

No. 17-881

**In The
Supreme Court of the United States**

SCOTT TIMBER CO., ET AL.,

Petitioners,

v.

OREGON WILD, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE*
THE NATIONAL ASSOCIATION OF HOME
BUILDERS IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders (NAHB) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

TABLE OF CONTENTS

	Page(s)
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE GOVERNMENT’S INVOLVEMENT CANNOT BE USED TO FORECLOSE THE REGULATED COMMUNITY- INTERVENOR FROM EXERCISING THE RIGHT TO APPELLATE REVIEW	3
A. <i>The Circuits are Divided on the Government Presumption Doctrine, Despite this Court’s Holding in Trbovich</i>	5
B. <i>The Ninth Circuit’s Opinion Propagates the Government Presumption</i>	8
II. THE ABILITY OF INTERVENORS TO APPEAL IS CRITICALLY IMPORTANT TO REGULATED INDUSTRIES	10
CONCLUSION	16

TABLE OF AUTHORITIES

	Page(s)
<i>Cases</i>	
<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico</i> , 458 U.S. 592 (1982)	6
<i>Alvarado v. J.C. Penney Co., Inc.</i> , 997 F.2d 803 (10th Cir. 1993)	3-4
<i>Center for Biological Diversity v. Jewell</i> , 248 F.Supp.3d 946 (D. Ariz. March 29, 2017)....	11
<i>Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.</i> , 974 F.2d 450 (4th Cir. 1992)	4
<i>Commonwealth of Pa. v. Rizzo</i> , 530 F.2d 501 (3d. Cir. 1976).....	9
<i>Daggett v. Comm’n on Gov’t Ethics and Election Practices</i> , 172 F.3d 104 (1st Cir. 1999).....	7
<i>Defenders of Wildlife v. EPA</i> , 420 F.3d 946 (9th Cir. Aug. 22, 2005).....	13
<i>Diamond v. Charles</i> , 476 U.S. 54 (1986)	3, 10
<i>Dimond v. District of Columbia</i> , 792 F.2d 179 (D.C. Cir. 1986)	7, 14
<i>Food & Water Watch v. EPA</i> , 5 F.Supp.3d 62 (D.D.C. Dec. 13, 2013)	11
<i>Forest Conservation Council v. U.S. Forest Serv.</i> , 66 F.3d 1489 (9th Cir. 1995)	9
<i>Grutter v. Bollinger</i> , 188 F.3d 394 (6th Cir. 1999)..	8
<i>Massachusetts Food Ass’n v. Massachusetts Alcoholic Beverages Control Comm’n</i> , 197 F.3d 560 (1st Cir. 1999)	7

TABLE OF AUTHORITIES (cont.)

	Page(s)
<i>Mausolf v. Babbitt</i> , 85 F.3d 1295 (8th Cir. 1996)	6-7
<i>NAHB v. Defenders of Wildlife</i> , 551 U.S. 644 (2007)	13, 15
<i>Nat'l Farm Lines v. Interstate Commerce Comm'n</i> , 564 F.2d 381 (10th Cir. 1977)	8
<i>Nat'l Parks Conservation Ass'n v. EPA (NPCA)</i> , 759 F.3d 969 (8th Cir. 2014)	6
<i>Pine Creek Valley Watershed Ass'n v. EPA</i> , 97 F.Supp.3d 590 (E.D. Pa. March 17, 2015)	11
<i>Stringfellow v. Concerned Neighbors in Action</i> , 480 U.S. 370 (1987)	10
<i>Stupak-Thrall v. Glickman</i> , 226 F.3d 467 (6th Cir. 2000)	8
<i>Trbovich v. United Mine Workers of America</i> , 404 U.S. 528 (1972)	5
<i>Utah Ass'n of Counties v. Clinton</i> , 255 F.3d 1246 (10th Cir. 2001)	8, 12
<i>U.S. v. City of Los Angeles, Cal.</i> , 288 F.3d 391 (9th Cir. 2002)	9

**STATUTORY AND
REGULATORY PROVISIONS**

28 U.S.C. §1291	9
28 U.S.C. §1292(a)	9
Fed. R. Civ. Proc. 24	2, 11

TABLE OF AUTHORITIES (cont.)

