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

BRIEF OF CAUSE OF ACTION INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN J. VECCHIONE
Counsel of Record
KARA E. MCKENNA
CYNTHIA F. CRAWFORD
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
John.Vecchione@causeofaction.org

Counsel for Amicus Curiae

April 30, 2018

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

QUESTIONS PRESENTED

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.*

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* *Amicus Curiae* Cause of Action Institute only addresses the second Question Presented in this brief.

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BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae CoA Institute is a 501(c)(3) nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[2] CoA Institute uses various investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, representing third-party plaintiffs in actions against the federal government and appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

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[1] In accordance with Supreme Court Rule 37.2(a), blanket consent has been granted by all parties. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute financially contributed to preparing this brief.

[2] *See* Cause of Action Inst., *About*, www.causeofaction.org/about (last visited Apr. 26, 2018).

CoA Institute has a particular interest in this matter, because the Fifth Circuit's determination that the United States Fish and Wildlife Service's ("FWS" or the "Service") failure to exclude an area of land from critical habitat designation under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, is discretionary and thus not subject to judicial review is contrary to existing law and precedent. As Judge Edith Jones articulated in her dissent from denial of rehearing *en banc*, the "ramifications" of the panel's decision "for judicial review of agency action cannot be underestimated." Pet. App. 126a. The panel's decision "play[s] havoc with administrative law." *Id.* at 156a (Jones, J., dissenting). This is because the determination is both contrary to existing law and precedent, but also because the consequences of denying judicial review are not limited to decisions made by the Service, but may be felt throughout the entire administrative state. An adverse ruling has the potential to deprive individuals and businesses affected by the regulatory powers of the administrative state of their right to challenge agency abuses of discretion.

SUMMARY OF THE ARGUMENT

The strong presumption in favor of judicial review of administrative actions was not overcome below. Stripping actions of such import as are found here of judicial review is inconsistent with precedent and the statutory scheme. Under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, there is a

"strong presumption" of the judicial reviewability of agency actions. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). The Court of Appeals for the Fifth Circuit's majority opinion did not overcome this presumption in its determination that the Service's decision not to exclude land from a critical habitat designation is not judicially reviewable.

In making its determination, the panel failed to adequately consider the language of 16 U.S.C. § 1533(b)(2) and the overall structure of the ESA, and erroneously relied on caselaw from the Ninth Circuit and several district courts that suffer from similar analytical impairments. The panel's decision that judicial review is precluded under 5 U.S.C. § 701(a)(2), is contradicted by this Court's emphasis on "careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988). The overall structure of the ESA and the specific language of 16 U.S.C. § 1533(b)(2) stand in stark contrast to the consistent holdings of this Court that the presumption of judicial review can only be overcome in narrow instances in which no standard is available to conduct such review. This is not that case. Thus, the FWS's decision not to exclude land from a critical habitat designation is judicially reviewable. *Cf. Bennett v. Spear*, 520 U.S. 154, 171-72 (1997).

STATEMENT OF THE CASE

The ESA generally requires that the Service, "determine whether any species is an endangered species or threatened species" due to certain natural or manmade factors. 16 U.S.C. § 1533(a)(1). The determination must be made "solely on the basis of the best scientific and commercial data available" and is subject to formal rulemaking processes. *See* 16 U.S.C. § 1533(b)(1)(A); § 1533(a)(1). Upon making such a determination, the Service shall "to the maximum extent prudent and determinable . . . designate any habitat of [an endangered or threatened species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). "Critical habitat" may be either occupied habitat or unoccupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i)-(ii). Unoccupied habitat is those "specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533" of the ESA. 16 U.S.C. § 1532(5)(A)(ii). Unoccupied areas may only be designated as critical habitat if "such areas are essential for the conservation of the species." *Ibid.*

The ESA requires that

> [t]he Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary 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, unless he 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).

