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

RESPONDENTS' BRIEF ON THE MERITS IN SUPPORT OF PETITIONER ON BEHALF OF MARKLE INTERESTS, LLC; P&F LUMBER COMPANY 2000; AND PF MONROE PROPERTIES, LLC

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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 because of the economic impact of designation is subject to judicial review.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitution

Statutes

Federal Regulations

Rule

Other Authorities

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. Petitioner's Petition for Writ of Certiorari was filed on July 11, 2017, and the Court granted the Petition on January 22, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:
The Congress shall have Power to . . . regulate commerce with foreign Nations, and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act (ESA) provides in pertinent part:

> The term "critical habitat" for a threatened or endangered species means:
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) 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 this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any

> habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section 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.

Id. § 1533(b)(2).

The Administrative Procedure Act (APA) provides in pertinent part:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or

> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a)(1)-(2).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702.

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> ***

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

5 U.S.C. § 706(2)(A)-(C).

INTRODUCTION

This case asks whether the U.S. Fish and Wildlife Service and its Director, and the Department of the Interior and its Secretary (collectively "the Service") exceeded their authority in designating thousands of acres of private land as critical habitat for the dusky gopher frog, even though the frog cannot survive on the land, it has virtually no connection to the species, and the designation will impose staggering costs on the property owners. The Service's decision—the first of its kind—conflicts with the plain meaning of the ESA, and the intent of Congress.

The ESA instructs that when prudent, the Secretary of the Interior designate as critical habitat those lands occupied at the time of listing the species as endangered or threatened, if the land contains physical or biological features essential to the species' conservation and requires special management considerations or protection. 16 U.S.C. § 1532(5)(A)(i); 16 U.S.C. § 1533(a)(3)(A). Designating areas not

occupied by a species at the time of listing is more difficult: the Secretary may only designate unoccupied areas as critical habitat when the habitat is "essential for the conservation of the species." *See* 16 U.S.C. § 1532(5)(A)(i).

The Service defied these limits by designating the land owned for the most part by Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC (collectively Family Landowners), as well as Weyerhaeuser Company, and St. Tammany Land Co., LLC. The designation imposes severe costs on these landowners and provides no actual benefit to the species, because the species cannot survive on the land. Although the Service conceded it had no agreements with the Family Landowners or other owners of Unit 1 to manage this site to provide habitat for the dusky gopher frog, the Service expressed its "hope" that the Family Landowners would make the dramatic changes that the owners would have to make to ever render the land habitable for the frog. 77 Fed. Reg. 35123 (June 12, 2012). Even though the ESA requires the Service to weigh economic costs with benefits to the species when designating critical habitat, the Service divorced any meaning from that requirement, deciding that its authority to list any land is unfettered and left to its sole discretion.

The Service strayed far from the constraints of the ESA and the clear intent of Congress. This Court should overturn the designation and make clear that such decisions are subject to judicial review and the plain requirements of the statute.

STATEMENT OF THE CASE

A. Designation of Critical Habitat for the Frog

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species, as required by the ESA. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001); 16 U.S.C. § 1533(a)(1); 16 U.S.C. § 1532(6) (the Secretary of the Interior must list a species as "endangered" when it "is in danger of extinction throughout all or a significant portion of its range"). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." 66 Fed. Reg. 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at 3a. At the time of listing, however, it was known to exist only in Harrison County, Mississippi, which is more than 50 miles from any of the land at issue in this case. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The ESA requires the Secretary of the Interior to designate critical habitat for an endangered species when prudent and the agency has sufficient data to perform the required analysis. 16 U.S.C. § 1533(a)(3)(A); 50 C.F.R. § 424.12(a)(2) ("[d]esignation of critical habitat is not determinable when . . . [d]ata sufficient to perform required

analyses are lacking"). The designation must be based on "the best scientific data available" and may only be made after the Secretary considers and weighs the cost of all relevant impacts, including economic impacts. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(a).

The ESA places additional limitations on the designation by defining "critical habitat" as (1) areas occupied at the time of listing that contain essential "physical or biological features" that require "special management considerations or protection"; and (2) areas not occupied by the species at the time of listing, but that are "essential to the conservation of the species." 16 U.S.C. § 1532(5). Moreover, the ESA states a congressional intent that critical habitat, as a general rule, be narrow in scope: "critical habitat shall not include the entire geographical area which can be occupied by the [species]" unless the Secretary determines it is otherwise justified. *Id.*

The Service issued a Proposed Rule in June, 2010, to designate 1,957 acres in Mississippi as critical habitat for the frog. 75 Fed. Reg. 31387, 31395 (June 3, 2010). At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." *Id.* at 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County, Mississippi. *Id.* In designating critical habitat, the Service searched for "additional locations with the potential to be occupied by the . . . frog." *Id.* at 31394. The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* at 31389. And that, "habitat in Alabama and Louisiana is severely limited" so the

Service "focus[ed] on identifying sites in Mississippi." *Id*. at 31394.

The Proposed Rule identified 11 "units" for designation as critical habitat in Mississippi—all within the DeSoto National Forest. *See id.* at 31396-31399. These included, federal land . . . managed by the State of Mississippi as a Wildlife Management Area, and private land used as a wetland mitigation bank. *Id.* at 31394. Four of the 11 units were partly occupied by the frog at the time of the Proposed Rule. *See id.* at 31396-31399. The seven unoccupied units were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.* at 31396.

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog only if Unit 1 was significantly modified and the frog were transferred there. *Id.* at 59783.