	Page(s)
Fed. R. Civ. Proc. 24(a)(2)	6
OTHER	
Karen Black, <i>Trashing the Presumption: Intervention on the Side of the Government</i> , 39 Env'tl. L. 481 (Spring 2009)	6
Paul Emrath, <i>Government Regulation in the Price of a New Home</i> , Special Study on Housing Economics.com, May 2016, http://www.nahbclassic.org/fileUpload_ details.aspx?contentTypeID=3&contentID =250611&subContentID=670247&channelID =311 (last visited 01.18.18).....	12
Katharine Goepp, <i>Presumed Represented: Analyzing Intervention as of Right When the Government is a Party</i> , 24 W. New Eng. L. Rev. 131 (2002).....	7
Petition for Writ of Certiorari, <i>Scott Timber Co., et al. v. Oregon Wild, et al.</i> , (No. 17-881), 2017 WL 6525803 (Filed Dec. 18, 2017).....	4, 9
<i>Defenders of Wildlife, et al. v. EPA, U.S. Fish & Wildlife Serv., Nat'l Ass'n of Home Builders</i> , Resp'ts Answering Brief, (Nos. 03-71439 & 03-72894), 2003 WL 22926366 (9th Cir. Nov. 6, 2003).....	13-14

TABLE OF APPENDICES

Page(s)

APPENDIX A. <i>Defenders of Wildlife, et al. v. U.S. Environmental Protection Agency and National Association of Home Builders, et al.</i> , Home Builders Motion to Intervene and Supporting Memorandum, Case No. 03-71439 (9th Cir. April 29, 2003) (Intervention Brief)	14, 15
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INTEREST OF *AMICUS CURIAE*¹

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States. NAHB members also include manufacturers, retailers, and providers of products and services closely related to the residential construction industry.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated. As an advocate, NAHB has an interest in protecting its rights when it intervenes in litigation.

¹ Counsel of record for all parties received notice prior to the due date of the *amicus curiae*'s intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

If not for intervention, the business community would frequently find itself on the outside looking in as the government and other parties litigate the regulations that govern their businesses and livelihoods. Intervention, especially as conceived in the 1966 amendments to Federal Rule of Civil Procedure 24 (“Rule 24”), has been an invaluable tool for industries and the trade associations that represent them to meaningfully participate in litigation that impacts the very nature of their business activities.

Intervention is itself a combination of rights and obligations, because, once granted, the intervenor has the same status as an original party – and this is precisely the point of intervention. Without the ability to exercise these rights, intervenor status is meaningless.

The Ninth Circuit has stripped the Petitioners of the full authority inherent in their intervenor status and left them unable to counteract an adverse decision through an appeal. The Ninth Circuit’s use of a “general rule” prohibiting intervenors from appealing decisions involving the government is an outgrowth of a doctrine that some courts have used to prevent parties from intervening in litigation where the government is a party.

These courts have instituted practices that have counteracted the intent of Rule 24, and imposed limitations on parties seeking to intervene or to exercise their rights as intervenors. Discussed more

fully below is the inconsistent application of the doctrine of “*parens patriae*” to intervention where the government is a party to the litigation. This principle, known often as the “government presumption,” has been used to bar intervention by finding that would-be intervenors are adequately represented by the government. The Ninth Circuit’s “general rule” that forecloses appeal by intervenors would lose much of its legal underpinnings if the government presumption were invalidated.

NAHB is no stranger to intervening in cases where the government is a party. Under the Ninth Circuit’s view, NAHB’s ability to intervene and bring appeals as an intervenor would be significantly diminished. NAHB therefore stands with Petitioners Scott Timber Company and Carpenters Industrial Council and asks this Court to hold that intervenors are eligible to appeal regardless of the nature of the parties in the litigation.

