No. 21-35121

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,
Plaintiff-Appellant,

v.

DEB HAALAND, in her official capacity as Secretary of the United States Interior; **MARTHA WILLIAMS**, in her official capacity as Principal Deputy Director of U.S. Fish and Wildlife Service;
Defendants-Appellees.

and
STATE OF WYOMING et al.
Intervenor Defendants-Appellees.

On Appeal from the United States District Court, District of Montana
No. 9:19-cv-00109-DLC
The Honorable Judge Dana L. Christensen

RESPONSE OF INTERVENOR-APPELLEES WYOMING STOCK GROWERS' ASSOCIATION, WYOMING FARM BUREAU FEDERATION, AND UTAH FARM BUREAU FEDERATION TO PETITION FOR REHEARING EN BANC

William E. Trachman
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
Tel: (303) 292-2021
Fax: (877) 349-7074
wtrachman@mslegal.org

Ivan L. London
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
Tel: (303) 292-2021
Fax: (877) 349-7074
ilondon@mslegal.org

Attorneys for Intervenor-Appellees Wyoming Stock Growers' Association, Wyoming Farm Bureau Federation, and Utah Farm Bureau Federation (Agricultural Associations)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

OTHER AUTHORITIES

RESPONSE TO APPELLANT'S STATEMENT

Appellant has always advanced a syllogism to obtain judicial review of Fish and Wildlife Service's (FWS) Grizzly Bear Recovery Plan. It argues that (1) the Grizzly Plan is a rule subject to the Administrative Procedure Act's rulemaking-petition provisions because the definition of "rule" is exceedingly broad; and (2) the denial of a rulemaking petition to amend a "rule" is always final agency action. Thus, says Appellant, courts may review the denial of any rulemaking petition under the arbitrary and capricious standard.

Of course, the theory would subject every conceivable public-facing action that an agency performs to judicial review, if it were adopted. A petition to amend agency guidance documents? A press release issued by an agency Secretary? A birthday message to commemorate the anniversary of a prominent civil rights statute?[1] All that one would need to sue would be to submit a petition to amend these items, and then invoke Appellant's theory when the petition is rejected.[2]

---

[1] *See, e.g.*, Department of Education Office for Civil Rights, *Dear Colleague Letter Commemorating the 18th Anniversary of the Americans with Disabilities Act (ADA) and Providing Information for Wounded Veterans*, at 3 (Jul. 25, 2008) ("I hope you will join me in celebrating our continued efforts and our shared interest in realizing the full potential of the Americans with Disabilities Act."), at https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html?queries%5Bsearch%5D=anniversary.

[2] *See also Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412 (9th Cir. 2023) (panel decision) (Sung, J., dissenting) ("This statutory definition is so broad it includes nearly every statement an agency may make.") (internal quotation marks omitted) (in this brief, the reporter citation is used rather than "Op.").

The District Court found one way to resolve this argument: it rejected the first portion of the syllogism. The Ninth Circuit panel found another way to resolve the argument: it assumed the first portion to be true, but rejected the second portion. Either way, Appellant's arguments are unworkable, and would announce a new era of "administrative litigation" gamesmanship to challenge *everything* that Executive Branch agencies do, going decades back in time potentially. The full Court should reject the effort to rehear the case en banc and decline to revisit the question of why exactly Appellant ought to lose this case.

BACKGROUND

"An en banc ... rehearing is not favored …." F.R.A.P. 35(a). Ordinarily it "will not be ordered" unless the petitioning party can show either that (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. *Id.* And here, Appellant has not satisfied its duty to establish either part of this test.

ARGUMENT

Appellant's petition does not meet the criteria for rehearing en banc per F.R.A.P. 35. Appellant has not shown that the panel decision conflicts with the decisions of this Court or the Supreme Court, or that the panel decision involves questions of exceptional importance. And Appellant has not shown any other compelling reason for rehearing en banc.

A. The panel decision maintains uniformity with this Court's decisions and Supreme Court precedent.

1. Appellant has not shown that the panel decision conflicts with the decisions of this Court.

Under F.R.A.P. 35(a)(1), one ground for en banc review enables the Court to act efficiently by hearing cases via panel while being able "to control and thereby to secure uniformity and continuity in its decisions," *see United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 690 (1960) (interpreting an early version of 28 U.S.C. § 46(c)), by "focus[ing] on the narrow grounds that support en banc consideration," *see* F.R.A.P. 35(b)(1)(A) advisory committee's note to 1998 amendment.