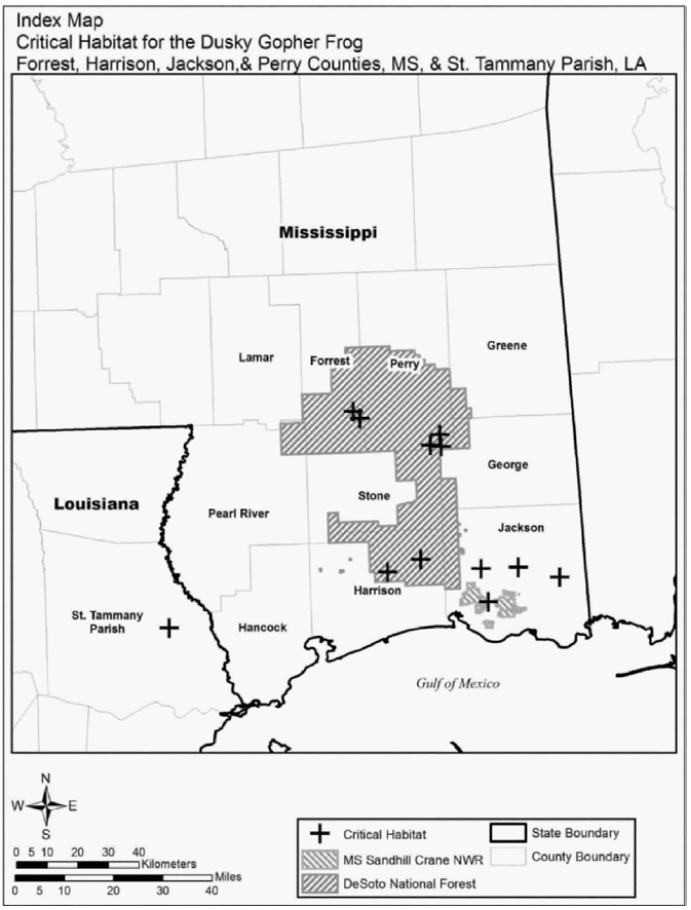
The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final

Rule, 77 Fed. Reg. 35118. (June 12, 2012). Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35119. The Service identified three physical and biological features that are essential for the survival of the dusky gopher frog, which are called "primary constituent elements." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

The dusky gopher frog requires all of the following elements in its habitat: (1) small, isolated, ephemeral, acidic breeding ponds in an open canopy forest; (2) upland forests filled with frog-friendly burrows and "historically dominated by longleaf pine" with "abundant herbaceous ground cover" that are "maintained by fires frequent enough to support an open canopy"; and, (3) upland, open-canopy habitat with various "subsurface structure[s] that provides shelter" for the frog that allow it to move between the breeding ponds and the longleaf pine forests. Final Rule, 77 Fed. Reg. at 35131.

Eleven of the twelve units designated as critical habitat contain all three essential elements. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps only one of the essential elements of critical habitat and therefore cannot without significant modifications provide habitat for the gopher frog.

Unit 1 in St. Tammany Parish is at least 50 miles away from any of the other units, and separated by county lines, the state line, and the Pearl River, as well. *Id*. at 35146.



Id. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site, meaning it will *never* reach Unit 1 on its own. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer "catastrophic events." *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were clear cut, replanted with longleaf pines, and regularly subjected to controlled burns, it is entirely owned by private parties. Pet. App. 88a. The Family Landowners own the vast majority of Unit 1. *See* Pet. App. 88a. The Petitioner Weyerhaeuser, Co., and amicus curiae St. Tammany Land Co. own the rest of Unit 1, and Weyerhaeuser leases the Family Landowners' property for its timber business. Pet. App. 88a. These private parties intend to harvest the timber and then develop the site. *See* March 12, 2012, Public Comment on Behalf of P&F Lumber. (Pet. Jt. App. at JA60; *id.* at JA59) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, at 4 (Jt. Pet. App. at JA33) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the Family Landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. *See id.* at 4-5 (Jt. Pet App. at JA32-33). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. *See* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. at 35123. The Service expressly acknowledged it cannot compel the Family Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not

"establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

B. The Service Disregards the Severe Economic Impact of the Designation and Fails To Exclude Unit 1

Under the ESA, the Service must also "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] of the potential economic impacts caused by the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation

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[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf (Final Economic Analysis).

could severely limit, or even foreclose entirely, such development.

"A critical habitat designation provides protection for threatened and endangered species by triggering what is termed a Section 7 consultation in response to actions proposed by or with a nexus to a federal agency." *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004). Under Section 7(a)(2) of the ESA (16 U.S.C. § 1536(a)(2)), each federal agency must consult with the Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." Accordingly, any actions undertaken on Unit 1 by the landowners having a "federal nexus," including actions requiring a federal permit, would trigger a Section 7 consultation.

The Service's Economic Analysis found that the designation of Unit 1 could cost landowners $34 million over a twenty-year period by stopping development of the property. Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87). The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years, because those units are already actively managed for the recovery of the frog. *See* Final Rule, 77 Fed. Reg. at 35140; 75 Fed. Reg. 39396-99 (July 8, 2010). Therefore, under either the second or third scenario, more than 99 percent of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1.

Despite the heavy and lopsided economic impact on private parties caused by the designation of Unit 1, the Service could identify no direct benefits to the frog from its designation. The Service's economic analysis found only ancillary benefits, such as increased property value for adjacent properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Family Landowners. Instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

C. Procedural Background

After their comments failed to persuade the Service to revise the designation of Unit 1, Markle Interests, LLC, filed suit against the Service challenging the Final Rule on statutory and constitutional grounds. Next, P&F Lumber Company 2000, LLC; PF Monroe Properties, LLC; and St. Tammany Land Co., LLC, which together own the vast majority of the land at issue, filed the same claims against the same defendants. Lastly, Weyerhaeuser Company filed the same claims against

the same defendants. The Landowners sought the invalidation of the final designation only insofar as it concerned Unit 1, recognizing that the Service had legitimately designated abundant habitat for the dusky gopher frog in Mississippi. These lawsuits sought identical declaratory and injunctive relief, and were consolidated before the district court. The Center for Biological Diversity and the Gulf Restoration Network were granted leave to intervene, of right, as defendants.

