dissolved if the mandate is issued. The workers and families who live onsite at Drakes Bay—some of whom have lived there their entire lives—will be kicked out of their homes. The company will be shut down, its experienced workers will have to find other jobs, and its customers will be lost to other oyster suppliers. Even if the company ultimately prevails in this case, therefore, its business could easily be destroyed.

The standards for a stay, as set out in Rule 41, are satisfied here: a substantial question has been raised and good cause exists. The motion should be granted, and issuance of the mandate should be stayed pending Drakes Bay's

petition for certiorari.[1]

III. LEGAL STANDARD

Staying the mandate pending certiorari requires "a substantial question" and "good cause". (FRAP Rule 41(d)(2)(A).) Motions for a stay are evaluated to assess whether there is (1) "a reasonable probability that four Members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari", (2) "a significant possibility of reversal of the lower court's decision", and (3) "a likelihood that irreparable harm will result if that decision is not stayed". (*Barefoot* v. *Estelle*, 463 U.S. 880, 895-896 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2).)

The standard is not difficult to meet. The Ninth Circuit "often" grants motions to stay the mandate pending a certiorari petition. (*United States* v. *Pete*, 525 F.3d 844, 850 (9th Cir. 2008).) No "exceptional circumstances" need be shown. (*Bryant* v. *Ford Motor Co.*, 886 F.2d 1526, 1528-1529 (9th Cir. 1989).) Circuit Rule 41-1 suggests that a stay will be denied only if "the petition for certiorari would be frivolous or filed merely for delay."

IV. THE STAY SHOULD BE GRANTED

When evaluating a petition for certiorari, the Supreme Court considers whether there is a circuit split on an important issue, and whether there is a conflict with a decision of the Supreme Court. (Sup. Ct. R. 10(a), 10(c).) A circuit split "is

[1] Defendants have advised that they intend to oppose the motion.

frequently sufficient" and "the most important basis" for Supreme Court review. (Gressman et al., *Supreme Court Practice* 249 (9th ed. 2008).) A conflict with the Supreme Court "is one of the strongest possible grounds". (*Id*. at 250.) These standards are satisfied here for the following reasons.

First, this case presents a circuit split over the scope of judicial review of agency permitting decisions under the APA. The majority relied on the *Ness* case, which held that federal courts do not have jurisdiction to review discretionary agency actions when the agency has not issued regulations governing the issuance of a permit. (Amended Opinion ("Op.") at 6-7, citing *Ness Inv. Corp.* v. *U.S. Dep't of Agr., Forest Serv.*, 512 F.2d 706, 715 (9th Cir. 1975); *see KOLA, Inc.* v. *United States*, 882 F.2d 361, 363 (9th Cir. 1989) (distinguishing *Ness* on the ground that regulations had been issued).) In the *Sabin* case, the Tenth Circuit considered the very same issue—whether the court had jurisdiction to review the U.S. Forest Service's refusal to issue a permit—and came to the opposite conclusion, i.e. that courts do have jurisdiction to review discretionary agency actions even when no regulations have been issued. (*Sabin* v. *Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975); *see Cheyenne-Arapaho Tribes* v. *United States*, 966 F.2d 583, 591 (10th Cir. 1992) (applying *Sabin* and finding agency leasing decision an abuse of discretion).) The Ninth Circuit has recognized that the *Ness* and *Sabin* cases are in conflict. (*Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810, 813 (9th Cir. 1987) (citing "*Ness*" and "*Contra Sabin*"), rev'd on other grounds by *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989).)

The majority's decision also presents a conflict with the Supreme Court decisions in at least three lines of cases: (1) those cases holding that jurisdiction is precluded only by clear and convincing evidence of Congressional intent, including *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986) and *Kucana* v. *Holder*, 558 U.S. 233, 251-252 (2010), (2) those cases holding that agency action must be overturned when it is based on an error of law, including *SEC* v. *Chenery Corp*., 318 U.S. 80, 94 (1943) and *Negusie* v. *Holder*, 555 U.S. 511, 516 (2009), and (3) those cases requiring an agency to provide a satisfactory explanation for its discretionary decisions, including *FCC* v. *Fox Television Stations, Inc*., 556 U.S. 502, 513 (2009) and *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

Second, this case presents a circuit split over whether an "environmental conservation effort" is exempt from NEPA, even if it harms the environment.[2] The majority relied on and extended the Ninth Circuit's *Douglas County* case, which held that actions that "prevent[ed] human interference with the environment" were exempt from NEPA. (Op. 31-32 (citing *Douglas County* v. *Babbitt*, 48 F.3d 1495, 1505-1507 (9th Cir. 1995) (square brackets in original).) In the *Catron County* case, the Tenth Circuit held to the contrary. (*Catron County Bd. of Comm'rs, New Mexico* v. *U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996).)