ARGUMENT

I. THE GOVERNMENT’S INVOLVEMENT CANNOT BE USED TO FORECLOSE THE REGULATED COMMUNITY-INTERVENOR FROM EXERCISING THE RIGHT TO APPELLATE REVIEW.

Intervention is essentially a collection of rights – the right to file motions, conduct discovery, and the right to pursue an appeal. *See, e.g., Diamond v. Charles*, 476 U.S. 54, 68 (1986)(holding that intervenors are “entitled, among other things, to seek review by this Court.”); *Alvarado v. J.C. Penney Co., Inc.*, 997 F.2d

803, 805 (10th Cir. 1993)(“We agree that ‘[w]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party.”); *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992)(“[W]e agree with Justice Black that, ‘No judge is granted power...to completely deny a party all opportunity to take depositions or to get affidavits essentially needed to get a fair trial of his case.’”)(*internal citations omitted*). If an intervenor is denied any of these fundamental elements, the intervention is greatly diminished.

As Petitioners ably describe, the Ninth Circuit has taken away its right to appeal, violating both statute and this Court’s precedent. Petition for Writ of Certiorari at 15-16, 18-24, *Scott Timber Co., et al. v. Oregon Wild, et al.*, (No. 17-881), 2017 WL 6525803 (Filed Dec. 18, 2017) (Pet. for Writ of Cert.). The “general rule” the Ninth Circuit has concocted to prevent intervenors from appealing where the government is a party is connected to the broader “*parens patriae*” or “government presumption” doctrine that some courts have employed to deny parties the right to intervene. An overview of the government presumption is useful here because the rationale against using the government presumption to exclude would-be intervenors can be equally applied against using a “general rule” to fundamentally alter an intervenor’s bundle of rights.

A. The Circuits are Divided on the Government Presumption Doctrine, Despite this Court's Holding in Trbovich.

This Court's jurisprudence supports the Petitioners' claim that the ability of an intervenor to appeal cannot be limited by the presence of the government in the litigation.

In *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), this Court held that the Secretary of Labor did not adequately represent a union member who had initially brought a claim of improper union activity to the Secretary's attention. *Id.* at 538. Under the statute, the Secretary was charged with litigating valid claims brought by individual union members; thus, the interests of the Secretary and the union worker were nearly identical. *Id.* at 531. This Court nonetheless found two grounds for inadequate representation. First, because the Secretary is essentially serving as the union member's lawyer, "the union member may have a valid complaint about the performance of 'his lawyer.'" *Id.* at 539. Second, the Secretary also had a separate, broader interest in "assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Id.*

Despite these seemingly clear parameters, some Circuit Courts have sought limiting principles where none exist. One of the principles applied to limit intervention is *parens patriae* or the government presumption doctrine.

The *parens patriae* doctrine, which originates in English common law, was defined for modern use by this Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). See Karen Black, *Trashing the Presumption: Intervention on the Side of the Government*, 39 *Env'tl. L.* 481 (Spring 2009). This Court held that the doctrine applied where a “quasi-sovereign” interest was at stake, such as the general health and well-being of a state’s citizens, or the right of states to defend against discrimination in the federal system. 458 U.S. at 607-8.

In the intervention context, *parens patriae* is implicated when courts seek to determine whether “existing parties adequately represent” the interest a would-be intervenor claims. Fed. R. Civ. Proc. 24(a)(2). Some courts, including the Ninth Circuit, have held that where the government is a party, “the bar is raised, because in such cases, the government is ‘presumed to represent the interests of all its citizens.’” *Nat’l Parks Conservation Ass’n v. EPA (NPCA)*, 759 F.3d 969, 976-77 (8th Cir. 2014)(quoting *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996)).

Some courts, like the Eighth Circuit in *NPCA* and *Mausolf*, restrict the government presumption to cases involving a “sovereign interest,” and that the bar is triggered only “to the extent [the proposed intervenor’s] interests coincide with the public interest.” *NPCA*, 759 F.3d at 977. Thus, in these circuits, the government presumption is more easily overcome. See, e.g., *Mausolf*, 85 F.3d at 1303 (“We emphasize that the *parens patriae* presumption . . . does *not* necessarily apply in all cases in which the

government is a party.”) (emphasis in original); *see also, e.g., Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (“State Farm’s application for intervention thus falls squarely within the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances.”).

