No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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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; and

(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.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional takings. This aspect of its advocacy is reflected in regular representation of property owners challenging overreaching governmental actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs at both the state and federal level in support of property owners. *See Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Council*, 505 U.S. 1003 (1992); and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

This case is of particular interest to SLF because the Fifth Circuit's holding that the U.S. Fish and Wildlife Service's (Service) decision to not exclude Petitioner's land from critical habitat violates this Court's precedent, disregards the presumption of

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[1] All parties have consented to the filing of this brief by blanket consent or individual letter. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

reviewability, and as Judge Jones explained for the six member dissent from the denial of rehearing en banc, represents an "abdication" of the judiciary's responsibility to oversee agency action in accordance with the Administrative Procedure Act. *Markle Interests L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 654 (5th Cir. 2017) (Jones, J., dissenting). The "ramifications" of the panel majority's decision for, among other things, "judicial review of agency action cannot be underestimated." *Id*. at 637.

SLF agrees with that assessment. Over the last decade, the administrative state has grown in two primary ways – through the launching of new agencies and through the growing deference the judiciary affords agency actions. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of prime concern because expansion of administrative deference raises serious constitutional concerns. SLF writes to explain how the panel majority's view that the Service's decision to not exclude Petitioner's property from critical habitat is unreviewable is simply wrong.

SUMMARY OF ARGUMENT

"The availability of judicial review, is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally void." Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (Little, Brown

1965). The common law presumption of reviewability grew out of the constitutionally protected right to claim protection of the laws. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (citing *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)). Congress codified the presumption of reviewability when it enacted the Administrative Procedure Act (APA). 5 U.S.C. § 701 *et seq*. This Court has "long applied . . . [a] strong presumption favoring judicial review of administrative action." *Mach Mining v. EEOC*, 135 S. Ct. 1645, 1653 (2015).

Two decades ago, this Court addressed that presumption in a case with striking similarity to the cases before the Court today, and held that the Service's determination to not exclude property from the critical habitat of two endangered fish was judicially reviewable. *Bennett v. Spear*, 520 U.S. 154, 172 (1997). More specifically, this Court held that the issue of whether the Service followed proper procedure and considered the economic impact of its decision to not exclude, or rather to include, property as critical habitat was judicially reviewable. *Id*.

Ignoring the presumption of reviewability, this Court's precedent, and basic separation of powers principles, the Fifth Circuit abdicated its responsibility to review the Service's consideration, or rather lack of consideration, of the economic impact of its decision to not exclude Petitioner's property from critical habitat. Reviewing executive branch actions is one of the most important roles the judiciary plays in our society. As Justice Kagan recently explained in her opinion for a

unanimous Court, this Court is reluctant to see an agency's compliance with the law rest in its hands alone because "[w]e need only know – and know that Congress knows – that legal lapses and violations occur, and especially so when they have no consequence." *Mach Mining*, 135 S. Ct. at 1652-53.

The implications of the Service's decisions to include or exclude property from critical habitats cannot be understated. The Service's argument that a court cannot review such decisions indicates a belief that it is above the law and that the judiciary lacks the power to hold it accountable and review whether it followed legislatively mandated procedures. And, in what can only be described as an abdication of responsibility, over a dissent and a six member dissent from the denial of rehearing en banc, the Fifth Circuit deferred to the Service.

ARGUMENT

I. A strong presumption of reviewability supports judicial review of habitat exclusion decisions.

A. Judicial review of the Service's decision not to exclude an area from critical habitat is presumed.

1. This Court's precedent antedating the APA supports judicial review of executive action. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall declared, "The very essence of civil liberty

certainly consists in the right of every individual to claim the protection of the laws." *Id.* at 163. Inherent in the constitutionally protected right to claim protection of the laws is a strong presumption of judicial review. *See Bowen*, 476 U.S. at 670 (citing *Nourse*, 34 U.S. (9 Pet.) at 28-29).

