No. 17-71

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

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

AMICUS CURIAE BRIEF ON THE MERITS IN SUPPORT OF PETITIONER ON BEHALF OF THE WYOMING STOCK GROWERS ASSOCIATION; WYOMING ASSOCIATION OF CONSERVATION DISTRICTS; WYOMING FARM BUREAU FEDERATION; WYOMING WOOL GROWERS ASSOCIATION; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO WOOL GROWERS, INC.; ARIZONA/NEW MEXICO COALITION OF COUNTIES FOR STABLE ECONOMIC GROWTH; AND PROGRESSIVE PATHWAYS, LLC

KAREN BUDD-FALEN
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
(307) 632-5105
karen@buddfalen.com

Counsel for Amici Curiae Wyoming Stock Growers Association; Wyoming Association of Conservation Districts; Wyoming Farm Bureau Federation; Wyoming Wool Growers Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; Arizona/New Mexico Coalition of Counties for Stable Economic Growth; and Progressive Pathways, LLC

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the United States Fish and Wildlife Service's decision not to exclude certain private property from a critical habitat designation, after taking into consideration the economic impact of the designation, is a discretionary agency decision that is reviewable by the Court.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTION

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

AMICUS CURIAE BRIEF OF THE WYOMING STOCK GROWERS ASSOCIATION; WYOMING ASSOCIATION OF CONSERVATION DISTRICTS; WYOMING FARM BUREAU FEDERATION; WYOMING WOOL GROWERS ASSOCIATION; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO WOOL GROWERS, INC.; ARIZONA/NEW MEXICO COALITION OF COUNTIES FOR STABLE ECONOMIC GROWTH; AND PROGRESSIVE PATHWAYS, LLC IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Wyoming Stock Growers Association; Wyoming Association of Conservation Districts; Wyoming Farm Bureau Federation; Wyoming Wool Growers Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; Arizona/New Mexico Coalition of Counties for Stable Economic Growth; and Progressive Pathways, LLC respectfully submits this *amicus curiae* brief, on behalf of themselves and their members, in support of Petitioner.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus* confirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties. *See* S.Ct.R. 37.3(a).

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The mission of the Wyoming Stock Growers Association (WSGA) is to serve the livestock business and families of Wyoming by protecting their economic, legislative, regulatory, judicial, environmental, custom, and cultural interests. The WSGA advocates for the protection of private property rights from over burdensome regulatory interference. The Association maintains a legal fund to enable it to initiate, defend or support litigation on critical issues with the potential to have a major impact on its members' ranching enterprises including their private property rights.

The Wyoming Association of Conservation Districts (WACD) provides leadership for the conservation of Wyoming's soil and water resources, promotes the control of soil erosion, promotes and protects the quality of Wyoming's waters, promotes the wise use of Wyoming's water and all other natural resources, preserves and enhances wildlife habitat, protects the tax base and promotes the health, safety and general welfare of the citizens of the State of Wyoming through a responsible conservation ethic. The WACD advocates for the protection of property rights and land and water resources through local solutions to environmental concerns.

The Wyoming Farm Bureau Federation (WFBF) is a general agriculture organization with more than 2,600 member families. Its members work together to develop agricultural resources, policy, programs and

services to enhance the rural lifestyle of Wyoming. This organization provides a means by which farmers and ranchers work together for the benefit of the agriculture industry including the use of private property on which its members depend. Its policies cover a broad range of issues including the Endangered Species Act.

The Wyoming Wool Growers Association (WWGA) is an association of ranchers on both private land and federal leased land whose goal is to protect, preserve, and enhance the lamb and wool industry and the ranching community and lifestyle. The WWGA has been an active partner with the State of Wyoming and its citizens in caring for, enhancing, and adding value to the renewable resources of the state, including those on private lands.

The New Mexico Cattle Growers Association was established in 1914 to assist livestock producers in the State of New Mexico. The association has members in all 33 of New Mexico's counties as well as in 19 other states. The purpose of the Association is to advance and protect the cattle industry of New Mexico; work toward solutions of industry problems; promote the well-being of the industry; provide an official and united voice on issues of importance to the cattle producers and feeders; and create and maintain an economic climate that will provide members of the Association with the opportunity to obtain optimum returns on their investment.