Other circuits have required far more of would-be intervenors seeking to join litigation where the government is a party.² The First Circuit, for example, has required would-be intervenors to overcome a presumption that applies where “the government [is] defending the validity of the statute.” *Daggett v. Comm’n on Gov’t Ethics and Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999). The First Circuit took this doctrine a step further when it decided *Massachusetts Food Ass’n v. Massachusetts Alcoholic Beverages Control Comm’n*, 197 F.3d 560 (1st Cir. 1999), later that year. In *Massachusetts Food Ass’n*, the court held that intervenors who were regulated by the government agency in the litigation could not satisfy what had become their burden of demonstrating inadequate representation. 197 F.3d at 567.

Still other courts have completely disavowed the government presumption. The Sixth Circuit has held that there is no “higher bar” for would-be intervenors when the government is a party to the

² See generally, Katharine Goepp, *Presumed Represented: Analyzing Intervention as of Right When the Government is a Party*, 24 W. New Eng. L. Rev. 131 (2002).

suit. *See, e.g., Stupak-Thrall v. Glickman*, 226 F.3d 467, 479 (6th Cir. 2000)(noting that “this circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved”(citing *Grutter v. Bollinger*, 188 F.3d 394, 397-8 (6th Cir. 1999)). The Tenth Circuit likewise has refused to apply the government presumption doctrine to private would-be intervenors, and identified the inherent and insurmountable conflict between the litigating positions of the government and private intervenors. *See Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001)(recognizing a “familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible.” (citing *Nat’l Farm Lines v. Interstate Commerce Comm’n*, 564 F.2d 381, 384 (10th Cir. 1977)).

Thus, a clear split exists in the circuits as to whether a government presumption exists, and if so, what showing would-be intervenors must make to overcome the presumption. The Petitioners here present this Court with an opportunity to clarify the use of the government presumption by speaking to the propriety of its use in the context of the Ninth Circuit’s extension of the doctrine to the prohibition of appeals.

B. The Ninth Circuit’s Opinion Propagates the Government Presumption.

While the Ninth Circuit does not explicitly reference *parens patriae* or the government presumption in

the Petitioners' case, its "general rule" bears a striking resemblance. The Ninth Circuit recognizes and applies the government presumption doctrine to parties seeking to intervene in cases where the government is an original party. See *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995)(holding that "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." *Id.* at 1499 (quoting *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 505 (3d. Cir. 1976))). See also, *U.S. v. City of Los Angeles, Cal.*, 288 F.3d 391, 403 (9th Cir. 2002)(holding that the government presumption was overcome by union, but not by community groups seeking to intervene in litigation and settlement between the United States and the City of Los Angeles over police misconduct issues).

The Ninth Circuit has now extended the government presumption to bar the ability of an intervenor – possessing all the rights of an original party – to appeal an adverse ruling solely on the basis of the government's presence in the litigation.

By removing the right to appeal, the court has stripped intervenor status of much of its power. In Petitioners' case, the Ninth Circuit held that, as a general rule, private parties cannot appeal a remand to a federal agency. As Petitioners explain, there is no basis in 28 U.S.C. §1291 or §1292(a) for courts to determine appeals based on the nature of the parties in the case. Pet. for Writ of Cert. at 18-19. The Ninth Circuit, in making a distinction based on the fact that the government is a party to the case, has

employed the government presumption in a slightly different context. Instead of using the government presumption to exclude Petitioners from intervening in the first place, the Ninth Circuit has in effect expanded the presumption to prevent Petitioners from pursuing an appeal.