On August 22, 2014, the district court recognized the injury inflicted on the Landowners by the designation, but rejected their argument that Unit 1 did not qualify as critical habitat. App. B at 79a, 122a. The Court described the Service's designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id.* at 103a, 133a, 115a, and 118a. Nevertheless, the Court deferred to the agency decision and affirmed the Final Rule. *Id.* at 122a.

The Family Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. The panel majority concluded the Service's designation was entitled to *Chevron*[2] deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable

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[2] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* deference holds that courts must defer to an agency's authoritative and reasonable interpretation of ambiguous language found within a statute that it administers.

will not be made in the foreseeable future, if ever. App. A at 16a.

In addition to their statutory claim that critical habitat must be actual habitat, the landowners challenged the designation under the Commerce Clause. *Id.* at 7a. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the ESA is a constitutionally permissible market regulatory scheme. *Id.* at 37a-45a. Next, the majority held that the Service's failure to exclude Unit 1 because of the disproportionate economic impacts the designation imposed on the landowners, was wholly discretionary and "unreviewable." *Id.* at 35a-39a. Lastly, the Court held critical habitat designations are not subject to the National Environmental Policy Act. *Id.* at 45a-47a.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." *Id.* at 48a. Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id.* More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id.* In fact, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id.* Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id.*

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species,"

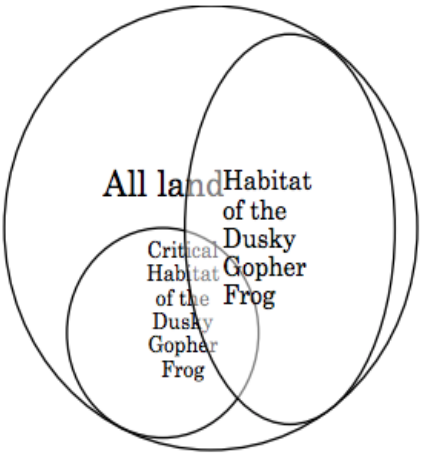
and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id.*, Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation "because it is theoretically possible, even if not probable, that [vast portions of the United States] could be modified to sustain the introduction or reintroduction of an endangered species." *Id.* at 49a.

The full Fifth Circuit rejected the landowners' motion for en banc review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA, because it provided "[n]o conservation benefits" to the frog, but "costs the Louisiana landowners $34 million in future development." Pet. App. B at 125a. On the merits, the dissent concluded the panel erred because (1) the ESA requires critical habitat to be inhabitable by the species; (2) Unit 1 is not essential to the conservation of the species because it lacks features essential to the species survival; and (3) the Secretary's decision weighing the economic harm with benefits to the species is judicially reviewable and the Secretary's decision was an abuse of discretion. *Id.*

Judge Jones noted that the two judges who affirmed the district court decision simply overlooked Section 1533a(a)(3)(A)(i) of the ESA that requires unoccupied habitat to nevertheless be a subset of a species' habitat. In short, "whatever is 'critical habitat,' according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the

entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species." Pet. App. at 132a.

To illustrate this point, Judge Jones used two helpful Venn diagrams. In one image, she set out the panel's approach, which failed to account for Section 1533(a)(3)(A)(i):



This Venn diagram highlights the error of the panel decision, which allows "critical habitat" for a species to include land that is not habitable for the species. *Markle Interests, L.L.C. v. United States Fish and Wildlife Service*, 848 F.3d 635, 643 (Jones, J., dissenting from denial of rehearing en banc).[3] The

[3] This brief cites here to the Federal Reporter rather than Petitioner Weyerhaeuser's Appendix because, due to a scrivener's error, that appendix did not reproduce the Venn diagrams that Judge Jones included in her dissent. *See* Pet. App. 137a-138a.

ESA instead adopts this more logical approach to habitat for a species, as demonstrated in a second image created by Judge Jones:

Id. As shown by Judge Jones's second Venn diagram, the ESA provides that critical habitat is a subset of habitat. *Id*. The panel failed to account for this logical requirement. *Id*. If a species cannot live on land, then it falls outside of habitat for the species and cannot qualify as "critical habitat." *Id*.

The dissent was unequivocal: "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at 125a.

SUMMARY OF ARGUMENT

Since the ESA does not define the word "habitat," or suggest that it is used in any other than its ordinary meaning, the Court should give the term its ordinary meaning of "the place where a particular species of animal or plant is normally found." Habitat, Black's Law Dictionary (10th ed. 2014). The Service's stretched interpretation of "habitat," as susceptible of including land on which the frog cannot currently survive, land on which it has not been seen in 50 years and will not be seen again *ever* absent modifications that the Family Landowners and other owners will not make, violates the plain meaning of the ESA and is ineligible for judicial deference under *Chevron*.

Nor does the ESA define "essential," whose ordinary meaning is "of the utmost importance: basic, indispensable, necessary." Essential, Merriam-Webster.com, www.merriam-webster.com/dictionary/Essential.

The Service's interpretation of "essential" as including land that cannot now support the species and never will absent vast and very expensive major modifications that will not be made, and which is remote from the other 11 units of designated habitat, all of which actually provide currently suitable habitat, stretches the statutory term far beyond its breaking point and is similarly ineligible for *Chevron* deference.

Even if the text of the ESA admitted of any ambiguity, the legislative history of the 1978 Amendments to the ESA demonstrate Congress's intent that unoccupied habitat be harder to designate than occupied habitat, and limited to areas that are

truly necessary to conservation, not merely speculatively useful in some possible and unknown future. House Agreement to Conference Report on S. 2899 in A Legislative History of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979, and 1980, 97th Cong., Congressional Research Service at 1220-21 (Comm. Print 1978), http://www.eswr.com/lh/ (A Legislative History of the ESA). *See also Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat"); *Cape Hatteras*, 344 F. Supp. 2d at 108, 122 ("The [Service] may not statutorily cast a net over tracts of land with the mere hope that they will develop [the physical and biological elements species require to survive] and be subject to designation.").