In 2001, the FWS listed the dusky gopher frog, *Rana sevosa*, as an endangered species.[3] As required under the ESA, the Service began the critical habitat designation process for the frog in 2010 and released a proposed rule, which identified areas in Mississippi as critical habitat for the frog. *See* 75 Fed. Reg. 31387, 31395 (June 3, 2010). In 2011, the FWS published a Revised Proposed Rule, which identified additional areas for designation as critical habitat, including over 1,500 acres of private land in Louisiana ("Unit 1"). *See* 76 Fed. Reg. 59774, 59780 (Sept. 27, 2011).

In 2012, the FWS published a final rule designating over 6,400 acres in Mississippi and Louisiana as "critical habitat," which included Unit 1. *See* 77 Fed. Reg. 35118 (June 12, 2012); JA100. Unit 1 is owned by several private property owners (collectively "Landowners" or "Petitioners"). *See* Pet. App. 88a-89a. Throughout the designation process and to this day,

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[3] The dusky gopher frog was originally listed as the "Mississippi gopher frog" but its name was later changed by the Service during the time that the rule designating its critical habitat was being developed. *See* Pet. App. 111a-112a; JA101.

Unit 1 has functioned as a closed canopy commercial loblolly pine timber operation by Petitioner Weyerhaeuser. *See* Pet. Weyerhaeuser Brief at 2; *see also* Pet. App. 88a-89a.

As identified during the critical habitat designation process, the dusky gopher frog requires three basic environmental features, or "primary constituent elements" ("PCEs"), in its habitat to survive: (1) small, isolated, ephemeral ponds located in an open canopy forest for breeding; (2) upland, open canopy forests frequented by fires often enough to maintain the open canopy and sustain "herbaceous ground cover" for nonbreeding habitat; and (3) similar type upland habitat connecting "breeding and nonbreeding habitat." *See* 77 Fed. Reg. at 35131; JA153-JA154. Of these three PCEs, Unit 1 only partially meets the first requirement – the existence of isolated ephemeral ponds. *Id.* at 35123; JA121. Further, the dusky frog has not been seen in the area of Unit 1 since the 1960s. *Id.* at 35124; JA124. Not only is Unit 1 currently uninhabitable by the frog, but designating the land as critical habitat could result in up to $34 million of lost development opportunities for the Landowners, which the Service acknowledged in its own economic analysis. *Id.* at 35140; JA188. Despite these facts, the Service included Unit 1 in the critical habitat designation for the dusky gopher frog because it determined that, *inter alia*, critical habitat designation does not require the presence of the PCEs for survival on the designated land and the Service's "economic analysis did not identify any disproportionate costs that are likely to result

from the designation." *Id*. at 35141; JA190. The Service also stated that it "believe[d] that the benefits" of designating the Unit 1 as critical habitat was "best expressed in biological terms" rather than economic considerations. *Id.*; JA137. Despite these facts, FWS still declared Unit 1 as critical habitat for the dusky gopher frog, a place where no such frog exists or according to the Service could survive in its present state.

In 2013, the Landowners challenged the designation of Unit 1 as critical habitat for the dusky gopher frog. Despite the district court's recognition that the Service's determination "that the economic impacts on Unit 1 are not disproportionate" was "troubling," the district court granted summary judgement in favor of the Service, deferring to the FWS's determination to include Unit 1 in the critical habitat designation and finding itself "without power" to overturn the Service's decision. Pet. App. 101a, 113a-114a, 118a.

On appeal, a divided Fifth Circuit panel affirmed the district court. *Id.* 1a-77a. The panel decided that the Service's determination not to exclude Unit 1 on the basis of disproportionate economic impacts was not subject to judicial review once the FWS "fulfilled its statutory obligation to consider" those impacts because that determination was discretionary and there were no manageable standards for the court to apply. *Id.* at 32a-36a. In February 2017, the Fifth Circuit denied the Landowners' petition for rehearing *en banc*, by an 8-6 vote. *Id.* at 124a. Judge Jones, joined by five other dissenting judges, issued an opinion warning that the "ramifications" of the panel majority's decision

regarding judicial review of agency action "cannot be underestimated." *Id.* at 126a. In response to the panel's ruling that the Service's economic analysis was not subject to judicial review, Judge Jones noted that the panel failed to consider *Bennet v. Spear* and its "clear signal that the Service's decision is reviewable." *Id.* at 161a. As Judge Jones argued, "[t]he panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action." *Id.* at 162a.