Here, there is no need for the Court to exercise secondary review because the panel applied this Court's "pragmatic" approach to administrative finality to the narrow circumstance of a petitioner (Appellant) demanding that FWS take on an obligation that Congress did not require, and for the refusal of which Congress did not provide any consequences. *Ctr. for Biological Diversity*, 58 F.4th at 417, 420.

Contrary to Appellant's contention (see Pet. 9–14), the Court's decisions show longstanding support for the panel's approach. *E.g.*, *Dietary Supplemental Coal., Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992) ("The finality element must be interpreted in a 'pragmatic' and 'flexible' manner."). The approach "insures judicial review will not interfere with the agency's decision-making process." *Id.* (citing *Winter v. Cal. Med. Rev., Inc.*, 900 F.2d 1322, 1324–25 (9th Cir. 1989)).

The approach is proper where—as here—Congress did not order an agency to do something that it chooses not to do. *See Ctr. for Biological Diversity*, 58 F.4th at 418 ("Nor does the Service have any statutory obligation to modify a recovery plan once adopted. It follows that a decision not to grant a petition to modify a plan is not final agency action.").

One Eleventh Circuit decision is instructive. In the case, an agency denied a rulemaking petition where Congress did not require the agency to act or impose any guidance, penalties or requirements for the agency's decision to deny a rulemaking petition. In *Conservancy of Southwest Florida v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073 (2012), petitioners (including Appellant here), petitioned FWS for a rule designating critical habitat for the Florida panther, which was a listed endangered species. But while FWS had designated the panther as endangered, the operative statute did not require the agency to also designate critical habitat for it. *Id.* at 1075.

Lacking authority to compel agency action under that statute, the petitioners invoked a later-enacted endangered-species statute that did not apply to species, like the Florida panther, which FWS had already designated as endangered. *Id.* FWS refused the petitioners' requests. *Id.* at 1077. The Eleventh Circuit held that because Congress did not require FWS to designate critical habitat for the Florida panther, the question whether to do so was committed to agency discretion, and the agency's denial of a rulemaking petition was not subject to judicial review. *Id.* at 1079–85.

As a further step for analyzing consistency with this Court's decisions and returning to this Court's precedent, the Court's decision in *Oregon Natural Desert Association v. U.S. Forest Service*, 465 F.3d 977 (2006), both demonstrates that the panel's decision was consistent with this Court's decisions *and* that Appellant failed to focus on the *narrow* grounds that might support en banc consideration.

In *Oregon Natural Desert Association*, which the panel cited for several points, *Ctr. for Biological Diversity*, 58 F.4th 417, 419–20, petitioners (again, including Appellant) sued the Forest Service, alleging that the agency had unreasonably issued annual licenses implementing grazing permits within "protected riparian stretches" of two rivers. 465 F.3d at 981. The district court decided that the issuances of the licenses were not final agency actions and granted judgment for the agency. *Id.*at 982.

This Court's decision on appeal in *Oregon Natural Desert Association* shows two important points for assessing the panel's consistency with the Court's decisions: it applied the longstanding "pragmatic" approach to determining final agency action, *id.* at 982–83, 985–86, and it explained in detail how the issuances of licenses in that case caused legal consequences to flow, which made the facts of that case different from the facts in this case, *id.* at 986–990.

With respect to the former point, this Court recited the rule that it has consistently applied since at least 1992, "In determining whether an agency's action

is final ... we focus on the practical and legal effects of the agency action: The finality element must be interpreted in a pragmatic and flexible manner." *Id.* at 982 (internal alterations, citations and quotations removed) (quoting *Dietary Supplemental Coal., Inc.*, 978 F.2d at 562). Even the dissent agreed at least with the correct precedential rule to apply. *Id.* at 991 (Fernandez, C.J., dissenting) ("Thus, a somewhat narrower *and more pragmatic* approach is required." (emphasis added)). In this case, the panel applied the same rule, quoting *Oregon Natural Desert Association*. *See Ctr. for Biological Diversity*, 58 F.4th at 417.