If the Service's interpretations of "habitat" as uninhabitable land, and "essential" as merely useful (perhaps, one day), are reasonable interpretations of the ESA, this Court should nonetheless reject them under the canon of constitutional avoidance. *See Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (*SWANCC*). The Service's interpretation of these terms enables the agency to impose conservation restrictions on private property with no connection at all to the species being conserved, which itself is an intrastate species with no connection to interstate commerce.

The Secretary's decision not to exclude Unit 1 from critical habitat is judicially reviewable under the APA. This Court should consider revisiting its

decision in *Heckler v. Chaney*, in favor of Justice Scalia's dissent in *Webster v. Doe*, given the breadth of the *Heckler* "no law to apply" standard [as applied by the lower courts] and the *Webster* dissent's superior explanation of the meaning of 5 U.S.C. § 701(a)(2).

The Secretary's refusal to exclude Unit 1 is certainly subject to judicial review under the *Webster* dissent because it is not the type of decision that the federal courts have traditionally declined to review. But *Heckler* itself does not render the Secretary's decision unreviewable, since "law to apply" is supplied by the ESA (benefits of exclusion outweigh those of inclusion, where exclusion will not lead to extinction), the APA (arbitrary and capricious, an abuse of discretion, or otherwise contrary to law), and general principles of administrative law. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (rational connection between facts found and decision made); *Columbia Falls Aluminum Co. v. Environmental Prot. Agency*, 139 F.3d 914, 923 (D.C. Cir. 1998) (rational relationship between methodology and reality being considered).

The decision not to exclude is also subject to judicial review under *Bennett v. Spear*, which holds that the Secretary's duty to engage in economic analysis of the impacts of critical habitat designation is mandatory and reviewable for abuse of discretion. 520 U.S. 154 (1997).

ARGUMENT

I

THE SERVICE VIOLATED THE TEXT AND INTENT OF THE ESA BY DESIGNATING UNIT 1 CRITICAL HABITAT

The ESA provides strict limits on the type of land that can be designated critical habitat. To designate land that was occupied by the species at the time it was placed on the endangered species list, the land must contain "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i)-(ii). The standard for designating critical habitat that is not occupied by an endangered or threatened species at the time of listing is more demanding. *Cape Hatteras*, 344 F. Supp. 2d at 125 ("Designation of unoccupied land is a more extraordinary event than designation of occupied lands."). To designate unoccupied land as "critical habitat," the Secretary must determine that the property is "essential to the conservation of the species." 16 U.S.C. § 1532(5)(ii); 50 C.F.R. § 424.12(e) (2014) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.").

The ESA does not define "habitat" or "essential." Absent a definition, the Court must read these words consistent with their plain meaning. *NISH v. Rumsfeld*, 348 F.3d 1263, 1270 (10th Cir. 2003) ("Our

first inquiry is whether the interpretation complies with the plain meaning of the statutory language.").

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). This Court assumes the ordinary meaning of language employed by Congress accurately expresses its legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 469 U.S. 189, 194 (1985). Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking Ass'ns*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.").

A plain interpretation of the ESA exposes the folly of the Service's designation of Unit 1 in this case. The designation strays far from the plain meaning of "critical habitat" or "essential to the conservation of a species," as laid out in the ESA. Moreover, even if the statute were ambiguous, Congress made its intentions clear when it passed the 1978 Amendments to the ESA, which defined "critical habitat," that it sought to place firm limits on the scope of what the Service could

designate as critical habitat. By designating Unit 1, the Service violated these limits.

The Court should reverse the Fifth Circuit's decision and restrain the Service from exceeding its authority under the ESA.

A. The ESA Requires Critical Habitat Be Habitable and Essential for the Conservation of a Species

1. "Habitat" Must Be Habitable; Otherwise It Is Not Habitat

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at 134a ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The ESA makes clear that all critical habitat is, by definition, "habitat" for the species:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that

> a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added). This language is clear and determinative. Critical habitat is a subset of a species' larger habitat. *See id.*[4]

In other words, all "critical habitat" must be, at a minimum, "habitat." "Habitat" exists for an organism where the resources can be found that allow it to survive. Linnea S. Hall, et al., *The Habitat Concept and a Plea for Standard Terminology*, 25(1) Wildlife Soc'y Bulletin 173, 175 (1997); John M. Frywell, et al., *Wildlife Ecology, Conservation, & Mgmt.* 427 (3d ed. 2014) ("The place where an animal or plant normally lives, often characterized by a dominant plant form or physical characteristic (e.g. soil habitat, forest habitat)."). In other words, "habitat" is a place naturally usable and accessible to the species.

Unit 1 lacks the physical and biological features essential for the dusky gopher frog to survive—all parties admit as much. Therefore, because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

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[4] The agency's own regulations support this logical position. For example, federal regulations implementing Section 7 of the ESA "impose requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added).

It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (citations omitted). Thus under "step one" of the *Chevron* doctrine, the Service is not entitled to deference.

The Court should enforce that plain meaning here and hold invalid the designation of Unit 1.

2. Unit 1 Is Not Essential to the Conservation of the Species

The ESA allows unoccupied habitat to be designated as critical habitat only when it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The ESA does not define "essential," nor has the Service defined the word. In the absence of a definition, this Court should look to the plain meaning of the word "essential." Merriam-Webster Dictionary defines "essential" in relevant part as "of the utmost importance: basic, indispensable, necessary."" Essential, Merriam-Webster.com, www.merriam-webster.com/dictionary/Essential.

The land in Unit 1 is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without expensive modifications that the property owners will not make; and, it does not support the existence or conservation of the species in any way. Pet. App. A at 49a-51a. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory text.

