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

REPLY BRIEF FOR PETITIONER

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I. The Administrative Record Demonstrates That Unit 1 Is Not Habitable.

Although the Government plays fast and loose with the facts, this is an APA case limited to the administrative record. Petitioner merely asks this Court to credit the Service's own findings published in the Federal Register, which conclusively establish that Unit 1 is not habitable.

FWS "determined" the "physical or biological features" that the "frog requires." JA144. In addition to breeding ponds, it requires "[u]pland forested nonbreeding habitat" "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover" and "underground habitat" that the "frog depends upon for food, shelter, and protection." JA153. The frog also requires "connectivity habitat" "characterized by an open canopy." JA153-154. These "habitat characteristics [are] required to sustain the species' life-history processes." JA152-153. The Government's brief ignores open canopies, which "maint[ain]" the frog's "food source." JA149. And it says (at 24) that fires create "[o]ptimal" habitat, when FWS in fact found that "fire is the only known management tool" that "maintain[s]" "suitable habitat." 66 Fed. Reg. 62993, 62999 (Dec. 4, 2001); see CBD Br. 6-7 (explaining importance of open canopies and fires).

FWS found that the frog is "endemic to the longleaf pine ecosystem" and endangered "[d]ue to fragmentation and *destruction of habitat*." JA144, JA148 (emphasis added). "Longleaf pine forest habitat" has been "replaced with dense pine plantations, agriculture, and urban areas." 66 Fed. Reg. 62995. Those "habitat changes" are "unsuitable" for the frog. *Ibid.* In particular, "habitat" "conver[sion] to pine

(often loblolly * * *) plantations" creates "closed-canopy forest unsuitable as habitat." JA145.

FWS's findings thus make clear that the frog cannot inhabit Unit 1's dense, closed-canopy, fire-suppressed loblolly commercial forests.[1] Indeed, FWS found that "[a]ll" areas designated as critical habitat for the dusky gopher frog contain the "elements to support all the life-history functions essential for the conservation of the species *with the exception of Unit 1*." 76 Fed. Reg. 59774, 59780 (Sept. 27, 2011) (emphasis added).[2]

The Service did find that Unit 1 is "restorable" to habitat "with reasonable effort." JA167. FWS's two "scenarios" in which Unit 1 has a federal nexus expose what FWS had in mind. FWS would require the landowners to cough up "60 percent" of Unit 1 to be "managed" as a frog "refuge" in exchange for the privilege to "develo[p]" the other "40 percent"; or FWS would decree that "no development occur" at all. JA68-

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[1] Petitioner has consistently maintained that Unit 1 is not frog habitat. C.A. Reply Br. 18 ("Unit 1" cannot "be called 'habitat'" because it is "not actually habitable"); D.Ct. Mem. 14 (Dkt. 67-1) ("there is no conceivable logic under which Unit 1 can be considered 'habitat'"); AR1826 (Unit 1 contains no "elements of [frog] habitat"). Petitioner certainly "dispute[s]" that "adult frogs could live" in Unit 1. U.S. Br. 21. Mere "stump holes" (*ibid.*) are not habitat. JA152-154. The Fifth Circuit understood that petitioner made this argument—see Pet. App. 21a (appellants "argue that the Service 'exceeded its statutory authority' under the ESA" "because Unit 1 is not currently habitable")—and ruled upon it. *Id.* at 23a ("There is no habitability requirement in the text of the ESA").

[2] The Government (at 10, 19-20) selectively quotes Dr. Pechmann to suggest that he regarded Unit 1 as habitat. Fairly read, Pechmann's view was that Unit 1 "could be restored to suitable upland habitat." JA14. In any event, FWS's findings control.

69, JA125, JA189. FWS calculated lost development value at $20.4 to $33.9 million. JA189.