The ability to appeal is a hallmark of party involvement, and this Court has held that intervenors have all the rights of original parties, including the right of review. *See Diamond*, 476 U.S. at 68 (recognizing that “...intervenors are considered parties entitled, among other things, to seek review by this Court...”); *see also Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-6 (1987) (“An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court.”). The Petitioners here have been denied that right, not based on the “finality” of the district court’s order, but (similar to the government presumption doctrine) because the Petitioners intervened on behalf of a federal agency. NAHB urges this Court to grant the petition and correct the Ninth Circuit’s rule that hinders the rights of an intervenor based on another party to the litigation.

II. THE ABILITY OF INTERVENORS TO APPEAL IS CRITICALLY IMPORTANT TO REGULATED INDUSTRIES.

Without the ability to appeal, intervenors like Petitioners and other regulated industries like residential construction, cannot fully protect their interests or those of their members. Petitioners and

NAHB share a unique status as members of the regulated community that are often faced with litigation over the regulations that govern their industries. Regulated communities must have unfettered access to the judicial system through intervention where they have satisfied the requirements of Rule 24.

NAHB frequently intervenes in cases on behalf of the federal government. *See, e.g., Center for Biological Diversity v. Jewell*, 248 F.Supp.3d 946 (D. Ariz. March 29, 2017)(intervening on behalf of the U.S. Fish & Wildlife Service in suit brought by ENGOs concerning the Services listing decision for the cactus ferruginous pygmy owl and its Significant Portion of the Range policy); *Pine Creek Valley Watershed Ass'n v. EPA*, 97 F.Supp.3d 590 (E.D. Pa. March 17, 2015)(intervening on behalf of EPA in a challenge filed concerning Clean Water Act antidegradation review); *Food & Water Watch v. EPA*, 5 F.Supp.3d 62 (D.D.C. Dec. 13, 2013)(intervening on behalf of EPA in support of its authorization of a pollution trading program). NAHB members are regulated by a wide range of federal agencies, from the U.S. Environmental Protection Agency, to agencies within the U.S. Departments of Housing and Urban Development, Labor, Interior, Commerce, and Agriculture, through countless regulations and guidance impacting every facet of their businesses. Often it is necessary for NAHB to challenge regulations because they improperly impose onerous burdens on

the residential construction industry.³ However, NAHB will also act to protect federal regulations where satisfied that the regulation at issue will not unduly burden NAHB's members. One of the ways NAHB seeks to preserve reasonable regulations is to intervene in litigation brought by groups seeking to overturn those rules. Such litigation frequently occurs in the environmental context, where environmental groups challenge agency regulations for failing to be, from their perspective, sufficiently stringent. Moreover, presidential administrations often change during long, drawn-out litigation. Intervention helps intervenors protect an outcome that may change during "unanticipated policy shifts." *Utah Ass'n of Counties*, 255 F.3d at 1256 (holding that intervenors' interest were not adequately represented by the government in part because the government's position in the litigation had become uncertain).

NAHB intervenes in order to prevent the promulgation of a regulation that is more burdensome to its members, which can arise either through court order, settlement, or a change in administration. Thus, in most of the cases in which NAHB intervenes, its interests in the regulation at issue vary significantly from the agency's, even

³ Nearly 25 percent of the cost of a new home results from regulation at the federal, state, and local level. See Paul Emrath, *Government Regulation in the Price of a New Home*, Special Study on Housing Economics.com, May 2016, http://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=250611&subContentID=670247&channelID=311 (last visited 01.18.18).

where NAHB and the agency's desired outcome is the same.

Perhaps no other NAHB case exemplifies this better than a case NAHB brought to this Court as an intervenor on behalf of EPA. In *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007), environmental groups challenged EPA's approval of a Clean Water Act permitting program called the National Pollutant Discharge Elimination System (NPDES) program, submitted by the state of Arizona. NAHB intervened on behalf of EPA to support its approval of Arizona's program. The Ninth Circuit sided with the ENGOs and held that EPA had improperly concluded that it did not have to perform consultation required by Endangered Species Act section 7(a). *Defenders of Wildlife v. EPA*, 420 F.3d 946, 950 (9th Cir. Aug. 22, 2005). After rehearing *en banc* was denied, NAHB, followed by EPA, filed a petition for *certiorari* with this Court. The petition was granted, and ultimately this Court reversed the Ninth Circuit, granting deference to EPA and FWS' regulation that interpreted section 7 to apply only to discretionary actions. *Defenders*, 551 U.S. at 666-67.