ARGUMENT

I. The Service's decision not to exclude Unit 1 from a critical habitat designation is subject to judicial review

A. The Fifth Circuit failed to apply the "strong presumption" of judicial reviewability of agency actions

Amicus agrees with Petitioner that "instead of presuming reviewability, the court presumed *un*reviewability." Pet. Weyerhaeuser Brief at 48 (emphasis in original). The presumption of unreviewability adopted by the panel is in clear contradiction to this Court's "'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

The APA sets forth "comprehensive provisions for judicial review of 'agency actions'" in §§ 701-06. *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). The APA

entitles persons "adversely affected or aggrieved by agency action" to judicial review of "final agency action for which there is no other adequate remedy in a court." *See* 5 U.S.C. §§ 702, 704. Availability of judicial review of final agency action is limited in only two circumstances: (1) where reviewability is precluded by statute; *or* (2) the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The APA's standards and scope of review are set forth in § 706, which requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be," amongst other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

In *Mach Mining*, this Court recognized that there is a "'strong presumption' favoring judicial review of administrative action" because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." 135 S. Ct. at 1651. This presumption is rebuttable. *See id*. As the Court articulated, the presumption favoring judicial review of administrative action "fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Id*. However, the "heavy burden" establishing "that Congress 'prohibit[ed] all judicial review' of the agency's compliance with a legislative mandate" is borne by the agency. *Id.* (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). *Amicus* agrees with Petitioner that this presumption is not defeated by the "permissive phrasing" of a statue because such phrasing only "indicates that Congress has given the

agency discretion" not barred judicial review outright. Pet. Weyerhaeuser Brief at 48.

The second exemption, where agency action is "committed to agency discretion by law" is "a narrow one." *Heckler*, 470 U.S. at 826, 838. *Heckler* affirmed that an agency decision not to enforce a statute is presumed to be immune from judicial review under § (a)(2), as traditionally committed to agency discretion. *See Heckler*, 470 U.S. at 830-31. Within its analysis of the reviewability of enforcement decisions, *Heckler* identified two key characteristics of an agency's decision not to act: the lack of exercise of the agency's "coercive power"; and the lack of "focus for judicial review" that the exercise of power would provide. *Id.* at 832 (citing *FTC v. Klesner*, 280 U.S. 19 (1929)). These characteristics, which are present when an agency does not act at all, cut the other way once an agency has acted to exercise its coercive power, thus providing a focus for judicial review.

Heckler also confirmed the analysis of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), that judicial review under § (a)(2) requires a meaningful standard against which to judge, and that, where such a standard exists, judicial review may be had – even in the special case of decisions not to enforce. *See Heckler*, 470 U.S. at 830-31, 835 ("If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701 (a)(2), and courts may require that the agency follow that law.").

While the § (a)(1) and § (a)(2) exceptions are distinct, as discussed *infra*, the strong presumption of reviewability of § (a)(1) is also applicable to § (a)(2) because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 135 S. Ct. at 1651; *see also Heckler*, 470 U.S. at 848 (Marshall, J., concurring in the judgment) (noting that "[s]ince passage of the APA, the sustained effort of administrative law has been to 'continuously narr[ow] the category of actions considered to be so discretionary as to be exempted from review' " (internal citation omitted)).

Application of the "strong presumption" of reviewability to both the § (a)(1) and § (a)(2) exceptions is particularly important in cases such as the present matter, where Congress has provided law to apply, the agency has exercised its coercive power, agency action has provided a focus for judicial review, and where the court's decision to decline judicial review under § (a)(2) contravenes the text of the statute and the overall structure of the law, may lead to significant economic harm, and encumbers private property. *Cf. Bennett*, 520 U.S. at 171-72, 176-77 (1997). The panel's failure to apply the "strong presumption" of reviewability is in error.