Rather than demonstrate that the area is actually essential to the frog, the agency argues only that the area could prove useful in case some speculative, catastrophic event—like "disease and droughts" caused at some unknown date and location—destroys the habitat in the other 11 units. 77 FR 35118, 35124 ("Unit 1 provides a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events."). Although the land in Unit 1 cannot presently support the frog, the Service piles speculation on speculation stating that it "hope[s]" to work with the private owners to convert their private land into suitable frog habitat, as a backup plan in case the other 5,000 acres prove inadequate as a result of future catastrophes. *See* 77 Fed. Reg. 35118, 35123. In other words, the Service only speculates that the land might someday become valuable to the frog.

Unit 1 provides no conservation benefit to the dusky gopher frog,[5] and it never will as it is now nothing more than theoretical "potential backup habitat" in the event of a catastrophe; even in the event of a catastrophe the land cannot sustain the frog. Those actual benefits that critical habitat must provide are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi. The Service's "interpretation of 'essential' . . . goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." Pet. App. at 56a. Therefore, as this Court has

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[5] *See Cape Hatteras*, 344 F. Supp. 2d at 108, 122 ("The [Service] may not statutorily cast a net over tracts of land with the mere hope that they will develop [the physical and biological elements species require to survive] and be subject to designation.").

explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Moreover, "essential for the conservation of the species" is a more demanding standard than the requirement for occupied habitat that it contain the needed biological features for the species.[6] However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the essential biological features. This approach makes it *less* onerous to designate unoccupied areas as critical

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[6]*Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat"); *Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d at 119 ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

habitat contrary to a logical reading of the statute and the intent of Congress.

The designation of Unit 1, based on the presence of a single suitable physical feature for a species, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." (Pet. App. at 149a). Accordingly, "the panel majority misconstrue[d] the statute. . . ." *Id.*

3. Courts Must Give Effect to Unambiguous Intent of Congress as Expressed in the ESA

If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron,* 467 U.S. at 842-43 (1984). The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Id.* at 843 n.9 (1984). The above explication of "habitat" and "essential" as used in the statute mean the lower courts' analyses should have ended with step one of *Chevron* and held that the Service had twisted the definition of "critical habitat" beyond the

intent of Congress and rejected the designation of Unit 1.

To uphold the intent of Congress, as expressed in the plain language of the ESA, this Court should reverse and hold that private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, does not constitute critical habitat under the ESA.[7]

B. Legislative History Demonstrates the Service Exceeded Its Authority When It Designated Unit 1 as Critical Habitat

If there is any question about what qualifies as unoccupied critical habitat under the ESA, ostensibly requiring a resort to *Chevron* step 2, legislative history makes clear that Congress intended it to be more limited than proposed by the Service here. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 210 n.29 (1978) (only necessary to look to legislative history where a statute is ambiguous). The ESA initially did not define "critical habitat." *See generally* Endangered Species Act of 1973, Pub. No. 93-205. The interpretative regulations at that time provided that

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[7] To be sure, if the Government believes Unit 1 important enough to sustain the frog despite the fact that conditions do not allow its survival without substantial changes, the Government has a different option provided for by the ESA: it can buy it. 16 U.S.C. § 1534(a)(2) (authorizing the Secretary "to acquire by purchase, donation, or otherwise, lands, waters, or interest therein" to conserve fish, wildlife, and plants); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995) ("The Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species.").

the Service list critical habitat "solely on the basis of biological factors." H.R. Rep. No. 95-1625 (1978), in A Legislative History of the ESA at 731-32. But the authority was broad: "[T]he Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured." *Id.* at 731-32 (emphasis added).

After *Tennessee Valley Authority*, 437 U.S. 153, interpreted the ESA as broadly prioritizing the conservation of species above human interests, no matter the cost, Congress responded by amending the ESA to better protect human interests. *See* H.R. Rep. No. 95-1625, in A Legislative History of the ESA at 734, 737, 741. Congress was also troubled by expansive critical habitat designations. *See, e.g.*, H.R. Rep. No. 95-1625, in A Legislative History of the ESA at 742 ("The committee believes, nonetheless, that the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied areas of the species.").

Throughout the entire legislative process, both the Senate and House made clear that critical habitat should only include those lands truly necessary for the survival of the species. Looking to limit the reach of critical habitat, the Senate Committee on Environment and Public Works Report asked the U.S. Fish and Wildlife Service to examine and deliver a report addressing "ambiguity in its regulatory process for critical habitat designations" because it disagreed with the Service's practice of designating as critical habitat lands needed for population expansions. Rather, the committee suggested only "lands which

are critical to a species continued survival" should qualify as critical habitat. Senate Report 95-874 (1978), in A Legislative History of the ESA at 947-48. The Senate subsequently amended the newly proposed definition of critical habitat on the Senate floor to adopt a definition that is similar to the current definition. *See* Senate Consideration and Passage of S. 2899, With Amendments on July 19, 1978, in A Legislative History of the ESA at 1108-109. Senator Garn proposed the adopted amendment saying the extent of critical habitat should usually be smaller than the "entire range of the endangered or threatened species." *Id.* at 1101, 1080-81.

At the same time, the House was considering its own amendments to the ESA. When the House considered its bill on the House floor, Representative Duncan of Oregon successfully proposed an amendment similar to the current definition of "critical habitat." House Consideration and Passage of H.R. 14104 (Oct. 14, 1978), With Amendments, in A Legislative History of the ESA at 879-81. Duncan explained that consultation "developed into the most significant part of the entire statute," in part because the ESA did not define critical habitat. *Id.* at 880. Regarding habitat unoccupied at the time of listing, the proposed amendment required "a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* at 881. He elaborated that to qualify as "essential" that it is not enough for the Service to simply show that excluding it "would appreciably or significantly decrease the likelihood of conserving it." This distinction, he thought, went "to the heart of the problem which every Member has felt in his district." *Id.*

The House and Senate ultimately conferred to reconcile their different ESA bills and to settle on one bill amending the ESA. The conference report does not mention the differences between the House and Senate versions and only states that it adopted a critical habitat definition contained in both versions. Conference Report No. 95-1804 in A Legislative History of the ESA at 1208. Representative Murphy explained "the Senate and House bills were not really all that far apart" but the House version was "considerably more developmentally oriented." House Agreement to Conference Report on S. 2899 in A Legislative History of the ESA at 1220-221. He said, "the guts of the House bill have been retained in the conference report. These include: . . . . An extremely *narrow definition of critical habitat*, virtually identical to the definition passed by the House." *Id.* (emphasis added).