It may seem that NAHB and EPA were in lock-step agreement here – both wanted Arizona to have authority to administer the NPDES program, and neither wanted Endangered Species Act consultation to be imposed onto EPA's approval process. But NAHB and EPA both had very different motivations. For EPA, its motivation was established by Congress. As EPA stated in its brief at the Ninth Circuit, “[r]ecognizing the ‘primary

responsibilities and rights' of states to control water pollution . . . Congress declared that it is the "policy of Congress" that states with NPDES programs meeting federal requirements be allowed to administer the NPDES program within their borders, subject to EPA approval and oversight." *Defenders of Wildlife, et al. v. EPA, U.S. Fish & Wildlife Serv., Nat'l Ass'n of Home Builders*, Resp'ts Answering Brief at 7, (Nos. 03-71439 & 03-72894), 2003 WL 22926366 (9th Cir. Nov. 6, 2003). EPA's primary interest was therefore to ensure that the correct balance between federal and state authority was reached in regulating discharges of pollutants in Arizona.⁴

NAHB's motivations in this case had nothing to do with EPA's cooperative federalism goals. Instead, NAHB and its affiliated local associations in Arizona ("Associations") had a far "more narrow and more parochial" interest. *Dimond*, 792 F.2d at 193. The Associations were actively involved in the development of Arizona's approval process to administer the NPDES program in that state. As the Associations asserted in their motion to intervene, their motivation to become engaged in the

⁴ EPA also recognized the inherent efficiencies in having a state administer the NPDES program. See *Defenders of Wildlife, et al. v. EPA, U.S. Fish & Wildlife Serv., Nat'l Ass'n of Home Builders*, Home Builders' Motion to Intervene and Supp. Mem. at App. 4a, (Nos. 03-71439), 2003 WL 22926366 (Filed April 29, 2003) (Intervention Brief) (citing to EPA Region 9 press release that acknowledged ADEQ's ability to "issue timely permits and also to enforce laws that protect the quality of Arizona's water resources.") (internal citations omitted).

development of Arizona's permitting program was to achieve "reduced compliance costs and fewer and shorter project delays arising from permitting activities" for their builder members. App. 2a, Intervention Brief at 3. Additionally, the Associations desired for their members to "benefit from Congress' objective of having the states administer the NPDES program, as opposed to an EPA office located in another state." App. 5a, Intervention Brief at 11. NAHB's goal in this case was to ensure that its Arizona members could enjoy these benefits of a state-delegated permitting program, and that its members nationally would not be impacted by confusion and delay resulting from the imposition of section 7 consultation to every state seeking to administer the NPDES program. Accordingly, NAHB sought *certiorari* apart from EPA's interests.

Thus, while both NAHB and EPA desired the same outcome, their interests were very different. Neither this Court, nor the Ninth Circuit, raised any jurisdictional concerns when NAHB pursued appeal of a remand order to a federal agency. Many other intervenors, like Petitioners here, have not been so lucky.

NAHB's experience in *NAHB v. Defenders of Wildlife* is illustrative of the type of significant interests regulated communities seek to protect when they intervene in litigation challenging government regulation. While NAHB was permitted to intervene – and appeal – in this instance, the same result may not have occurred in the Ninth Circuit today or in another circuit that employs the government

presumption doctrine to would-be intervenors or to intervenors that seek to exercise their right to appeal. A clear statement from this Court that intervention or the exercise of intervenor rights are not dictated by the presence or absence of the government as a party will protect regulated communities like the Petitioners and NAHB, and ensure that their issues are adjudicated by the courts.

CONCLUSION

For the foregoing reasons NAHB urges this Court to grant the petition.