The New Mexico Wool Growers, Inc. is the state of New Mexico's oldest livestock trade organization. The

Association lobbies in the interests of the sheep industry, including the food and fiber industry in the state of New Mexico. The New Mexico Wool Growers also provides information, programs and advocacy services. The organization is active in promoting agriculture and ranching and works on legislative and regulatory issues that affect the industry.

The Arizona/New Mexico Coalition of Counties for Stable Economic Growth (Coalition) is a coalition of local governments in the states of Arizona and New Mexico as well as agriculture and industry organizations, private individuals and businesses located in both states. The Coalition's mission includes protecting the rural economies of the member local governments, maintaining and increasing the tax base, protecting private property rights, protecting and enhancing endangered plants and animal species at the same time as reducing the negative effects of the Endangered Species Act restrictions on federal, state and private lands.

Progressive Pathways, LLC is an entity formed by private property owners in Wyoming with the continuing purpose of educating its members and other interested publics regarding pipelines, condemnation and landowners' rights, especially as these issues affect private property owners. The LLC also works to take whatever steps are necessary to protect local residents (including schools, farmsteads, and areas of concentrated populations) to address environmental damage and to help protect and improve landowners' rights

through legislation, public education, the courts and any other forum that will further this purpose.

STATEMENT OF THE CASE

Two of the most fundamental rights given to us by our Founding Fathers is the right to use and own private property. James Madison in Federalist 54 wrote "Government is instituted no less for the protection of the property than of the persons of individuals." Federalist No. 54 (James Madison). The Founding Fathers further acknowledged this right by creating two constitutional amendments protecting the right to private property in the forms of the Fifth and Fourteenth Amendments. Under these constitutional amendments private property cannot be taken without due process of law. U.S. Const., amend. V; U.S. Const., amend. XIV. One of the most important forms of due process of law when property is being taken by administrative actions is the right for judicial review. *Greene v. McElroy*, 360 U.S. 474, 493 (1959).

In this case, the United States Fish and Wildlife Service (FWS) designated two tracts of land as critical habitat under the Endangered Species Act (ESA). One tract contained all of the primary constituent elements necessary for the survival of the dusky gopher frog including a population of the species. Additionally the FWS designated the Petitioner's private property as critical habitat, although, as admitted by the FWS, as it currently sits, Petitioner's parcel is uninhabitable by the

endangered frog and contains none of the endangered species themselves. 77 Fed. Reg. 35,129 (June 12, 2012). When conducting the required economic analysis for designating critical habitat, the FWS determined that the designation of the Petitioner's tract could result in up to $34 million in economic impacts due to lost development opportunity. *Id*. at 23,140. Further, the FWS could not show any discernible benefit for designating the Petitioner's private land as critical habitat. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 848 F.3d 635, 654 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc). The ESA requires that the FWS consider the economic impact of designating critical habitat, and if the benefits of excluding a parcel from the critical habitat designation outweigh the benefits of including the parcel as critical habitat, then the Secretary may exclude the land from a critical habitat designation. 16 U.S.C. § 1533(b)(2). That analysis was not done in this case and the Respondents argue that the decision to not complete the required analysis is not reviewable by the Court.

Despite the great disparity between the potential economic harm and any benefits associated with designating the currently uninhabitable Petitioner's land as critical habitat, the FWS persisted on designating the habitat and further refused to exclude the Petitioner's land as critical habitat. Both the United States District Court for the Eastern District of Louisiana and on a split decision, the 5th Circuit Court of Appeals ruled in favor of the FWS stating that species habitability is not a requirement for critical habitat, and

further, that the court cannot review the FWS's decision not to designate critical habitat because the decision is a discretionary decision. Sustaining precedent that would allow the FWS to designate currently uninhabitable land as critical habitat, and further, not allowing judicial review of decisions not to exclude certain tracts of private land from a critical habitat designation should not stand. The *amici curiae* represent thousands of agricultural landowners owning tens of thousands of acres of land in the West. Many of these landowners have property that is similarly situated to the Petitioner's land in that their land could have only one of the physical and biological features deemed necessary for a listed species' habitat but be designated as "critical habitat" anyway despite the harm to the landowner. A ruling in favor of the FWS would expose their land to similar unchallengeable critical habitat designations.