In sum, Congress intended to strictly limit the breadth of the critical habitat designation such that it would not apply to non-habitat in hopes that the landowners would voluntarily modify the property to make it a useful bank against harm caused to a species by speculative "catastrophic events."

C. The Constitutional Avoidance Doctrine Requires Court To Reject the Service's Interpretation of the ESA

The doctrine of constitutional avoidance cautions that agency interpretations that authorize an agency to "push the limit of congressional authority" should be avoided as a matter of prudence. *SWANCC*, 531 U.S. at 172-73. Here, interpreting the ESA in the manner the Service wishes would force the Court to evaluate whether this application of "critical habitat" runs beyond Congress's Commerce Clause authority. The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id*. at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id*. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate

economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012)

This Court could have been describing this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. Virtually the only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*—that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause—the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

Moreover, this Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The

traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id.* at 174. That impingement created a constitutional conflict. It is no wonder that both 18 states and St. Tammany Parish (where Unit 1 sits) filed amicus briefs in support of Weyerhaeuser in the instant case and Markle in 17-74 at the petition stage. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

II

THE SERVICE'S DECISION NOT TO EXCLUDE UNIT 1 FROM CRITICAL HABITAT DESPITE THE ECONOMIC IMPACT OF THE DESIGNATION IS SUBJECT TO JUDICIAL REVIEW

Under the ESA, the Service may exclude areas that otherwise qualify as critical habitat from a designation if the government determines that the benefits of exclusion outweigh the benefits of inclusion, and if the exclusion would not result in the species' extinction. *See* 16 U.S.C. § 1533(b)(2). The lower court held that a decision not to exclude an area

is immune from judicial review under the APA, pointing to the APA's bar on judicial review of agency action "committed to agency discretion by law" as construed by this Court in *Heckler*. Pet. App. at 33a. The *Heckler* "no law to apply" standard is rarely actually true of any given agency action, because all agencies must meet fundamental principles of rationality and fairness—e.g., principles derived from the U.S. Constitution and federal administrative common law, such as the "rational connection" requirement, *see Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43, or the principle regarding cost-benefit disproportion. *See Michigan v. Environmental Prot. Agency*, 135 S. Ct. 2699, 2707 (2015). Courts routinely manage these principles all the time. Hence, denial of judicial review on the ground of "no law to apply" is almost always improper, because at least some law, including the law derived from the Constitution, Bill of Rights, and federal administrative common law, is available. *See Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).

If an agency action falls within a category traditionally immune from judicial review—for example, official immunity or political question—then the bar should apply. *See* Damien Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 ELR 10352 (2017). Otherwise, this Court should recognize that Congress intended § 701(a)(2) to continue a common law of judicial review, which "had marked out, with more or less precision, certain issues and certain areas . . . beyond the range of judicial review. *Webster*, 486 U.S. at 608 (Scalia, J., dissenting). Since those areas do not include the Service's decision on whether to exclude an area from

critical habitat, courts should review decisions on whether to exclude an area from critical habitat for an abuse of agency discretion, as Judge Jones concluded. Pet. App. 160a-61a.

A. That the APA Commits Some Decisions to Agency Discretion Not Subject to Judicial Review Does Not Mean This Decision Is Unreviewable

1. Challenging Agency Action: When Agency Action Is Committed to Agency Discretion and Unreviewable by Law

a. The "No Law To Apply" Standard Should Be Limited

The APA provides the fundamental charter for administrative decision-making in the federal system. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 Ind. L.J. 1207, 1208 (2015) ("The Administrative Procedure Act . . . is one of the most important statutes in the United States Code. . . . [T]he [Act] is still the 'fundamental charter' of the 'Fourth Branch' of the government.") (quotation omitted). Further, the APA provides a right of judicial review to persons who are aggrieved by federal agency action. *See* 5 U.S.C. §§ 702, 704. This right is limited in two ways: first, the courts must apply generous standards of review for agency action subject to challenge under the APA, *see Motor Vehicle Mfrs. Ass'n of the U.S.*, 463 U.S. at 43 ("The scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency."); and second, the APA denies judicial review when it is precluded by statute, 5 U.S.C. § 701(a)(1), as well as when the

action "is committed to agency discretion by law." *Id.* §701(a)(2).

Whether review is "precluded by statute" is easy enough to determine. But not so with the APA's second exclusion—those actions committed to agency discretion by law. This Court addressed this second category in *Heckler v. Chaney*, 470 U.S. 821 (1985), and the lower court relied upon *Heckler* to conclude the decision not to exclude Unit 1 was unreviewable.

In *Heckler*, this Court held that agency action "committed to agency discretion by law" means that judicial "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830. This Court provided little guidance to elaborate upon the "no law to apply" test, other than to explain that agency decisions not to criminally prosecute or civilly enforce are beyond judicial review, *id.* at 831-33, and to hold that the "no law to apply" test applies when Congress intends for it to apply. *See Webster*, 486 U.S. at 601.

b. Justice Scalia Offers a Better Approach Than the "No Law To Apply" Standard

As opposed to the *Heckler* "no law to apply" test, Justice Scalia's dissent in *Webster v. Doe* offers a better way to apply the APA's discretion-committed exception to judicial review. *Webster* involved a former CIA employee who challenged his employment termination. *Id.* at 599-601. Doe contended the CIA terminated him because of his homosexuality, and that this termination violated the agency's own governing statutes, regulations, and the Constitution.