Even then, frog habitat would need to be created. The Government acknowledges (at 36 n.7) that ripping out loblolly forests, ending timber operations, planting longleaf pines, and managing them with frequent fires is not "reasonable effort," but "wholesale transformation." It claims FWS "nowhere indicated" that those efforts would be necessary. *Ibid.* But that is the only way the species could be established in Unit 1. Unsurprisingly, therefore, FWS did *not* respond to landowner comments that "Unit 1 will never have PCEs" because "timber management" on the property "precludes burning or planting longleaf pine trees" by saying that replanting and burning would be unnecessary. JA121-123. FWS said instead that "PCEs" were not needed for designation, Unit 1 has ponds, and "funding to private landowners for habitat management" might be available. *Ibid.*

That half-answer confirms what the Service's findings about the frog's life-needs already show: transforming Unit 1 into fire-managed "longleaf pine savannahs" (JA23) would be necessary to create habitat. And that is a massive undertaking, not a matter of a few "holes or stumps." U.S. Br. 36 n.7; see AR3080 (FWS field notes: Unit 1's "[u]plands" "[n]ee[d] fire [and] management"); CBD Br. 26 (frog has survived through "intense human effort" and "extensive habitat restoration").

For good reason, then, each Fifth Circuit opinion acknowledged that it is "undisputed" that Unit 1 is uninhabitable by the frog. Pet. App. 49a (Owen, J., dissenting). See *id.* at 24a (majority) (FWS "*found* that the *currently uninhabitable* Unit 1 was essential" for frog conservation) (emphasis added); *id.* at 131a (Jones, J., dissenting from denial of rehearing en banc)

("[n]o one disputes that the dusky gopher frog cannot inhabit Unit 1"). Unit 1 cannot "sustain a dusky gopher frog population" without "significant transformation and then, annual maintenance." *Id.* at 49a (Owen, J.).

II. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

Given the Service's findings, its designation of Unit 1 as critical habitat is arbitrary and capricious and not in accordance with law.

A. The designation violates ESA Section 4(a)(3), which, the Government now concedes, unambiguously limits designations to the species' "habitat." See U.S. Br. 23 (this provision "contemplates that a species' 'critical habitat' is part of its 'habitat'").

The Government observes (at 25) that the ESA does not define "habitat." But lack of a statutory definition does not automatically trigger deference. *E.g.*, *SWANCC*, 531 U.S. at 172, 174. This Court instead construes undefined terms based on their "ordinary or natural meaning." *F.D.I.C.* v. *Meyer*, 510 U.S. 471, 476 (1994). That principle resolves this case.

The Government admits (at 32-33) that Unit 1 is not "habitat" under the dictionary definitions we cited (Pet. Br. 23), which require "habitat" to be habitable. *E.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) ("the place where a plant or animal species naturally lives and grows," with the "physical features" that are "naturally or normally preferred" by a species).

The Government is silent about the Forest Service's contemporaneous definition as a place "where all essentials for [a species'] development and existence are present." It is silent about FWS's definition in its *Habitat Conservation Planning Handbook*, which is focused on the "particular environmental conditions"

where an "animal lives." And it never mentions the definitions used in international conventions. *E.g.*, Convention on Biological Diversity, art. 2 (1992) ("the place or type of site where an organism or population naturally occurs"). See Pet. Br. 23-24 (discussing these and other definitions). Yet these sources all define "habitat" in terms of habitability.

The Government (at 33) points to other dictionary definitions of "habitat" that it asserts cover Unit 1. But they do not. Unit 1 lacks the "'physical features'" "'naturally or normally preferred'" by the frog (*ibid.*)—the "fire-maintained, open-canopied, pine woodlands" where they "spend most of their lives." JA144-145. Unit 1 cannot "'natural[ly]'" sustain the "'life and growth'" of the frog (U.S. Br. 33), because it lacks "features" needed to "support the life-history processes of the species." JA154. It is not "the kind of locality" where the frog "naturally grows or lives." U.S. Br. 33 (citing OXFORD ENGLISH DICTIONARY 995 (2d ed. 1989)).