With respect to the latter point (whether legal consequences flow), the *differences* between *Oregon Natural Desert Association* and this case are important, as the panel also explained. *See id.* at 417, 419–20.

In *Oregon Natural Desert Association*, the agency's issuance of licenses to implement grazing permits marked "the consummation of a process that set[] the parameters for the upcoming grazing season and it impose[d] legal consequences on the permit holder." 465 F.3d at 983; *see also id.* at 984–99. The licenses set out and put "into effect" specific, conditions-reflected authorizations and limits on grazing, *id.* at 984; they started the "grazing season," *id.* at 985; they told the grazing permit and license holders "where within the allotment to graze, how many head to graze when, or any specific conservation measures that the Forest Service deemed warranted for the upcoming season," *id.* at 985 n.11; and they presented the "threat

of civil and criminal penalties" that the Forest Service had in fact threatened to impose, *id.* at 986–89. And because actual permits and licenses were involved, Congress had provided requirements and standards for the agency (and courts) to apply when dealing with non-compliance, which the agency had incorporated into implementing regulations. *Id.* at 987–89.

Similarly, in *Weight Watchers International, Inc. v. F.T.C.*, 47 F.3d 990 (9th Cir. 1995), the agency action—the agency's "promulgation" of new requirements on the regulated community without proper rulemaking, and the agency's subsequent denial of the regulated community's rulemaking petition regarding the same—directly affected the agency's ability to enforce compliance on the regulated community and to bring penalties against non-complying parties. *Id.* at 991. As the panel stated, the rulemaking-petition denial in that case "directly affected the obligations of regulated parties." *Ctr. for Biological Diversity*, 58 F.4th at 419–20. And the panel's explanation of the *Weight Watchers* decision yields the correct point, which is supported by this Court's decisions and Supreme Court precedent: some rulemaking-petition denials are final agency actions, and some are not; to figure out which is which, the courts must apply a "pragmatic" approach.

In this case, no legal consequences flowed from FWS's decision. The denial did not mark the consummation of the recovery-plan process. *Id.* at 417. It did not cause any legal consequences to flow—Congress neither mandated FWS's

compliance with recovery plans nor supplied any guidance, penalties or requirements for how, when or whether to amend (or for failure to amend) recovery plans. *Id.* at 417–18. Here, as in *Conservancy of Southwest Florida*, Congress neither supplied any requirement that FWS must act per petitioners' requests, nor gave any "meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 415; 677 F.3d at 1079 (citing 5 U.S.C. § 701(a)(2)).

In sum, the panel's decision applied the Court's longstanding precedent, which is that the Court must assess administrative finality in a "pragmatic and flexible manner." *See Ctr. for Biological Diversity*, 58 F.4th at 417; *Dietary Supplemental Coal., Inc.*, 978 F.2d at 562. Appellant cannot show any inconsistency in the Court's decisions, nor does Appellant find some narrow ground that would justify further review. Accordingly, the Court should deny the petition.

2. Appellant has not shown that the panel decision conflicts with the decisions of the Supreme Court.

The panel's decision properly applied controlling precedent. *See infra*, Argument § A(1). For instance, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court announced the rule that in determining whether an agency action is a "final agency action" as 5 U.S.C. § 704 uses the phrase, the courts must "interpret[] the 'finality' element in a pragmatic way" and with a "flexible

view." *Id.* at 149–50.[3]

In *Abbott Laboratories*, the "Commissioner of Food and Drugs" published regulations requiring prescription-drug manufacturers to provide labeling on a much larger set of drug products than had been required. *Id.* at 138. A group of drug manufacturers and a trade group challenged the *published regulations*, arguing that the Commissioner had exceeded his authority in the promulgation. *Id.* The district court granted relief to the plaintiffs, but the Third Circuit Court of Appeals reversed, effectively on the ground that the promulgation of the regulations was not sufficiently "final" to warrant judicial jurisdiction. *See id.* at 139.