Id. The lower courts ruled the courts could review Doe's claims, but this Court disagreed in part. *Id.* Based in large part on the unique circumstances of national security, the Court held the National Security Act commits to the CIA director's absolute, statutorily granted, discretion the decision on whether to terminate a CIA employee. *Id.*

That being said, the Court then also held that, although Congress intended to grant unfettered discretion to the CIA director to act under the enabling statute, Congress had evinced no such intent in regards to colorable constitutional claims. *Id.* at 602-04. The Court concluded that Doe's constitutional challenges could proceed. *Id.*

Justice Scalia dissented. He explained that Congress had given the CIA director absolute discretion to terminate employees, power not even subject to reviewability for unconstitutional conduct. *See id.* at 615-16. He explained that the "no law to apply" standard did not accurately convey what Congress meant in § 701(a)(2). *Id.* at 607-08. As he saw it, "there is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest." *Id.* at 608. Yet, "there are many governmental decisions that are not at all subject to judicial review," such as a prosecutor's decision to prosecute even when that decision is based on personal animus. *Id.*

Therefore, the "key to understanding" § 701(a)(2), is to compare it with § 701(a)(1). *Id.* Recall that the latter provision forecloses review "to the extent that

. . . statutes preclude judicial review." *Id.* The question then arises: "Why 'statutes' for preclusion, but the much more general term 'law' for commission to agency discretion?" *Id.* The answer, Justice Scalia explained, is that Congress intended §701(a)(2) to keep in place a certain common law of judicial review, which "had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review." *Id.*

Examples of those issues include the doctrines of political question, sovereign immunity, and official immunity, along with prudential limitations on courts' powers and "what can be described no more precisely than a traditional respect for the functions of the other branches." *Id.* at 609. Accordingly, the key inquiry to correctly applying §701(a)(2)'s bar on review is not, "Is there law to apply?" but rather, "Is this the type of decision that, for a variety of reasons, courts traditionally have declined to review?" Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 ELR at 10360.

Justice Scalia's approach resolves how to observe the APA's bar on review of action committed to agency discretion yet also observe the Act's separate authorization for "abuse of discretion" review. *See* 5 U.S.C. § 706(2)(A). By acknowledging that judicial review does not turn solely on whether an action is truly "discretionary," but instead should turn on whether the agency decision falls within a category of traditionally non-reviewable action, *Webster*, 486 U.S. at 609-10 (Scalia, J., dissenting), the two principles are harmonized. Since the decision here does not fall into a category of agency action that the courts have

refrained from reviewing, then the fact that the action is discretionary should not preclude the courts from determining whether the Service abused its discretion in making its decision.[8]

2. Applying the Scalia Test, the Service's Decision Weighing Economic Impact with Conservation Benefits Should Be Subject to Judicial Review

Is exclusion decision making not akin to the discretionary decision that the Supreme Court in *Heckler* held to be non-reviewable? *See Heckler*, 470 U.S. at 838. Contrary to the Fifth Circuit's conclusion, *see Heckler*, 470 U.S. at 838, exclusion decision making is not akin to the discretionary decision that this Court held to be non-reviewable in *Heckler*. *Heckler* concerned an agency decision *not to enforce*, *see id.* at 837-38 ("The [U.S. Food and Drug Administration's] decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA."), whereas a decision not to exclude an area of critical habitat is effectively a decision *to enforce* the ESA's rules regarding critical habitat, just as Judge Jones explained in her cogent dissent from the denial of rehearing en banc. *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, No. 14-31008, 2017 WL 606513, at *15 n.21 (5th Cir. Feb. 13, 2017) (Jones, J., dissenting from denial of rehearing en banc) ("[T]he Service's

[8] Adopting the Scalia test would not require the Court to reverse *Webster*. That Scalia developed the correct interpretation of §701(a)(2) does not mean he also correctly determined that the alleged discrimination at issue fell within the traditional category of "no review" agency action.

decision not to exclude . . . is really part and parcel of the Service's decision to include. . . .").

Moreover, none of the concerns that led the *Heckler* Court to rule against the availability of judicial review—the fear of intruding upon prosecutorial decision making, infringing upon agency discretion over how to expend government resources, or improperly inserting the judiciary into an agency's enforcement prioritization, *see Heckler*, 470 U.S. at 831-32—have anything to do with a critical habitat exclusion. When declining to exclude areas from critical habitat, the Service does not: i) act like a prosecutor; ii) decide how best to use its resources; and is not prioritizing enforcement. Instead, it is determining that an area subject to active enforcement of the ESA's critical habitat rules—should indeed be included in the critical habitat, notwithstanding the economic and other non-biological consequences of the designation. Simply put, critical habitat exclusion decision making is not the type of agency activity traditionally considered non-reviewable.

Certainly, the ESA itself does not provide a court with a standard by which to adjudge an exclusion decision. But that is not the end of the analysis. Although the ESA may not explicitly provide the law to apply, the Constitution and administrative law do so provide. In particular, the requirements that agencies act based on public-regarding, non-animus-motivated reasons, and that they do so consistently according to those reasons, also apply to critical habitat exclusion decision making. Hence, a challenge to the decision here, where the economic impact is so stark and the biological benefit nonexistent, *see* 77 Fed.

Reg. at 35140-35141, should be judicially reviewable for abuse of discretion. *See* Jones dissent at 161a-162a.

3. Objections to Judicial Review Do Not Hold Up to Scrutiny

The lower court advanced two basic arguments against judicial review of the Service's decision not to exclude Unit 1 from critical habitat:

> (i) the ESA at § 4(b)(2) says that the Services "may" exclude but not "must" exclude (Pet. App. at 35a); and
>
> (ii) the ESA provides no "meaningful" or "substantive" standard by which to measure a decision not to exclude (*id.*).

Neither argument against judicial review is convincing, especially when confronted with the argument advanced by Justice Scalia in *Webster* and adopted here.

a. Permissive Language of §4(b)(2) Does Not Mean That Decisions Made Pursuant to That Power Are Unreviewable

That § 4(b)(2) is couched in permissive language does not mean that decisions made pursuant to that power are unreviewable. The APA's text commands a contrary conclusion. Indeed, the APA expressly allows for judicial review of discretionary decision making. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . an abuse of discretion . . . .").