Finally, it is important to note that despite Respondents' claims to the contrary, critical habitat designations on private land can fundamentally harm the property rights and economic use associated with the land. Section 7 of the ESA requires that all federal agencies must consult with the FWS whenever performing discretionary activities that could result in destruction or adverse modification of critical habitat (*see Conservation Council for Hawai'i v. Babbitt*, 2 F.Supp.2d 1280, 1286 (D. Haw. 1998)) *and* if the FWS determines that such adverse modification will occur, then the federal agency must either discontinue the action, ask for an exemption, or provide mitigation in order to replace the harmed critical habitat. Section 7

has evolved to reach nearly all agency activities, including minor and relatively unrelated activities such as FEMA granting flood insurance, the Farmer's Home Administration providing a loan guarantee for upgrading a water pipeline, or the U.S. Rural Electrification Administration funding an electrical substation. *See Florida Key Deer v. Stickney*, 864 F.Supp. 1222 (S.D. Fla. 1994); *see also National Wildlife Federation v. FEMA*, 345 F.Supp.2d 1151 (W.D. Wash. 2004). ESA Section 7 consultation was required in all of these cases because of the potential that the project would encourage new development. *Florida Key Deer* at 1235. In *Sierra Club v. Glickman*, 145 F.3d 606, 619 (5th Cir. 1998), the court required the farmers to undergo ESA Section 7 consultation regarding the impact of irrigation on critical habitat prior to receiving farm subsidy payments. In an industry where merely every action requires acquiescence from the federal government, even on private land, the designation of critical habitat on private land could stop many otherwise lawful uses of private property.

SUMMARY OF THE ARGUMENT

Amici Curiae urge this Court to rule in favor of the Petitioner and hold that the court may review the FWS's decision not to exclude certain lands as critical habitat pursuant to 16 U.S.C. § 1533(b)(1)(2). This Court has stated that agency actions are presumptively judicially reviewable. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The presumption

is rebuttable by the federal agency when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. *Id*. at 1651. However, the agency bears a "heavy burden" in attempting to show that Congress "prohibited all judicial review" of the agency's compliance with a legislative mandate. *Id*. Based on precedent set by this Court regarding other claims by agencies of unreviewable actions, the language set forth by Congress in the Endangered Species Act does not "prohibit all judicial review," and thus falls short of overcoming the strong presumption in favor of judicial review.

The Fifth Circuit's ruling that the FWS's decision not to exclude certain private property from a critical habitat designation is unreviewable also contradicts this Court's decision in *Bennett v. Spear*. That case held that the agency's ultimate decision regarding critical habitat designation could, at the very least, be reviewable for an "abuse of discretion." 520 U.S. 154, 172 (1997).

Finally, ruling that the FWS's decision is unreviewable abdicates the Court's traditional role of ensuring that the mandates of Congress are enforced. Doing so would be counter to Congress' intent when it ordered the designation of critical habitat because it would take the teeth away from Congress' mandate that the FWS take into consideration the economic impact of specifying any particular area as critical habitat. Further, such a ruling would create no legal recourse for property owners whose property would

suffer severe and perhaps unjustified economic harm due to inclusion in a critical habitat designation.

ARGUMENT

I. THE LANGUAGE IN THE ENDANGERED SPECIES ACT DOES NOT OVERCOME THE PRESUMPTION FOR JUDICIAL REVIEW.

Agency actions are presumptively judicially reviewable. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015) (holding that a court may review whether the EEOC has satisfied its statutory obligation to attempt conciliation with an employer, as a prerequisite to a Title VII action, despite fact that the statute grants the EEOC "broad leeway" in determining how to attempt conciliation). The presumption is rebuttable by the federal agency when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. *Id*. at 1651. This must be shown by "'clear and convincing' indications drawn from 'specific language,' 'specific legislative history,' and 'inferences of intent drawn from the statutory scheme as a whole' that Congress intended to bar review." *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (ruling that judicial review was proper despite language within the statute stating "the determination . . . under this section . . . shall be final and non-appealable"). One way Congress shows its intent to prohibit agency review is when "there is no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470

U.S. 821, 830 (1985). However, the agency bears a "heavy burden" in attempting to show that Congress "prohibited all judicial review" of the agency's compliance with a legislative mandate. *Mach Mining, LLC*, 135 S. Ct. at 1653.