B. This Court has recognized that the exception for agency actions committed to agency discretion under § 701(a)(2) is narrow and requires "careful examination" of the underlying statute

The exceptions provided by § 701(a)(1) and (a)(2) are distinct. As noted in *Heckler*, the language of § 701(a) "clearly separates the exception provided by § (a)(1) from the § (a)(2) exception." 470 U.S. at 830. Section 701(a)(1) "applies when Congress has expressed an intent to preclude judicial review." *Id.* The Court has recognized that access to judicial review under § 701(a)(1) may only be restricted "upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

In contrast, the APA's legislative history indicates that § 701(a)(2) "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Overton Park,* 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The "no law to apply" standard of § 701(a)(2) applies "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. Under such circumstances, the Court has stated that "the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Id.* The Court indicated that such a construction "avoids conflict with

the 'abuse of discretion' standard of review in § 706" because "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.'" *Id.* The exception created by § 701(a)(2) is "narrow" and remains so. *See id.* at 838 (citing *Overton Park*, 401 U.S. 402).

A determination that an exception under § 701(a)(2) applies to an agency action "requires careful examination of the statute on which the claim of agency illegality is based." *Webster*, 486 U.S. at 600. What a "careful examination" comprises is undefined. However, *Webster* suggests that the examination includes review of the language of the specific provision, as well as, "the overall structure" of the law at issue. *See id.* at 600-01 (analyzing "[t]he language of § 102(c) [of the National Security Act of 1947 ('NSA')]" and the "overall structure of the NSA" to determine that "Congress meant to commit individual employee discharges to the Director's discretion"). Thus, "careful examination" to determine if an exception under § 701(a)(2) applies requires something more than a conclusory determination that judicial review is precluded.

This Court has also recognized the existence of "certain categories of administrative decisions" that are precluded from review under § 701(a)(2) because the "courts traditionally have regarded" such categories "as 'committed to agency discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). Such categories have included the decision not to undertake an enforcement

action, *see Heckler*, 470 U.S. 821; the denial of a petition to reopen based only on "material error," *see ICC v. Locomotive Engineers*, 482 U.S. 270 (1987); the decision to terminate an employee for national security concerns, *see Webster*, 486 U.S. 592; and "[t]he allocation of funds from a lump-sum appropriation," *see Lincoln*, 508 U.S. at 191. These traditional categories represent those "areas" of agency decisionmaking "in which courts have long been hesitant to intrude." *See Franklin v. Massachusetts*, 505 U.S. 788, 819 (1992) (Stevens, J., concurring in part and concurring in judgment).

Effectively, the narrow exception that an agency action is committed to agency discretion under § 701(a)(2) applies when it falls within one of the traditional categories committed to agency discretion *or* is one of the "rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at 191 (quoting *Heckler*, 470 U.S. at 830). Under either instance, the determination requires a "careful examination" of the language of the provision and overall structure of the statute being challenged and is subject to the "strong presumption" in favor of reviewability.

C. The language of 16 U.S.C. § 1533(b)(2) and overall structure of the ESA do not preclude judicial review

The ESA does not explicitly preclude judicial review of critical habitat designations. Nor is the determination by FWS not to exclude Unit 1 from being designated as critical habitat under the ESA the type of administrative action that the courts have been hesitant to intrude upon. Thus, judicial review of the Service's decision is only barred if 16 U.S.C. § 1533(b)(2) is drawn in such a way that precludes a reviewing court from having a "meaningful standard against which to judge the agency's exercise of discretion." *See Heckler*, 470 U.S. at 830. To determine if the § 701(a)(2) exception applies to decisions not to exclude areas from critical habitat designations, a court must engage in a "careful examination" of the language of 16 U.S.C. § 1533(b)(2) and the overall structure of the ESA. Consistent with this Court's "strong presumption" in favor of judicial review of agency actions, a court's conclusory determination that judicial review is precluded is not sufficient to establish that the § 701(a)(2) exception applies.