The Government's non-dictionary definitions are no better a fit. The Government observes (at 26-27) that habitat can be "degraded." But Section 4 is plain that "habitat" also can be "destr[oyed]." 16 U.S.C. § 1533(a)(1)(A). At that point, the Act does not "apply" to that land at all. *Hill*, 437 U.S. at 186 n.32.[3] As FWS found, the frog is endangered because of "destruction of habitat," including conversion to loblolly pine plantations that make land "unsuitable as habitat." JA145, JA148. Unit 1 is a loblolly plantation, the frog has not lived there since before the ESA's enactment,

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[3] In accusing petitioner of misinterpreting *Hill*, CBD (at 47 n.19) does not even try to explain footnote 32 of *Hill*, which stands for the proposition that once a species' "habitat [is] destroyed," the Act has "no subject matter to which it might apply." The Government does not contest our reading.

and Unit 1 is "unoccupied" by the frog though its ponds are supposedly "little changed"—the clearest indicators that Unit 1 is not habitat. JA160, JA162.

FWS did not designate Unit 1 so that frogs could use it "seasonally or for one purpose." U.S. Br. 29. It designated Unit 1 in the "hope" that "habitat" could be "restor[ed]" and the frog "translocated" there. JA123, JA167. It accordingly designated not only Unit 1's ponds, but also the 1544 acres around them, because the frog needs nonbreeding habitat and the "breeding and nonbreeding habitat" must be "connect[ed]." JA148. Indeed, there would be no purpose in designating Unit 1 only for its breeding ponds, when successful breeding occurs in zoos and even cattle tanks, and when, after breeding, frogs would have nowhere to go and nothing to eat because Unit 1 provides no habitat for their other life processes.

The designation of Unit 1 is nothing like "migratory" or "marginal" habitat that a species uses *en route* or now and then. U.S. Br. 26-27, 29. Nothing in Section 4's authorization to "designate any habitat" permits designation of *non*-habitat for a *non*-migratory species like the frog. 16 U.S.C. § 1533(a)(3)(A)(i).[4]

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[4] The Government argues (at 27) that "habitat" includes unoccupied areas "surrounding" where "a species is found" that "provide elements necessary to maintain the species." That was the context in which petitioner stated below that FWS could protect some unoccupied areas that lack essential features. C.A. Br. 28-29; see U.S. Br. 37 n.8; CBD Br. 42-43. But, *first*, areas of that sort are not at issue here. Unit 1 does not sustain frog habitat in Mississippi, and even if the frog were introduced into Unit 1's ponds, the surrounding uplands do not supply the features the frog needs to survive. *Second*, Judge Jones explained how, though surrounding areas that supply elements necessary for species survival that are not "habitat" cannot be designated "critical habitat," they may still receive other ESA protections. See Pet.

Ultimately, the Government's "case-by-case application" (at 25) defines "habitat" so amorphously that no land falls outside its scope. As in *Hill*, this Court should reject that "Humpty Dumpty" approach in which a word "means just what [the Government] choose[s] it to mean." 437 U.S. at 173 n.18. Under any plausible definition, uninhabitable Unit 1 is not "habitat" and so FWS may not designate it as "critical habitat."

B. The Government fares no better with statutory context. Section 3 defines "critical habitat" to mean "occupied" "areas" that contain "features" "essential to the conservation of the species" "which may require special management considerations or protection," and unoccupied "areas" that "are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). The Government (at 28) is correct that "an 'area' may qualify as 'habitat' even if it is 'outside the geographical area occupied by the species.'" But the Government reaches too far in concluding that FWS may designate an area that "does not currently contain the 'physical or biological features' of *occupied* critical habitat." *Ibid.*

The Government overlooks the word "habitat" in Section 4(a)(3) and in the term "critical habitat." See Pet. Br. 22-26. Its interpretation also contradicts Section 3(5)(C), which provides that "critical habitat" generally "shall not include the entire geographical area which *can be occupied*" by the species. 16 U.S.C. § 1532(5)(C) (emphasis added). Section 3(5)(C) shows that Congress intended occupied *and* unoccupied

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App. 140a-141a ("the 'action' targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat").