In the present case, the ESA requires that the FWS *shall* consider the economic impact of a critical habitat designation. 16 U.S.C. § 1533(b)(2). (Emphasis added). When a statute distinguishes between "may" and "shall," it is generally clear that "shall" imposes a mandatory duty; therefore the FWS has a mandatory duty to make economic considerations when designating critical habitat. *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969, 1977 (2016); *see also Bennett v. Spear*, 520 U.S. 154 (1997) (ruling that the FWS must mandatorily make economic considerations when designating critical habitat). Upon considering the economic impact of a critical habitat designation, the FWS, "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. . . ." 16 U.S.C. § 1533(b)(2). The majority in the Fifth Circuit adopted the FWS's argument that once the Service fulfills its statutory obligation to "consider" economic impacts, a decision not to exclude an area is discretionary, and is thus not reviewable in court. *Markle Interests, LLC v. U.S. Fish and Wildlife Service*, 827 F.3d 452, 474 (5th Cir. 2016). The Fifth Circuit based this decision on *Heckler* in which this Court ruled that, "If no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is

impossible to evaluate agency action for 'abuse of discretion.'" 470 U.S. 821 (1985). Since § 1533(b)(2) states that the agency "may" exclude an area from critical habitat, the Fifth Circuit concluded that the decision was completely discretionary, and thus unreviewable by the court.

There are several reasons why the Fifth Circuit's majority conclusion is incorrect. First, the discretionary action in *Heckler* is distinguishable from the agency action set forth in excluding private property from a critical habitat designation. Second, the Administrative Procedures Act (APA) does not prohibit judicial review of all discretionary decision making. Third, there are judicially manageable standards available for judging whether the FWS's decision not to exclude the property as critical habitat was an abuse of discretion. Finally, the FWS never overcame the "heavy burden" it must show in order to overcome the presumption of judicial review. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 848 F.3d at 654 (Jones, J., dissenting from denial of rehearing en banc).

A. *Heckler v. Chaney* is distinguishable from the present case.

The Fifth Circuit majority based its ruling that the FWS's decision not to exclude Petitioner's property from the critical habitat designation on the precedent set forth in *Heckler v. Chaney*. Pet. App. at 35a. However, *Heckler* is distinguishable from the present case

and *Heckler*'s rationale does not extend to the type of decision made by the FWS here.

In *Heckler*, this Court reviewed the extent to which a court may review the Food and Drug Administration's decision not to take enforcement actions requested by respondents. 470 U.S. at 838. The Court concluded that an agency's decision not to enforce a statutory provision regarding an enforcement action is unreviewable. *Id*. The Court based its decision on: (1) not wanting courts to intrude upon prosecutorial decision making; (2) infringing upon agency discretion over how to expend government resources; or (3) improperly inserting the judiciary into an agency's enforcement prioritization. *Id*. at 831-832. Further, the Court rationalized that an agency's decision not to take an enforcement action is a decision "not to exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id*. at 832.

In contrast, a decision not to exclude an area of habitat as "critical" is essentially a decision to enforce the ESA's rules regarding critical habitat. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 848 F.3d 635, 654 n.21 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc). In deciding to not exclude an area from the designation of critical habitat (particularly one that does not contain the primary constituent elements for the species' survival), the FWS is not making a decision to do no action, *but rather is making an affirmative decision to take action to designate the particular area as "critical habitat" and enforce the*

requirements of the ESA against that property owner. Because of this distinct difference, preventing the FWS's decision from judicial review does not protect any of the interests which with the *Heckler* Court was concerned. When declining to exclude areas from critical habitat, the FWS is not (1) acting as a prosecutor determining whether to prosecute a private citizen; (2) deciding how to use its resources because critical habitat designation does not involve any resource allocation, but is rather a decision to place extra regulatory restrictions on a piece of land; or (3) prioritizing enforcement. Instead, the decision not to exclude private land as critical habitat looks closer to a decision by the agency to "exercise its coercive power over an individual's liberty or property rights." *Heckler*, 470 U.S. at 832. Decisions that have the ability to infringe upon an individual's liberty or property rights are the very types of decisions the courts are supposed to review and protect from unlawful infringement. *Heckler*, 470 U.S. at 832. Because of these distinguishable differences, the concerns in *Heckler* do not apply in this case and the Court should allow judicial review of the decision not to exclude the Petitioner's property from the critical habitat designation.