The Supreme Court, after providing a thorough analysis of the genesis of the Administrative Procedure Act and its intersection with the relevant food and drug statute, held that the "pragmatic" approach in that case was to treat the publishing of the regulations as a final agency action. *Id.* at 149. But in doing so, the Supreme Court outlined the importance of the "pragmatic" approach:

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

[3] Note that the Supreme Court abrogated the *Abbott Laboratories* decision on other grounds in *Califano v. Sanders*, 430 U.S. 99 (1977).

Id. at 148–49. In *Abbott Laboratories*, the promulgation of regulations was "final agency action" for judicial review because no further administrative proceedings were contemplated, *id.* at 149; the regulations were "quite clearly definitive," *id.* at 151; the impact of the regulations on drug companies was "direct and immediate," *id.* at 152; and a failure to follow the regulations "would risk serious criminal and civil penalties," *id.* at 153. The Supreme Court continues to use this *Abbott Laboratories* "pragmatic" rule to decide finality, as demonstrated in *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016) ("This conclusion tracks the 'pragmatic' approach the Court has long taken to finality.").

When this Court recognized and applied the "pragmatic" rule in 1992, it cited the *Abbott Laboratories* decision as the basis for its adoption and application of the rule. *Dietary Supplemental Coal., Inc.*, 978 F.2d at 562. Similarly, when this Court applied the "pragmatic" rule to determine "finality" fourteen years later in *Oregon Natural Desert Association*, the Court cited both this Court's 1992 adoption and application of the rule, 465 F.3d at 982, and *Abbott Laboratories*, *id.* at 985. The panel, in turn, cited recent Supreme Court precedent (*Hawkes Co.*) for the rule, consistent with this Court's decisions. *Ctr. for Biological Diversity*, 58 F.4th at 420.

Additionally, as the panel explained, and contrary Appellant's argument in its petition (at 2, 10), nothing about the panel's decision conflicts with the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). *See Ctr. for*

Biological Diversity, 58 F.4th at 419. For one thing, that case arose per a judicial-review provision in the Clean Air Act, not Administrative Procedure Act section 10(c), 5 U.S.C. § 704. *See, e.g.*, 549 U.S. at 514 n.16.

For another, the petition at issue there would require the agency to set actual, "enforceable emission standards" requiring compliance by the regulated community on threat of penalty. *See id.* at 515–16. The panel in this case appropriately relied on that point as an important distinction between the rulemaking-petitioners in *Massachusetts* and Appellant here. *Ctr. for Biological Diversity*, 58 F.4th at 419. In *Massachusetts*, the agency action directly affected the agency's ability to enforce compliance on the regulated community and to bring penalties against non-complying parties. Similarly, in *Abbott Laboratories*, the agency issued regulations directly affecting the agency's ability to enforce compliance on the regulated community and to bring penalties. Similarly, in *Oregon Natural Desert Association*, the agency's decision to grant annual licenses with operating conditions directly affected the agency's ability to enforce compliance on the regulated community and to bring penalties.

Here, in contrast and as described by the panel, FWS's decision *not* to undertake an exercise that Congress did *not* authorize, and which would *not* result in the culmination of the agency's recovery-plan process nor would be enforceable is different, and it does not warrant treatment as final agency action. Such action

would not be pragmatic. Whether FWS agrees to amend a recovery plan does not directly affect the agency's ability to enforce compliance on the regulated community and to bring penalties: FWS "does not initiate enforcement actions based on recovery plans." *Ctr. for Biological Diversity*, 58 F.4th at 418. Rather, imposing judicial oversight over FWS's decision whether to amend a recovery plan would result in "premature adjudication," in which this Court would "entangl[e]" itself "in abstract disagreements over administrative policies," and would cause "judicial interference" before FWS's actual administrative decision on listing grizzlies has been formalized and its effects felt in a concrete way. *See Abbott Labs.*, 387 U.S. at 148–49. This case is unlike *Massachusetts*, and the panel applied the correct rule from the Supreme Court's precedent to a situation that is different from those in Appellant's arguments. *See Ctr. for Biological Diversity*, 58 F.4th at 418–20.

To get around this, Appellant argues in its petition (at 2) that *Massachusetts* makes all "denials of rulemaking petitions ... subject to judicial review." But that is incorrect. As Appellant admits in its petition (at 10), the Supreme Court said that denials of rulemaking petitions are only "*susceptible* to judicial review." *Massachusetts*, 549 U.S. at 527–28 (emphasis added). Such denials are not "requiring" of judicial review. *See id.* As the Eleventh Circuit explained in the Florida panther case, where it decided that FWS's denial of a rulemaking petition was not reviewable under the Administrative Procedure Act, sometimes such denials

are reviewable, and sometimes they are not.