[2] The EIS found that shutting down the oyster farm "could result in long-term major adverse impacts on California's shellfish market", and in would result in significant adverse effects on water quality, eelgrass, fish, birds, harbor seals, and special status species. (SER 53-55, 57-58, 62-63, 66, 74.)

The NEPA issue here touches on another circuit split. As the majority acknowledged, there is a circuit split on the closely related issue of whether NEPA applies to agency actions that have only beneficial effects. (Op. 32 n.11, citing *Humane Society of U.S.* v. *Locke*, 626 F.3d 1040, 1056 n.9 (9th Cir. 2010) (noting that the Fifth Circuit, DC Circuit, and Eleventh Circuit have held that NEPA applies, and that the Sixth Circuit has held that it does not).)[3]

Third, this case presents a circuit split over whether an agency commits prejudicial error under the APA when the agency conducts a defective public-disclosure process and then, when challenged, asserts that it was aware of the issue and would not have made its decision differently. The majority concluded that although the agency's final EIS violated NEPA, there was no prejudice to plaintiffs because the agency was "well aware of the controversies on the specific topics" and "was unambiguous that they did not carry weight in [the] decision." (Op. 34-35.) The DC Circuit held, to the contrary, that an agency commits prejudicial error when it conducts a defective public-disclosure process (in that case, public comment required for a permit issued under the Endangered Species Act), even if the agency later asserts that it was well aware of the controversy and would not

[3] Citing *Sierra Club* v. *Froehlke*, 816 F.2d 205, 211 n.3 (5th Cir. 1987); *Natural Res. Def. Council, Inc.* v. *Herrington*, 768 F.2d 1355, 1431, (D.C. Cir. 1985); *Nat'l Wildlife Fed'n* v. *Marsh*, 721 F.2d 767, 783 (11th Cir. 1983); and *Envtl. Def. Fund* v. *Marsh*, 651 F.2d 983, 993 (5th Cir. 1981); *contra Friends of Fiery Gizzard* v. *Farmers Home Admin.*, 61 F.3d 501, 504-05 (6th Cir. 1995).

have made its decision differently. (*Gerber* v. *Norton*, 294 F.3d 173, 182-184 (D.C. Cir. 2002).)

These issues—the scope of jurisdiction over discretionary agency actions, whether NEPA applies to "environmental conservation efforts" or those actions that have only beneficial effects, and whether an agency commits prejudicial error when it does not comply with public-disclosure requirements—are important issues that merit Supreme Court review. The amicus brief filed by the Pacific Legal Foundation on behalf of the California Cattlemen's Association, among others, illustrates this point.[4]

Because the majority creates circuit splits on these important issues, and conflicts with Supreme Court decisions, there is a reasonable probability that the Supreme Court will grant Drakes Bay's petition. There is also a significant possibility that the Supreme Court will reverse. As noted above, the majority's decision is not consistent with Supreme Court precedent on jurisdiction. The majority's decision that NEPA does not apply to environmental conservation efforts is not consistent with the plain language of NEPA. (*See Humane Society*, 626 F.3d at 1056 (acknowledging, without deciding, that the conclusion that NEPA

[4] As these amici note, "[California Cattlemen's Association] has many members who hold federally issued grazing permits in many areas of California, and the panel decision potentially impacts how the … Administrative Procedure Act (APA) appl[ies] to agency decisions related to those permits." (Dkt. 81 at ECF page 8 of 24; *see also id.* at ECF page 21 of 24 (noting similarity between statutory discretion given for Drakes Bay's permit application and statutory discretion given for federal grazing permits).)

applies even to actions with only environmentally beneficial consequences "is consistent with the weight of circuit authority and has the virtue of reflecting the plain language of the statute").) Even within the Ninth Circuit, there have been differences of opinion about the issues, as shown by the dissent and the injunction issued by the motions panel.

Drakes Bay will suffer irreparable harm if the mandate is not stayed. The workers and families who live onsite at Drakes Bay—some of whom have lived there their entire lives—will be kicked out of their homes. The company will be shut down, its experienced workers will have to find other jobs, and its customers will be lost to other oyster suppliers. Even if the company ultimately prevails in this case, therefore, its business may be destroyed.[5]

The district court found that, without an injunction, Drakes Bay's business would be destroyed and it was "likely" to suffer irreparable harm. (*Drakes Bay Oyster Co.* v. *Salazar*, 921 F.Supp.2d 972, 995 (N.D. Cal. 2013).) Defendants have not contested that finding on appeal. Drakes Bay has thus met its burden to show that there is a likelihood it will suffer irreparable harm if the mandate is not stayed.

V. CONCLUSION

Issuance of the mandate should be stayed pending the filing and disposition of Drakes Bay's petition for certiorari.

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[5] If Drakes Bay is shut down, the State of California will lose its only oyster cannery, and one-third of its oyster production.

DATED: January 20, 2014

Respectfully submitted,

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9th Circuit Case Number(s) 13-15227

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Catherine Rucker
Barbara Ruth Cutler Davenport Scott

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