B. The APA does not prohibit judicial review of all discretionary decisions.

Despite the lower court's ruling to the contrary, the APA does not prohibit judicial review of all discretionary decisions. In fact, the APA's text commands the opposite. Title 5 U.S.C. § 706(2)(A) states, "The

reviewing court shall . . . hold unlawful and set aside agency action . . . found to be an abuse of *discretion* . . . " 5 U.S.C. § 706(2)(A). (Emphasis added). If a court cannot review discretionary agency decisions, then how can a court review for "abuse of discretion?" Thus, the APA text expressly allows for review of discretionary final decisions that are "abusive discretion."

Further, ruling that a statute that uses permissive phrasing in granting an agency power as unreviewable would create precedent that could open up a floodgate of bureaucratic decisions that even though irrational and not ascribable to agency expertise, yet the impacted regulated public would have no relief. Traditionally, permissive phrasing in a statute indicates that Congress has given the agency discretion. But discretion is not necessarily a barrier to judicial review. *E.g.*, *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) (decisions under statute providing that agency "may correct any military record" when it "considers it necessary" "are subject to judicial review"); *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401-1402 & n.7 (D.C. Cir. 1995) ("may" suggests that "Congress intends to confer some discretion on the agency," not that "the matter is committed exclusively to agency discretion"); *Beno v. Shalala*, 30 F.3d 1057, 1066-1067 (9th Cir. 1994) ("the mere fact that a statute contains discretionary language does not make agency action unreviewable"). The fact that Congress gives an agency broad latitude does not mean that it has "left *everything*" to the agency. *Mach Mining*, 135 S. Ct. at 1652. A ruling that is contingent upon the rationale that the use of the

word "may" precludes judicial review would be devastating to modern day administrative law. Thus, despite the Endangered Species Act's use of "may," the decision may still be judicially reviewed under the context of abuse of discretion.

C. There are judicially manageable standards by which to measure the decision not to exclude private property from a critical habitat designation.

Despite the lower court's assertion to the contrary, there are judicially manageable standards by which to measure the FWS's decision not to exclude land from a critical habitat designation. These standards can be found in the ESA, the APA, and the Constitution.

The ESA delivers the first judicially manageable standard upon which to measure the Service's decision. The ESA states that the FWS "may exclude any area from critical habitat if he determines that the benefits of such *exclusion outweigh the benefits of specifying such area as part of the critical habitat*."[2] 16

[2] As a note, the statute continues on to state that the FWS cannot exclude land from a critical habitat determination if the Service "determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). However, this section is not at issue in the present case because as has been stated several times, the land at issue is not currently habitable by the endangered frog. 77 Fed. Reg. at 35,129. Further, there are currently no dusky gopher frogs on the Petitioner's land, thus exclusion of the land from a critical habitat designation cannot result in the extinction of the species.

U.S.C. § 1533(b)(2). (Emphasis added). In other words, Congress specifically required the FWS to perform some type of "balancing test" or analysis to determine whether exclusion is proper. Thus, a court could review a decision to determine whether the Service actually conducted the balancing test or analysis when it made a determination not to exclude certain property from a critical habitat determination. This review would look similar to the review this Court has already mandated to review the Endangered Species Act, requiring that the agency must actually consider the economic effects of designating critical habitat. *See Bennett v. Spear*, 520 U.S. 154 (1997).