> We do not suggest that the denial of a petition for rulemaking is always unreviewable, or even presumptively unreviewable. Such a notion would be contrary to precedent. [citing *Massachusetts*.] But the features that such a decision shares with nonenforcement decisions further support our conclusion that, given the absence of any applicable statutory or regulatory standards, the Service's decision not to initiate rulemaking to designate critical habitat for a pre–1978 species is committed to agency discretion by law.
>
> We take care to note that not every agency action that is in some sense discretionary is exempt from APA review.... This, however, is such a case.

Conservancy of Sw. Fla., 677 F.3d at 1085. In *Massachusetts*, the agency's denial of a rulemaking petition called for judicial review, as some denials do. *See* 549 U.S. at 527–28; *Conservancy of Sw. Fla.*, 677 F.3d at 1085. In *Conservancy of Southwest Florida*, the agency's denial of a rulemaking petition did not call for judicial review, as some denials do not. *See id.* The panel acknowledged the distinction and applied the right "pragmatic" rule from the Supreme Court's and this Court's decisions and determined—for good reason—that FWS's denial of Appellant's rulemaking petition here did not call for judicial review. *See Ctr. for Biological Diversity*, 58 F.4th at 417, 418–20. The panel's decision maintains uniformity with this Court's decisions and Supreme Court precedent. *See Hawkes Co.*, 578 U.S. at 599; *Massachusetts*, 549 U.S. at 527–28; *Abbott Laboratories*, 387 U.S. at 148–49; *Or. Natural Desert Ass'n*, 465 F.3d at 982; *Dietary Supplemental Coal., Inc.*, 978 F.2d

at 562. The Court should deny Appellant's petition. *See* F.R.A.P. 35(a)(1).

B. The panel decision does not present a question of exceptional importance.

First, under F.R.A.P. 35(a)(2), a panel decision does not create a conflict equating to "exceptional importance" unless it conflicts with the decisions of other circuits, which generally—if not always—means "*all other circuits* that have considered the issue." *See* F.R.A.P. 32(b)(1)(B) advisory committee's note to 1998 amendment (emphasis added). Here, Appellant cannot meet that standard because the panel decision is not only consistent with this Court's decisions, but also with the other circuits' decisions. Second, there is no other basis for labeling the finality question in this case as one of exceptional importance.

1. Appellant has not shown that the panel decision conflicts with the decisions of any other circuit.

The panel decision does not conflict with Supreme Court precedent or Eleventh Circuit precedent. *See infra*, Argument § A. Nor, as the panel explained, does its decision conflict with D.C. Circuit precedent. *Ctr. for Biological Diversity*, 58 F.4th at 418 (explaining *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012), for the proposition that recovery plans are not binding). While Appellant leans heavily in its petition (at 3, 11) on *American Horse Protection Association v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987), to suggest a conflict with the D.C. Circuit, that case stands for the proposition that when an agency denies a rulemaking petition, it

must give "a brief statement of the grounds for denial" as required by 5 U.S.C. § 555. 812 F.2d at 4. At most, *American Horse Protection Association* is consistent with *Massachusetts*, Supreme Court precedent and this Court's decisions—rulemaking-petition denials are "susceptible to judicial review." *Massachusetts*, 549 U.S. at 527–28. Some such denials are final agency actions, and some are not; so the courts must apply the "pragmatic" rule on a case-by-case basis to determine finality.

The D.C. Circuit applies the "pragmatic" rule too. For example, in *Sierra Club v. Envtl. Prot. Agency*, 955 F.3d 56 (D.C. Cir. 2020), the court explained, "Whether an agency action has "direct and appreciable legal consequences" under the second prong of *Bennett* is a "'pragmatic' inquiry." *Id.* at 62–63 (citing, among other decisions, *Hawkes*, 136 S. Ct. at 1815; *Abbott Labs.*, 387 U.S. at 149). Applying the "pragmatic" rule, the court held that the agency's publication of a guidance document was not a final agency action, because "it does not determine rights or obligations and does not effectuate direct or appreciable legal consequences as understood by the finality inquiry." *Id.* at 58.