"critical habitat" to be limited to areas that "can be occupied"—*i.e.*, *now*. See Pet. Br. 26-27. The Government would render Section 3(5)(C)'s limitation a dead letter by defining critical habitat to include areas that "can be occupied" only if new habitat is created. Because it cannot account for Section 3(5)(C), the Government (at 24) buries it in an unexplained "see also" cite.[5]

The Government's reading also is at odds with the ESA's definition of "critical habitat." The Government (at 40) agrees with petitioner that Congress intended that it "be easier to show" that a "feature" is "essential" to the conservation of a species than to show that an "area" is "essential" to the conservation of the species. See Pet. Br. 27. Yet the Government reads Section 3 to allow designation of unoccupied land that "currently lacks *all features* of the species' occupied critical habitat." U.S. Br. 37 (emphasis added). By allowing designation of areas that lack all habitat features, the Government's reading manifestly is *not* "consistent with th[e] understanding" that "the test for unoccupied critical habitat is '*more* stringent' than that for occupied critical habitat." *Id.* at 40.[6]

Section 3(5)(A) must be read reasonably. An "area" cannot be "essential for the conservation of the species"

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[5] CBD's suggestion (at 35, 47 n.19) that Section 3(5)(C) applies only to *occupied* critical habitat contradicts the language of Sections 3(5)(A) and (C) and CBD's own recognition (at 25) that the "term [critical habitat] extends fully to areas the species does not currently occupy."

[6] CBD drops the Government's pretense and argues (at 36) that the ESA makes it easier for FWS to designate unoccupied non-habitat than occupied habitat. That reading violates the ESA's language, structure, and legislative history and attributes an absurd intent to Congress.

if it lacks the "features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A). There is nothing "essential" about land on which a species cannot survive. There is especially nothing "essential" about unoccupied, uninhabitable, private land that does not and will not support the species, either now or in the foreseeable future. The Court should reject "the oxymoron of uninhabitable critical habitat." Pet. App. 138a (Jones, J.).[7]

The Government is wrong to claim (at 24) that our reading makes occupied "habitat" "automatically qualify" as occupied "critical habitat." The ESA defines occupied critical habitat to mean areas with essential features that "may require special management considerations or protection." 16 U.S.C. § 1532(5)-(A)(i)(II). If an area's features do not require protection—for example, they exist in abundance and the species is endangered for other reasons (such as disease or hunting)—that area should not be designated as critical habitat even if it is occupied. Our reading, unlike the Government's, thereby "give[s] effect" to "every clause and word of a statute." *Bennett*, 520 U.S. at 173.

The Government (at 28-29) relies on the word "any" in Section 4's term "any habitat." But the meaning of

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[7] FWS recently proposed new rules regarding critical habitat designation. 83 Fed. Reg. 35193 (July 25, 2018). Its proposal would codify the common-sense notion that an area is not "essential" unless "there is a reasonable likelihood that the area will contribute to the conservation of the species." *Id.* at 35201. And FWS could consider whether "extensive restoration would be needed" and whether "a non-federal landowner" is "unwilling to undertake or allow such restoration." *Id.* at 35198. This proposed rule operates prospectively only. *Id.* at 35194. And a rule giving the Service any discretion to designate non-habitat as critical habitat still violates the plain language of the ESA.

"any" "depends on the statutory context," and "'any' in this context does not bear the heavy weight the Government puts upon it." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 629 (2018). "Any habitat" allows FWS to designate any land that contains habitat that is critical. It does not allow designations of non-habitat.

The ESA's definition of "conservation" also does not save the designation. U.S. Br. 30, 37-38. Using a designation to require habitat creation is neither "habitat acquisition and maintenance" nor "transplant-tation." 16 U.S.C. § 1532(3). Anyway, the ESA's definition of "conservation" cannot be read to repeal Section 4's operative language. Congress did not empower FWS to use designations to extort private landowners into transforming their land into habitat.[8]

C. The Government (at 30) points to the ESA's "purposes." But "no statute yet known 'pursues its [stated] purpose[ ] at all costs.'" *Henson*, 137 S. Ct. at 1725. And the ESA has several purposes. *Bennett*, 520 U.S. at 177. What is determinative is the "particular provision of law upon which the [agency] relies." *Id.* at 175-176. For the reasons explained above, Sections 3(5)(A), 3(5)(C), and 4(a)(3) reflect an unambiguous purpose to cabin FWS's designation authority.

Congress enacted those provisions to push back against this Court's decision in *Hill* and FWS's overbroad regulatory definition of critical habitat. Pet. Br. 7-10, 31-32. That purpose is served by reading "habitat" as written and commonly understood: to

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[8] Nothing in our argument prevents the Government from creating habitat on federal land or designating such habitat where it already exists. U.S. Br. 41 n.10. It is, after all, "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species" and "shall utilize their authorities" to do so. 16 U.S.C. § 1531(c)(1); see *id.* § 1536(a)(1).

exclude uninhabited areas that cannot support the species.