In the present case there is a question as to whether the Service actually conducted a good faith attempt at a balancing test or analysis. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 848 F.3d 635, 653 (5th Cir. 2017) (Jones, J., dissenting from denial of rehearing en banc). In conducting the economic analysis of designating the Petitioner's land as critical habitat, the FWS concluded that the designation could cost up to $34 million in economic harm to the landowners due to lost development opportunity. *Id*. When discussing the benefits of the designation, the economic benefit the FWS concluded was that individuals could possibly pay to protect the endangered frogs. *Id*. The other benefits the FWS listed were abstract items, such as "open space" and "decreased development." Finally, the FWS's statement regarding the direct benefits

of designating the land as critical habitat was "best expressed in biological terms." *Id*. However, the Service failed to quantify or express what those benefits are in light of the concrete cost associated with the designation when it concluded "that the economic analysis did not identify any disproportionate costs that are likely to result from the designation." 77 Fed. Reg. at 35,141. Thus, the court could perform a judicial review as to whether the FWS balancing of the abstract benefits of designating property that does not have the necessary primary constituent elements for survival of the species and has no species living on the property versus the loss of the use of the private property and whether that determination was "an abuse of discretion" under 5 U.S.C. § 706(a)(2).

The APA also provides grounds for judicial review of the decision not to exclude private property from a critical habitat designation. This Court has traditionally prohibited agencies from making inconsistent decisions based on agency policy, stating that such decisions could be an arbitrary and capricious change from agency practice. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). In the present case, Congress has specifically directed the agency to consider the economic consequence of designating an area as critical habitat, and has specifically given the agency the power to exclude areas that are disproportionately costly to designate. Further, this Court has expressed in *Michigan v. EPA* that "no regulation is appropriate if it does more harm than good," and when deciding whether to regulate,

agencies have long treated cost as a centrally relevant factor in determining whether to regulate. 135 S. Ct. 2699, 2707 (2015). The reality is that a critical habitat designation puts intense regulation upon the private property owners. ESA Section 7 consultation is required for any action that may cause jeopardy to the continued existence of any listed species "or result in the destruction or adverse modification of [critical] habitat of such species." *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1051 (9th Cir. 2013). As explained above, a critical habitat designation puts the property squarely within the purview of Section 7 of the ESA, which requires that all discretionary actions undertaken by any government entity cannot adversely modify the critical habitat. 16 U.S.C. § 1536. Federal district and circuit courts have required ESA Section 7 consultation on issues impacting private landowners such as authorizing Federal Emergency Management Agency mapping and determinations related to the granting of flood insurance, the Farmer's Home Administration providing a loan guarantee for upgrading a water pipeline and the U.S. Rural Electrification Administration funding an electrical substation. *Florida Key Deer v. Stickney*, 864 F.Supp. 1222 (S.D. Fla. 1994) (holding that the mapping and issuing of flood insurance encourages private property development, thus ESA Section 7 consultation was required).[3] Additionally, in *Sierra Club v. Glickman*, 145 F.3d 606, 619 (5th Cir. 1998), the Fifth Circuit required

[3] In this case, the property owners have made it known that they are looking at development of this property in the future.

farmers to undergo ESA Section 7 consultation regarding the impact of irrigation on their private lands that were designated as critical habitat prior to receiving farm subsidy payments.

In the present case, the FWS determined that the ephemeral ponds on the landowner's property are critical habitat despite the fact that those ponds are currently uninhabitable by the frogs. 77 Fed. Reg. at 35,129. At a minimum, under these precedents, if the landowners ever request FEMA insurance or any type of subsidy for any development activity that could jeopardize the ephemeral ponds, or request a permit from the Army Corps of Engineers to fill the ephemerals ponds, these requests will be denied unless some other mitigation occurs at the landowners' cost. Thus, with this backdrop of Congress' mandate that the FWS weigh the benefits of excluding critical habitat, and traditional requirement that no regulation should create more harm than good, the landowners should have a right, on remand, to judicial review. Thus the court should examine whether the FWS abused its discretion when the agency determined that the benefits of including the land as critical habitat even with the $34 million cost did not outweigh the currently unquantifiable benefits "best expressed in biological terms."