Nearly every other circuit court has likewise applied the "pragmatic" rule to assess administrative finality, and Appellant does not cite any circuit that has rejected it. *See Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 441–44 (5th Cir. 2019); *Dhakal v. Sessions*, 895 F.3d 532, 539 (7th Cir. 2018); *Hosseini v. Johnson*, 826 F.3d 354, 360 (6th Cir. 2016); *Hawkes Co. v. U.S. Army Corps of*

Engineers, 782 F.3d 994, 1002 (8th Cir. 2015), *aff'd*, 578 U.S. 590 (2016); *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014); *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 249 (3d Cir. 2011); *G. & T. Terminal Packaging Co. v. Hawman*, 870 F.2d 77, 79 (2d Cir. 1989); *Eastman Kodak Co. v. Mossinghoff*, 704 F.2d 1319, 1322 (4th Cir. 1983). Applying the "pragmatic" rule, the courts have reached different decisions on finality based on the facts before them.

2. Appellant has not shown any other basis for considering the question of finality here exceptionally important.

While ignoring the circuit courts' unanimity in applying the "pragmatic" rule and that the panel's decision was consistent with both this Court's decisions and Supreme Court precedent, Appellant tries in its petition (at 16) to inject "confusion" into the result. But there is no confusion. Some denials of rulemaking-petitions are "final," and some are not. Contrary to Appellant's statement (also at 16), it is *not* "well-settled that denials of rulemaking petitions are judicially reviewable ...." They are "susceptible to judicial review." *Massachusetts*, 549 U.S. at 527–28. So the courts must apply the "pragmatic" rule to determine finality on a case-by-case basis. The courts are capable of that exercise, as the panel was in this case. There is nothing exceptional about that.

Failing that, Appellant argues (at 16) that the panel "eviscerated the statutory right to petition for rulemaking" because there is no guarantee of judicial review of any denial. But that is not logical. Again, some denials are final agency actions, and

some are not. When seeking the review of a denial would only invite the courts' "premature adjudication" and cause courts to "entangl[e] themselves in abstract disagreements over administrative policies," and would not "protect the agencies from judicial interference," then the denial is not final and no judicial review is warranted. *See Abbott Labs.*, 387 U.S. at 148–49. This longstanding principle of judicial restraint is not exceptional. Nor does it prevent petitioning for rulemaking.

Last, Appellant argues (at 17) that the panel holding would frustrate implementation of the Endangered Species Act. But how so? The panel recited ample precedent that recovery plans like the one at issue here are not enforceable—they help FWS discharge its statutory duties, but do not impose any legal obligations. *Ctr. for Biological Diversity*, 58 F.4th at 418 (quoting *Friends of Blackwater*, 691 F.3d at 434). Moreover, as the panel pointed out, Congress did not impose any obligation on FWS to amend a recovery plan like the one at issue in this case. *Id.* at 418. The panel decision respects the Endangered Species Act and FWS's role. There is nothing exceptional about that.

The panel's decision does not present a question of exceptional importance, and the Court should deny Appellant's petition. *See* F.R.A.P. 35(a)(2).

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

DATED this the 14th day of April 2023.

Respectfully submitted,

/s/ Ivan L. London

William E. Trachman
Ivan L. London
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
(303) 292-2021
wtrachman@mslegal.org
llondon@mslegal.org

Attorneys for Agricultural Associations

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,187 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word, Times New Roman 14-point font.

April 14, 2023.

/s/ Ivan L. London

William E. Trachman
Ivan L. London
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
Tel: (303) 292-2021
Fax: (877) 349-7074
wtrachman@mslegal.org
ilondon@mslegal.org

Attorneys for Agricultural Associations

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2023, I electronically filed the foregoing *Response to Petition for Rehearing En Banc of Intervenor Appellees Wyoming Stock Growers' Association, Wyoming Farm Bureau Association, and Utah Farm Bureau Association*, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system, which will serve all registered CM/ECF users.

/s/ Ivan L. London
Ivan L. London
MOUNTAIN STATES LEGAL FOUNDATION