Both the language of 16 U.S.C. § 1533(b)(2) and the overall structure of the ESA indicate that Congress did not intend to preclude judicial review of decisions not to exclude lands from a critical habitat designation, especially where, as here, significant economic impacts occur. The determination to inflict millions of dollars of economic harm on private Landowners based on erroneous analysis of the ESA is precisely the type of

agency action the APA was designed to combat. The ESA requires that

> [t]he Secretary *shall* designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary *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, unless he 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) (emphasis added). The language of 16 U.S.C. § 1533(b)(2) is "plainly [that] of obligation rather than discretion." *Bennett*, 520 U.S. at 172. The grant of discretion from Congress to an agency, as indicated by permissive statutory language, does not bar judicial review. *See, e.g.*, *Mulloy v. United States*, 398 U.S. 410, 415-16 (1970) ("permissive" statutory language does not permit a board to act "arbitrarily"); *Dickerson v. Sec'y of Defense*, 68 F.3d 1396, 1401-02 (D.C. Cir. 1995) ("permissive" statutory language such as "may" indicates "that Congress intends to confer some discretion on the agency" but "does not mean the matter is *committed* exclusively to agency discretion" (emphasis in original)).

Further, the language of 16 U.S.C. § 1533(b)(2) articulates a "meaningful standard against which to judge the agency's exercise of discretion." *See Heckler*, 470 U.S. at 830. As the panel recognized, 16 U.S.C. § 1533(b)(2) "articulates a standard for reviewing the Service's decision to exclude an area." Pet. App. 35a. Further, as noted by the dissenters, it is undisputed that the decision to include an area as critical habitat is also judicially reviewable. Pet. App. 160a n. 21 (Jones, J.). As Judge Jones stated, "the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1" as critical habitat. *Ibid.* (emphasis in original). Thus, the Service's decision not to exclude an area from a critical habitat designation is also judicially reviewable. As Petitioner argues, "[t]he panel's recognition that courts may review decisions *to exclude* should have compelled the conclusion that courts also may review decisions *not to exclude*." Pet. Weyerhaeuser Brief at 49 (emphasis in original).

The overall structure of the ESA also commands that judicial review is not precluded in this matter. In *Bennett*, the Court noted that the ESA serves an "overall goal of species preservation." 520 U.S at 176. However, that is not the ESA's only goal. The ESA's other "objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176-77. This latter goal, of avoiding "needless economic dislocation" by the unintelligent pursuit of the FWS's "environmental

objectives" is precisely what is at issue in the present matter. The Service determined that it "did not identify any disproportionate costs" resulting from the designation of Unit 1 as critical habitat for the dusky gopher frog despite its own recognition that the designation could lead to nearly $34 million of lost development opportunities for the Landowners, which was not offset by its belief that the benefit of the designation was "best expressed" in unquantified "biological terms." *See* 77 Fed. Reg. 35118, 35140-141, JA188-JA190. The Fifth Circuit's failure to consider and carefully examine the structure of the ESA, and this goal in particular, was error. The designation of land, where a species cannot live, as critical habitat creates a clear judicially reviewable question. *See, e.g.*, *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

D. The Fifth Circuit failed to conduct the sort of "careful examination" required to establish that judicial review is precluded under § 701(a)(2)

The panel failed to engage in the type of "careful examination" of the language of 16 U.S.C. § 1533(b)(2) and overall structure of the ESA required by *Overton Park* and its progeny. To support its determination that judicial review was precluded, the panel erroneously relied on the Ninth Circuit's decision in *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), as well as the opinions of several district courts. *See* Pet. App. 34a-35a. In *Bear Valley Mut. Water Co.*,

the Ninth Circuit misquotes this Court's discussion in *Heckler* regarding reasons supporting the "general unsuitability for judicial review of agency decisions to refuse enforcement" and uses the misappropriated quote to support its determination that permissively written statutes are "presumptively unreviewable." *Compare Heckler*, 420 U.S. at 832 *with Bear Valley Mut. Water Co.*, 790 F.3d at 989. Notwithstanding the Ninth Circuit's failure to apply the correct framework articulated in *Heckler*, this determination is in clear opposition to the recognition that permissive statutory language does not bar judicial review.