Finally, the Constitution also provides a standard of review of all agency actions not specifically excluded, regardless as to whether a statute itself lends the decision to judicial review. *See Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (holding that the Constitution itself provides a standard for judicial review even when the

statute itself does not). Decisions that are irrational violate due process and must be allowed for judicial review. *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In looking at whether an agency decision is rational, the agency must articulate a rational connection between the facts found and the decision made. *Id*. Such review of agency decisions is necessary to protect the public from decisions that would be otherwise illegal, such as deciding not to exclude a parcel because of the race or religion of its owner, or a decision not to exclude critical habitat due to the speech of the landowner. Since the FWS made a conclusion that there were no disproportionate costs associated with the inclusion of the Petitioner's property as critical habitat, despite the strong evidence to the contrary without articulating any rationale as to why the decision was made in light of the facts, the decision is irrational and should be subject to judicial review.

D. The U.S. Fish and Wildlife Service failed to overcome the "heavy burden" it must show in order to overcome the presumption of judicial review.

Agency actions are presumptively judicially reviewable. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The presumption is rebuttable when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. *Id*. at 1651. This can be shown by " 'clear and convincing' indications drawn from 'specific language,' 'specific

legislative history,' and 'inferences of intent drawn from the statutory scheme as a whole' that Congress intended to bar review." *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016). However, the agency bears a "heavy burden" in attempting to show that Congress "prohibited all judicial review" of the agency's compliance with a legislative mandate. *Mach Mining, LLC*, 135 S. Ct. at 1653.

In the present case, the Fifth Circuit presumed unreviewability, instead of reviewability, essentially placing the burden of showing reviewability on the Petitioner. That is a reversal of the burden of proof required by this Court. *See Markle*, 848 F.3d at 653 (Jones, J., dissenting from denial of rehearing en banc). In doing so the Fifth Circuit ignored this Court's precedent of placing the "heavy burden" upon the FWS to prove that Congress prohibited all judicial review of its decision not to exclude uninhabitable private property as critical habitat. *Mach Mining, LLC*, 135 S. Ct. at 1653.

II. THE LOWER COURT'S DECISION CONFLICTS WITH *BENNETT V. SPEAR*.

By ruling that there is no judicial review of the FWS's decision, the lower court directly ruled contrary to this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997).

In *Bennett*, the Court held that the FWS's consideration of economic impact was mandatory. In that case, similar to the present case, the FWS based its

argument in favor of discretion on the permissive language of the Endangered Species Act that stating that the Service *may* exclude critical habitat. *Id*. at 172. This Court rejected that argument stating:

> *the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion* does not alter the categorical requirement that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'

Id. (Emphasis added). As applied to this case, this requirement means that the court has the jurisdiction to determine if the FWS legitimately considered the economic impacts of designating Petitioner's land as critical despite the fact that it did not contain the primary constituent elements for eligibility as balanced with the tremendous cost of the designation. It cannot be understated that in this case, the FWS recognized that the Petitioner's property has to have man-induced physical alterations to be habitat for the species. 77 Fed. Reg. at 35,118, 35,123. The court should have the jurisdiction to determine whether speculative action in the future (the FWS "hopes" to work with private landowners to convert their land into suitable habitat) balanced with the huge economic loss to the landowners is an abuse of agency discretion.

In reviewing for abuse of discretion, agency action is set aside if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered

an explanation for its decision that runs counter to the evidence before the agency," or is otherwise "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" In the present case, reviewing the ultimate decision would require the court to look at the agency's rationale for its decision making, including how the FWS applied its economic analysis to its decision to include landowners' property in the critical habitat decision. Ultimately, the majority of the Fifth Circuit failed to review the decision under an abuse of discretion standard, despite the fact that the evidence indicates a possibility of such abuse. On the other side of the analysis, the FWS failed to articulate any substantial benefits that outweigh those costs due to the fact that the land cannot currently be occupied by the dusky gopher frog and cannot sustain the species in the future without an affirmative act to convert the property to suitable critical habitat. Such contradictions should be reviewable in court because they run "counter to the evidence before the agency" and "[are] so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43.

III. THE RULING THAT THE U.S. FISH AND WILDLIFE SERVICE'S DECISION IS UNREVIEWABLE IS COUNTER TO CONGRESS' INTENT WHEN IT MANDATED THE FWS TO DESIGNATE CRITICAL HABITAT.