Dated: January 19, 2018

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APPENDIX

TABLE OF APPENDICES

	Page(s)
APPENDIX A. <i>Defenders of Wildlife, et al. v. U.S. Environmental Protection Agency and National Association of Home Builders, et al.</i> , Home Builders Motion to Intervene and Supporting Memorandum, Case No. 03-71439 (9th Cir. April 29, 2003) (Intervention Brief)	App. 1a

APPENDIX A

1a

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DEFENDERS OF
WILDLIFE; AND CENTER
FOR BIOLOGICAL
DIVERSITY; CRAIG
MILLER

Case No. 03-71439

Petitioners,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY,
Respondent,

and

NATIONAL ASSOCIATION
OF HOME BUILDERS,
SOUTHERN ARIZONA
HOME BUILDERS
ASSOCIATION, AND
HOME BUILDERS
ASSOCIATION OF
CENTRAL ARIZONA,

*Applicants in
Intervention.*

**HOME
BUILDERS'
MOTION TO
INTERVENE
AND
SUPPORTING
MEMORANDUM**

* * *

designed to implement the AZPDES Program,⁵ assisted in the development of relevant legislation,⁶ and participated in ADEQ's development of the State's equivalent to EPA's Storm Water Construction General Permit, designed to authorize small discharges of storm water containing pollutants with negligible environmental impacts resulting from construction activities.⁷ Lurie Declaration at ¶¶ 11-18. Home Builders have invested significant time and money in these efforts because they will benefit from EPA's transfer of authority to the State, by way of reduced compliance costs and fewer and shorter project delays arising from permitting activities. *Id.* at ¶¶ 9-10; Wilhelm Declaration at ¶¶ 11, 16.

* * *

⁵ These rules are codified in Title 18, Chapter 9, Articles 9 and 10 of the Arizona Administrative Code.

⁶ These laws are codified at Arizona Revised Statutes, Title 49, Chapter 2, Article 3.1 and Chapter 4, Article 4.

⁷ The State's construction general permit was finalized on February 25, 2003.

3. Home Builders have an interest in receiving the benefits of State administration of the NPDES Program.

As discussed above, Congress intended to “recognize, preserve, and protect the primary responsibilities and rights of States” in administering the CWA. 33 U.S.C. §1251(b). This Court recently explained that the CWA “anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Environmental Defense Center*, 319 F.3d at 414, quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 1010 (1992). The CWA encourages states to “assume the major role in the operation of” the NPDES Program. *Boise Cascade*, 942 F.2d at 1430. Accordingly, EPA is required to approve state NPDES programs that satisfy the nine requirements specified in CWA §402(b), 33 U.S.C. §1342(b), and cannot attach conditions based on ESA concerns. *American Forest and Paper*, 137 F.3d at 297-298. Both the State of Arizona and EPA believe that the AZPDES, administered by ADEQ, will function more efficiently than the NPDES administered by EPA’s San Francisco office:

This move represents a win for Arizona citizens and businesses. The public benefits from our consolidated oversight of water pollution control activities, and businesses benefit from reduced permit costs. As a result of the

agreement, ***ADEQ will be in a much better position to issue timely permits and also to enforce laws that protect the quality of Arizona's water resources.***

EPA News Release, (Exhibit A).

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-11-

that farmers intending to purchase lands pursuant to the Reclamation laws had a sufficiently protectable interest in receiving the benefits Congress intended they receive when it enacted those laws to intervene in an action seeking to force the Department of the Interior to develop an environmental impact statement prior to promulgating rules authorizing such sales. 622 F.2d at 438. The Court explained that the farmers were “precisely those Congress intended to protect with the reclamation acts and precisely those who will be injured if the Department of the Interior does not act expeditiously in accordance with the mandates of the reclamation acts and the [APA].” *Id.* Likewise, in this case, Home Builders’ members are intended to benefit from Congress’ objective of having the states administer the NPDES Program, as opposed to an EPA office located in another state. Home Builders’ members will be injured by any decision that overturns or otherwise clouds or delays the AZPDES Program. Projects will be delayed, permits may be pulled, and the home building industry will suffer. Lurie Declaration at ¶¶27-28.