The Government (at 39) cites unenacted bills to imply that Congress intended a broader reading. That suggestion ignores House and Senate Report statements strongly criticizing aggressive designations of unoccupied areas, as well as the lead House conferee's explanation that Congress selected an "extremely narrow definition of critical habitat." See Pet. Br. 31-32. The 1978 amendments also tightened the definition of critical habitat from FWS's prior regulation. Congress rejected as insufficiently rigorous the regulation's language allowing designation of areas that "appreciably decrease the likelihood of the survival and recovery of a listed species." 43 Fed. Reg. 870, 875 (Jan. 4, 1978); see LEG. HIST. 880 (Rep. Duncan: there instead "ought to be a showing that [critical habitat] is essential to the conservation of the species"). And Congress added Section 3(5)(C) so that designations generally will be narrower than all land that can be occupied by the species. The Government would turn Congress's intent on its head by allowing designation of unoccupied, uninhabitable land that will have *no* appreciable effect on the species.

D. The Government cannot sidestep the canon of constitutional avoidance. It acknowledges (at 42) that the canon applies "when statutory language is susceptible of multiple interpretations." After arguing at length that the ESA's alleged ambiguities require *Chevron* deference, the Government abruptly reverses course and says (at 43) the canon does not apply because the Act is not "sufficiently ambiguous to warrant departure from its text." Of course, we are asking the Court to *apply* the plain text, not depart from it. Were there ambiguity, the canon would resolve it against FWS's broad reading; and the canon counsels

against finding ambiguity when statutory language is plain enough.[9]

The Government contends (at 42-43) that the "canon is inapplicable" because "the principal case petitioner relies on"—*SWANCC*—is factually dissimilar. But we cited *SWANCC* for its *legal* holding that the avoidance canon applies when agency interpretations test constitutional boundaries—a holding that applies far beyond *SWANCC*'s facts. *E.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 923 (1995); *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

SWANCC's federalism concerns apply forcefully. The Government needlessly reads the ESA to block development of non-habitat and force landowners to create habitat as the price of obtaining unrelated federal permits. That reading "raise[s] serious constitutional problems" by "permitting federal encroachment upon a traditional state power" over land use and "alter[ing] the federal-state framework." *SWANCC*, 531 U.S. at 173. As St. Tammany Parish's briefs attest, FWS's designation of Unit 1 threatens the Parish's goal to develop Unit 1 as a neighborhood and poses a fire hazard to its residents. Our reading ameliorates federal intrusion into core state and local land use authority by confining designations to actual habitat. See Alabama *et al.* Amicus Br. 1-2, 10

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[9] CBD's belief that we must challenge the ESA's constitutionality to invoke the canon "misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation." *Clark*, 543 U.S. at 381. "The canon is not a method of adjudicating constitutional questions," but "a tool for choosing between competing plausible interpretations." *Ibid.* "[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions." *Ibid.*

(overbroad designations harm States by causing "loss of tax revenue," "reduced employment," "foreclosed industrial and recreational use," and "expenditure of taxpayer funds").

The Government's Commerce Clause argument (at 43-45) similarly fails. The Government does not deny that there is no interstate commerce in the frog. It invokes *Raich*'s aggregation principle, but nothing about the designation of non-habitat for a non-economic, intrastate species is "an essential part of a larger regulation of economic activity." *Gonzales* v. *Raich*, 545 U.S. 1, 36 (2005); see Pet. Br. 34. The Government's attempt to federalize zoning based on a species' absence from land that cannot sustain it strains the boundaries of the Commerce Clause. See Cato Amicus Br. 14-21. The Court can avoid that constitutionally suspect interpretation by reading the ESA to prohibit designation of non-habitat.