Finally, the Court should overturn the lower court ruling that the decision not to exclude Petitioner's property as "critical habitat" is unreviewable because such precedent would abdicate the Court's role of being guardians of Congressional intent in the face of agency decisions.

As stated above, this Court has determined that judicial challenge to critical habitat decisions can be sustained. *Bennett v. Spear*, 520 U.S. 154 (1997). The legislative history behind including economic considerations in making critical habitat designations originates from the infamous *Tennessee Valley Authority v. Hill* (*TVA*). In *TVA*, the Court ruled that the Endangered Species Act cannot make economic considerations when deciding whether to list a species as endangered. Further the Court ruled that the construction of a dam being built by the Tennessee Valley Authority should be discontinued despite the fact that Congress spent over $100 million on the structure. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). In response, Congress amended the Endangered Species Act to require economic considerations when designating critical habitat. The 1978 House Report regarding the amendment to the Endangered Species Act indicates that, after *TVA*, Congress added Section 4(b)(2) to "avoid conflicts" with "Federal activities at an

early stage." H.R. Rep. No. 95-1625, at 13, 16 (1978). Thus, the designation of critical habitat is the only opportunity to prevent "needless economic dislocation" in the early stage of federal activities. *Bennett*, 520 U.S. at 176.

Congress' mandate that economic consequences must be considered and the FWS's ability to exclude critical habitat must be read together. Together, they make "economic consequences" an "explicit concern of the ESA" and advance Congress' "primary" "objective" of "avoid[ing] needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-177. Without judicial review of the agency's decision not to designate uninhabitable private property as critical habitat, the Congressional mandate that the FWS take economic considerations in designating critical habitat is rendered toothless because the economic analysis could give all indications that the land in this case should be excluded, but the Service could still capriciously refuse to exclude critical habitat with impunity.

Such a decision would run contrary to the majority in *Mach Mining*. Without judicial review, "compliance with the law would rest in the [Service's] hands alone." *Mach Mining*, 135 S. Ct. at 1652. The Court "need not doubt the [Service's] trustworthiness, or its fidelity to law, to shy away from that result." *Id*. "We need only know – and know that Congress knows – that legal lapses and violations occur, and especially so when they have no consequence." *Id.* at 1652-1653. Thus, by

refusing to review the decision not to exclude certain land designations as critical habitat, the Court would essentially make Congress' mandate of economic consideration useless. Therefore, judicial review must be afforded to the decision not to exclude property within a critical habitat designation.

CONCLUSION

Although the FWS will try to argue that the designation of critical habitat has no "real impact" on a landowner's use of private property, that is simply not the case. In this day, it is hard to imagine any type of business based upon the ownership and use of private property that, at some point, does not require some federal permit or authorization. Certainly the *amici* and their members cannot imagine a scenario where a federal authorization is not required which would trigger the requirements of ESA Section 7 consultation. Section 7 consultation is required once critical habitat is designated based on the prohibition of "adverse modification" as a form of species "take" prohibited by Section 9 of the ESA. 16 U.S.C. § 1540. This case is not about whether the FWS can affirmatively designate critical habitat under the requirements of the ESA, but rather it is about whether the federal courts have jurisdiction to review that substantive decision. Given that there is no type of administrative review for a critical habitat designation, the FWS should not be granted the unfettered discretion to designate any property, anywhere without at least a minimal review

of the court for abuse of discretion. As Justice Marshall stated in *Overton Park*, "Section 701 of the Administrative Procedure Act, 5 U.S.C. s 701 (1964 ed., Supp. V), provides that the action of 'each authority of the Government of the United States,' . . . is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.'" That case goes on to state that there is only a very narrow exception for "action committed to agency discretion" and that is "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated by Califano v. Sanders*, 430 U.S.

99, 97 (1977). That exception does not apply in this case and the decisions of the lower courts should be reversed.

Respectfully submitted,

KAREN BUDD-FALEN
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
(307) 632-5105
karen@buddfalen.com

Counsel for Amici Curiae Wyoming Stock Growers Association; Wyoming Association of Conservation Districts; Wyoming Farm Bureau Federation; Wyoming Wool Growers Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; Arizona/New Mexico Coalition of Counties for Stable Economic Growth; and Progressive Pathways, LLC