Rather, a statute's use of the word "may" more likely denotes that a court's review of the agency's decision should be deferential. *Dickson v. Secretary of*

Defense, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (a statute's use of the word "may" "does not mean that the matter is committed exclusively to agency discretion" but instead that the "courts should accordingly show deference to the agency's determination" when reviewing it).

b. The ESA May Provide No "Meaningful" or "Substantive" Standard by Which To Measure a Decision Not To Exclude, But Both the Constitution and the APA Do

The ESA may give the Services wide discretion to establish the general rules and principles that will govern their exclusion decision making. *See* Ashutosh Bhagwat, *Three-Branch Monte*, 72 Notre Dame L. Rev. 157, 191 (1996) ("If . . . an agency formulates and consistently follows a particular enforcement policy, courts should be extremely deferential in reviewing the discretionary aspects of that policy regarding such matters as limited resources, as well as in reviewing the application of such discretionary factors to particular enforcement decisions."). But the agencies cannot depart from these guideposts on whim or fancy. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[A]n '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'") (quoting *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). If they do, then courts should be allowed to step in—indeed, they *should* step in if they are going to fill the role our Founding Fathers gave them in the Constitution and Chief Justice Marshall recognized in *Marbury*. *See Marbury*

v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Here, the Service declined to exclude an area the designation of which would impose $34 million in costs. *See* 77 Fed. Reg. at 35140-41. The Service explained that it "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141. The Family Landowners and Weyerhaeuser should be allowed, upon remand, to demonstrate that the impacts of the designation of Unit 1 are—contrary to the Service's bare assertion—disproportionate. *See Michigan v. EPA*, 135 S. Ct. at 2707 (agency action that produces substantial costs with little or no benefit is "not . . . rational").

Contrary to the Fifth Circuit panel's decision, there are meaningful standards by which to adjudge a decision not to exclude critical habitat. Besides the APA standards identified above, the Constitution also provides a standard by which all agency action can be adjudged regardless of any particular standard unique to the agency action at issue. *See Webster*, 486 U.S. at 603-04 (majority opinion) (holding that the Constitution itself would provide a meaningful standard even when the statute itself does not).

Moreover, the fundamental principle of rational decision making,[9] which undergirds administrative

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[9] *See Michigan v. EPA*, 135 S. Ct. at 2707 (agency action that produces substantial costs with little or no benefit is "not . . . rational"); *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("If an agency takes action not based on neutral and rational principles, the APA

law, provides two meaningful standards that proceed from the underlying substantive statute: an agency (i) must articulate a rational connection between the facts found and the decision made, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 and (ii) must explain how its methodology rationally relates to the reality intended to be depicted. *Columbia Falls Aluminum Co. v. Environmental Prot. Agency*, 139 F.3d 914, 923 (D.C. Cir. 1998) (an agency's use of a model is arbitrary if the model bears no rational relationship to the on-the-ground facts). These standards can be applied even in the context of an entirely "discretionary" action— for example, assuming the Service truly had otherwise unfettered discretion to exclude or not to exclude a given parcel, surely it could not decline to exclude a parcel because of the race or religion of its owner?

Here, the Service irrationally declared Unit 1 critical habitat for a frog that biologically cannot benefit from the designation, regardless of the economic impact upon the Family Landowners and Weyerhaeuser. That irrational decision is reviewable under the APA and the Constitution, and this Court should say so.

B. The Lower Court's Decision Conflicts Plainly with *Bennett v. Spear*

And finally, the Court can avoid the *Heckler* test and its weaknesses as applied to the ESA by simply relying upon *Bennett v. Spear*, 520 U.S. 154 (1997).

In *Bennett*, the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory—not discretionary. There

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grants federal courts power to set aside the agency's action as 'arbitrary' or 'capricious.'").

the Service based its argument in favor of discretion on the permissive language of the Act: "[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." *Id.* at 172 (quoting 16 U.S.C. § 1533(b)(2)). This Court rejected that argument, explaining that "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.* (quoting 16 U.S.C.§ 1533(b)(2)). *In other words, courts can review what the Service designates as critical habitat, and that reviewability should include the rationality of the economic implication of the decision not to exclude land from the designation.*

The lower court's decision holds otherwise. As Judge Jones explained: "The panel majority opinion clashes with *Bennett*'s holding that the Service's 'ultimate decision' is reviewable for abuse of discretion." Pet. App. at 161a. Reviewing the ultimate decision would necessarily include how the agency weighed the economics of excluding—or declining to exclude—a unit within a critical habitat designation.

The failure to reconcile the instant case with *Bennett* is particularly confounding because the economic impact was so severe upon the landowners, and the conservation benefit to the frog amounts to nil. The landowners faced up to $34 million in negative economic impact upon the landowners, with no economic benefit, or biological benefit, to the frog. The designation of Unit 1 does not and cannot benefit

the frog, yet the Service can designate Unit 1 and the landowners are without recourse to go to court. That cannot be right.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141. That decision should be reviewable in court, because it "runs counter to the evidence before the agency" and "is 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.

CONCLUSION

Scholars call the ESA the "pit bull" of environmental law. Jonathan H. Adler, *Introduction: Rebuilding the Ark, in Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* 1, 1 (Jonathan H. Adler ed., 2011); Joe Mann, *Making Sense of the Endangered Species Act: A Human-Centered Justification*, 7 N.Y.U. Envtl. L.J. 246, 250 (1999) ("In all of American environmental law, one would be hard-pressed to find another piece of legislation that establishes such an inflexible prioritization scheme as the ESA."). It may be a pit bull, but here the Service took the ESA and its critical habitat provisions off the leash Congress put on it with the 1978 Amendments. This Court should reverse.

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