E. The Government goes further than the Fifth Circuit in bestowing limitless authority on FWS. It does not share the panel's view (Pet. App. 27a-28a) that an "inadequacy determination" cabins FWS's power to designate unoccupied areas. U.S. Br. 3 n.2 (amended regulation eliminated that requirement). And unlike the panel (Pet. App. 30a n.20), the Government (at 37) would allow FWS to designate areas that "currently lac[k] all features" necessary for species survival.

The Government assures the Court (at 39) that the word "essential" and its obligation to "us[e] the 'best scientific data available'" impose "meaningful limits." That is "a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action." Pet. App. 155a (Jones, J.). Indeed, the Government insists (at 37) that courts must be at their "'most deferential'" in reviewing FWS's designations. In this case, the mere

presence of ponds would allow FWS to designate uninhabitable private land, depriving its owners of $20 to $34 million in value, in the "hope" that the owners will "voluntar[ily]" transform the land into frog habitat "through prescribed burning" and "frog translocations." JA123. In the next case, the ponds are not needed at all because the land has "'forested areas' or 'a natural light regime.'" Pet. App. 156a (Jones, J.).

"The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Court should restore the ESA's limits on FWS's designation authority.

F. The clarity of statutory text, context, structure, history, and canons of construction overcome the Government's appeals to *Chevron* deference. "[D]eference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018). Given "all the textual and structural clues" discussed above, "it's clear enough" that the ESA forbids designation of Unit 1 as critical habitat, "leaving no ambiguity for the agency to fill." *Wis. Cent.* v. *United States*, 138 S. Ct. 2067, 2074 (2018).

G. The Government does not dispute FWS's decades-long position that critical habitat designations do not benefit listed species, are forced by litigation and not biology, and divert agency resources from actual conservation. See Pet. Br. 42-45. Nor does the Government deny that the ESA provides tools that better protect species while treating landowners more equitably. In particular, it does not deny that FWS can purchase land or conservation easements, can fund similar state efforts, or can negotiate the release of an

experimental population (which prohibits critical habitat designation). *Id.* at 39-42.

The Government says (at 41-42) that these "conservation tools have no bearing" on critical habitat designations. But their existence shows that there is no need for this Court (or FWS) to stretch the plain meaning of "habitat" or "essential" in the name of species protection. This Court should reverse the Service's unlawful designation of Unit 1.

III. The Service's Decision Not To Exclude Unit 1 From Critical Habitat Designation Is Subject To Judicial Review.

Reversal is independently required because the Fifth Circuit erroneously refused to review FWS's decision not to exclude Unit 1 from designation under ESA Section 4(b)(2).

The Government defies this Court's unanimous decision in *Bennett* in arguing that courts may never review FWS's decisions not to exclude areas from critical habitat. *Bennett* explained that the Service's "ultimate decision" whether to exclude areas from designation "is reviewable" for "abuse of discretion." 520 U.S. at 172. The Government suggests (at 50-51) that its position "is not necessarily inconsistent" with *Bennett* by conceding that courts may review FWS's decisions "to exclude an area from critical habitat." But *Bennett* did not concern a decision *to exclude*. It ruled that an "implici[t]" designation of critical habitat—and thus a decision *not to exclude*—is reviewable for abuse of discretion. 520 U.S. at 172. *Bennett* confirms that the Fifth Circuit should have reviewed FWS's decision not to exclude Unit 1 from designation.[10]

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[10] CBD says (at 56) that a "decision to exclude is 'properly reviewable because it is equivalent to a decision not to designate

Bennett also was correct. The Government admits (at 48) there is a strong presumption in favor of judicial review of agency action. It attempts (at 46) to rebut that presumption by pointing to Section 4(b)(2)'s "two operative sentences." The first states that "[t]he Secretary shall designate critical habitat" after "taking into consideration the economic impact" and "any other relevant impact" of "specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The second sentence states that "[t]he 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 "extinction" "will result."