Heckler argues that agency decisions to refuse enforcement proceedings are unsuitable for judicial review because they lack a focus for judicial review. As stated in *Heckler*, "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." 470 U.S. at 832 (emphasis in original).

In contrast, the Ninth Circuit guts the context of this statement from *Heckler* – that it relates solely to reasons why decisions not to enforce are generally unsuitable for judicial review – and instead states that "where a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" *Bear Valley Mut. Water Co.*, 790 F.3d at 989 (quoting *Heckler*, 470 U.S.

at 832) (ellipses in the original). This turns *Heckler* on its head.

Consideration of the facts of a case and the language and structure of laws is necessary to create context for a court's analyses and decisions. That context in turn may signal limitations on a court's rationale or holdings. Such limitations should be applied, or in the very least considered in subsequent matters. To strip, or separate facts and context and only apply bare statements from the caselaw, as the Ninth Circuit did in *Bear Valley Mut. Water Co.*, removes important guidance, not just for the courts, but for agencies and individuals as well. This erroneous analysis by the Ninth Circuit, supporting its determination that an agency's decision not to exclude critical habitat is not reviewable, is an improperly applied, irrelevant, and incorrect construction of this Court's limited rationale in *Heckler*. Any reliance on *Bear Valley Mut. Water Co.* is erroneous.

Similarly, the other cases cited by the panel also suffer comparable analytical infirmities. A review of the cases relied on by the panel indicate that the entire rationale in support of the unreviewability of decisions not to exclude lands from a critical habitat designation boils down to a single district court's approximately 255-word "analysis." *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 2006 WL 3190518, at *20 (E.D. Cal. 2006). In establishing that there are allegedly "no substantive standards by which to review the FWS's decisions not to exclude certain tracks" of land, the court in *Home Builders Ass'n of N. Cal.*, failed to

consider the overall structure of the ESA and only engaged in a limited analysis of 16 U.S.C. § 1533(b)(2)'s language. *See id.* Despite this, subsequent courts have continued to apply the same deficient analysis in *Home Builders Ass'n of N. Cal.* in support of finding that decisions not to exclude areas from critical habitat designations are not subject to judicial review. *See Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1034-35 (9th Cir. 2015), *aff'g* No. C 11-4118 (stating that any consideration of the dual objectives identified in *Bennett* was simply "foreclosed" by the Ninth Circuit's earlier decision in *Bear Valley Mut. Water Co.*); *Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n. 4 (D. Haw. 2014) (baldly citing the district court's determination in *Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, 2012 WL 6002511, at *7 (N.D. Cal. Nov. 30, 2012)); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (quoting *Home Builders Ass'n of N. Cal.*, 2006 WL 3190518, at *20). The APA provides the well-known arbitrary and capricious standard, and destroying millions in economic returns to private land holders to designate land upon which, by the Service's own analysis cannot live, is easily justiciable and subject to review.

The subsequent repetitions of the erroneous determination in *Home Builders Ass'n of N. Cal.*, does not cure it of its analytical faults. The bald parroting of prior court decisions falls short of *Webster*'s requirement that courts undertake "careful examination" of the language of the provision and the overall structure

of the law in determining whether the § 701(a)(2) exception applies. *See* 486 U.S. at 600-01. Such "careful examination" was never considered in *Home Builders Ass'n of N. Cal.*, a failure which infects subsequent reliance on that determination including the panel's decision at issue here.

The panel's decision contravenes existing law and precedent regarding the availability of judicial review of agency action and "play[s] havoc with administrative law." Pet. App. 156a (Jones, J., dissenting). The panel's determination, that the Service's decision not to exclude Unit 1 from a critical habitat designation was unreviewable, was error because the panel failed to undertake the proscribed "careful examination" as contemplated in *Overton Park, Heckler*, and *Webster*, and relied on analytically infirm caselaw.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fifth Circuit, and remand for proceedings consistent with this Court's order.

Respectfully submitted,

JOHN J. VECCHIONE
Counsel of Record
KARA E. MCKENNA
CYNTHIA F. CRAWFORD
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
John.Vecchione@causeofaction.org

Counsel for Amicus Curiae