Those two sentences do not oust judicial review. The Government claims (at 47) that, because the second sentence provides that "the Service *may* exclude" an area without "identify[ing] any set of cases in which the Service *should* do so," decisions not to exclude are unreviewable. But this Court has never held that statutes phrased in the permissive are immune from judicial review. To the contrary, it has found law to apply even when statutes afford agencies wide latitude. *E.g.*, *Chappell*, 462 U.S. at 303 (agency "may correct any military record" when it "considers it necessary"); *Mulloy* v. *United States*, 398 U.S. 410, 414-416 (1970) ("may reopen" draft classifications); *Barlow* v. *Collins*, 397 U.S. 159, 165-167 (1970); see *Inova Alexandria Hosp.* v. *Shalala*, 244 F.3d 342, 348 (4th Cir. 2001) (citing decisions that "routinely conclude that judicial review is available notwithstanding

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critical habitat.'" But a decision *not* to exclude is by similar reasoning the equivalent of a decision to designate critical habitat, which CBD recognizes (at 54) "is fully reviewable."

statutory language that seemingly allows for unlimited discretion").

Section 4(b)(2) gives FWS discretion to determine whether to exclude an area. But review of those determinations for *abuse of discretion* honors that discretion. "[W]ide latitude" does not mean Congress has "left *everything*" to the agency. *Mach Mining*, 135 S. Ct. at 1652; see *Citizens of Overton Park* v. *Volpe*, 410 U.S. 402, 410 (1971).[11]

The Government reads Section 4(b)(2)'s sentences independently, but they must be "interpreted holistically." Pet. App. 160a n.21 (Jones, J.). The first sentence's demand to "tak[e] into consideration the economic impact" and "any other relevant impact" informs the Secretary's "determin[ation]" in the second sentence whether "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). And vice versa. Rational weighing of costs and benefits during the exclusion decision is part of what it means to "tak[e] into consideration" all relevant impacts. If FWS calculates costs and benefits but then declines to exclude an area from designation because its owner's name starts with "W," the Service would not have "tak[en] into consideration" the relevant impacts and courts should set aside that exclusion decision as arbitrary and capricious.

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[11] *Webster* v. *Doe*, 486 U.S. 592, 600-601 (1988), concerned the National Security Act, which embodied "extraordinary deference" to the CIA Director. And courts "have long been hesitant to intrude" on national security determinations. *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993). Those considerations are absent here. See Wash. Legal Found. Amicus Br. 16-17; NFIB Amicus Br. 21-22 n.2.

For all the ink it spills insisting that "there exists 'no meaningful standard against which to judge the agency's exercise of discretion'" (U.S. Br. 48-49), the Government never once explains why the abuse-of-discretion standard under *State Farm* and its progeny fails to provide such a standard. Abuse of discretion is the "familiar default standard of the Administrative Procedure Act." *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 496 (2004). Our opening brief showed (at 52-56) that FWS's exclusion decision smacks of abuse of discretion. And the Government (at 53-54) contests our argument head-on.[12] That briefing confirms that courts can resolve disputes about exclusion determinations under APA standards.

The Government cannot find refuge in appeals to the ESA's "overriding purpose." U.S. Br. 51. This Court explained in *Bennett* that, while the ESA serves the "overall goal of species preservation," *another* objective —the "primary" one of the 1978 amendments—is to "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. Judicial review serves that statutory purpose.[13]

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[12] The Government's merits defense of FWS's exclusion decision is unpersuasive. The Government does not address FWS's failures to perform an area-specific analysis or explain *why* it decided that the high costs of designation are "not disproportionate." See Pet. Br. 53. Nor does it defend FWS's decision to discount stigma and oil and gas costs as too uncertain while refusing to discount "biological" benefits that are more speculative. See *id.* at 54-55.

[13] As we explained (Pet. Br. 47 n.13), the 1978 House Report shows an intent to give the Secretary broad discretion, but not to make exclusion decisions immune from judicial oversight. See AFBF Amicus Br. 29-33; NFIB Amicus Br. 23-27. A complete lack of standards to guide agency action also would raise constitutional concerns. See NAHB Amicus Br. 9-12.

The Court should reaffirm *Bennett*'s conclusion that decisions not to exclude areas from critical habitat designation are reviewable for abuse of discretion. And for the largely uncontested reasons we identified (Pet. Br. 52-56), the Court should reverse the judgment below or remand for further proceedings.

IV. This Court Has Article III Jurisdiction.

Both courts below held that petitioner has standing. Pet. App. 13a-14a, 95a-99a. The Government does not contest that ruling. Only CBD—raising an argument it did not assert in the Fifth Circuit or its brief in opposition—contends that the unlawful designation of Unit 1 does not inflict an "injury in fact" on petitioner. To quote the district court, that contention is "utterly frivolous." Pet. App. 98a.

The Fifth Circuit correctly held that the designation injured petitioner by "'immediately'" reducing the value of its land. Pet. App. 13a; see JA83. "Certainly he who is 'likely to be financially injured'" has standing. *Ass'n of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 154 (1970). "[L]oss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). Even unrealized losses confer standing. *Ibid.* (lost chance to obtain settlement); *Clinton* v. *City of New York*, 524 U.S. 417, 430 (1998) ("contingent liability"); *Bryant* v. *Yellen*, 447 U.S. 352, 367 (1980) (reduced ability to purchase land). An *actual* loss of Unit 1's value plainly is an injury.

That petitioner is an aggrieved landowner and lessee "reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete." *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007). This Court long ago held that landowners may challenge government actions that "reduce the value of [their] lands and destroy their marketability." *Vill. of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

Although standing is shown without it, the Fifth Circuit erred in dismissing the landowners' development plans as too speculative. Pet. App. 11a-13a. The landowners "spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate th[e] future development" of Unit 1. JA33. As a result, St. Tammany Parish rezoned the land "for future development." JA29; see JA80-83. Those are not the sort of "'some day' intentions"—like the "profession of an 'intent'" to view wildlife in Sri Lanka without "concrete plans" to do so—that this Court addressed in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992). See *Clinton*, 524 U.S. at 432-433.

In fact, *Lujan* shows Weyerhaeuser has standing. It held that when "the plaintiff" is "an object of the [challenged] action," there is "little question" that the plaintiff has standing. 504 U.S. at 561. As CBD admits (at 22), petitioner falls into that camp.

CBD cites (at 22) to *Spokeo* v. *Robins*, 136 S. Ct. 1540 (2016). There, plaintiff challenged a credit report that overstated his wealth, which the Ninth Circuit held on remand was a concrete injury. 867 F.3d 1108 (9th Cir. 2017). The designation of Unit 1, which saps the land of value and imposes a regulatory regime that impedes development, is orders of magnitude worse. The designation imposes a "'real,' and not 'abstract'" injury that "cause[s] harm or present[s] any material risk of harm." *Spokeo*, 136 S. Ct. at 1548, 1550; see *id.* at 1551 (Thomas, J., concurring) (plaintiffs have standing to protect "property rights"); Energy and Wildlife Action Coalition Amicus Br. 20-27.

CBD also invokes *National Park Hospitality Association* v. *Department of Interior*, 538 U.S. 803 (2003), which concerned ripeness, not standing. There, the Court refused to adjudicate a "facial challenge" to a regulation that was "nothing more than a 'general

statemen[t] of policy'" because it caused "no practical harm" and "further factual development would significantly advance [the Court's] ability to deal with the legal issues presented." *Id.* at 807, 809, 810, 812.

Those concerns do not apply here. Petitioner challenges the final designation of *its owned and leased land*, not some abstract policy. The designation immediately reduced the land's value and precludes petitioner from obtaining federal "licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid" (50 C.F.R. § 402.02) without a costly and time-consuming Section 7 consultation process. See *Otay Mesa Prop., L.P.* v. *U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) ("Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to result in the destruction or adverse modification of critical habitat") (quotation marks omitted); EWAC Amicus Br. 26-27 (even if federal action is not triggered, designation adversely affects project financing); cf. *U.S. Army Corps of Engineers* v. *Hawkes Co.*, 136 S. Ct. 1807, 1814-1815 (2016) (CWA jurisdictional determinations, which trigger an "arduous, expensive, and long" process, have "'direct and appreciable'" consequences). Finally, unlike in *National Park Hospitality*, further factual development —on top of a long administrative record compiled over a decade—will shed no further light on whether the designation violated the ESA.[14]

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[14] CBD's ripeness argument is thus meritless. It also is waived because it was not raised in CBD's brief in opposition. See *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 & n.10 (2010).

There is no Article III barrier preventing this Court from overturning FWS's unlawful designation of Unit 1 as critical habitat of the dusky gopher frog.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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