Throughout history, the Court has emphasized the need for judicial review of executive actions. And, despite a period of judicial restraint that resulted only out of deference to Congress, by the early 20th century, any perceived barriers to judicial review faded away. *See Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (explaining that the acts of all administrative agency "officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief"). The increased level of executive actions and the already growing administrative state underscored the need for judicial review. In 1915, the Court reaffirmed the common law presumption of reviewability when it reviewed the Acting Commissioner of Immigration's detention of a group of aliens for the purpose of deportation even though the statute at issue did not provide for judicial review. *Gegiow v. Uhl*, 239 U.S. 3, 8 (1915). Writing for the Court, Justice Oliver Wendell Holmes explained that judicial review was appropriate because the statute did not forbid courts from considering whether the Commissioner's act violated the statute. *Id*. at 9. In doing so, Justice Holmes made clear that under the common law, unless a

statute forbids judicial review, the courts have both the power and duty to review challenged executive actions.

Over the next few decades, the Court continued to stress the need for judicial review of administrative decisions. By way of example, in *Lane v. Hoglund*, 244 U.S. 174 (1917), the Court reviewed the actions of the Secretary of Interior taken under a homestead law. In doing so, the Court found judicial review of administrative acts both appropriate and necessary, explaining that to find otherwise would "limit[ ] the powers of the court" and "be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties." *Id*. at 182. And, in *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932), the Court reviewed the Secretary of Labor's imposition of fines against steamship companies for bringing aliens with illnesses into the United States. The Court explained that it had the power to review the administrative action because even though "Congress confer[red] on the Secretary great power, . . . it is not wholly uncontrolled." *Id*. at 339.

In 1944, the "powers of the court" to review executive actions that the Court so often spoke about received their greatest affirmation and explanation. In *Stark v. Wickard*, 321 U.S. 288 (1944), the Court explained that the presumption of reviewability arises from Article III of the United States Constitution because "[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id*.

at 310. The Court continued: "[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id*. Starting with the presumption of reviewability inherent in the Constitution, the Court reviewed the statute governing the Secretary of Agriculture's actions and, finding it silent as to judicial review, explained that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id*. at 309.

2. In 1946, Congress enacted the Administrative Procedure Act and codified "the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). When determining whether critical habitat designations are subject to judicial review, the Court demands that the APA's "generous review provisions . . . be given a hospitable interpretation." *Id*. at 141 (internal quotations and citations omitted). Both the Court and Congress have emphasized that "'[v]ery rarely do statutes withhold judicial review[]'" because to do so would convert statutes into "blank checks drawn to the credit of some administrative officer or board." *Bowen*, 476 U.S. at 671

(quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

B. Congress did not preclude judicial review of the Service's decision to not exclude an area from critical habitat.

This Court's precedent establishes "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen*, 476 U.S. at 670 (quoting *Abbott Labs*., 387 U.S. at 140). "[S]tatutory preclusion of judicial review must be demonstrated clearly and convincingly." *Nat'l Labor Relations Bd. v. United Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987). Although this Court does not apply the "clear and convincing evidence standard" in a strictly evidentiary sense, "the standard serves as 'a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" *Bowen*, 476 U.S. at 672 n.3 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984)).

Various considerations inform the Court's analysis of whether Congress intended to foreclose a given avenue of judicial review, including the nature of the administrative action, and the statute's language, structure, objectives and legislative history. *See Block*, 467 U.S. at 349; *see also Bowen*, 476 U.S. at 673. The leading consideration in determining whether

Congress precluded judicial review is whether a party can obtain meaningful judicial review of the agency action at issue if review under the APA is precluded. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).

Notably, the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq*. is devoid of any explicit prohibitions on judicial review of the Service's decision to not exclude land from critical habitat. "[S]ilence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts." *Stark*, 321 U.S. at 309; *see also Dunlop v. Bachowski*, 421 U.S. 560, 566-67 (1975); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970). Because the plain words of the ESA lack an express prohibition against judicial review, the Service "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit . . . judicial review of [its] decision." *Dunlop*, 421 U.S. at 567. The presumption of reviewability demands that "[t]he question is phrased in terms of 'prohibition' rather than 'authorization[.]'" *Id*. (quoting *Abbott Labs.*, 387 U.S. at 140). "[O]nly upon a showing of 'clear and convincing evidence' of contrary legislative intent should the courts restrict access to judicial review." *Id*. (quoting *Abbott Labs.*, 387 U.S. at 141).

Turning to the remaining factors the Court considers, the Service offers no evidence that the ESA's legislative history supports preclusion. *Bowen*, 476 U.S. at

673 (noting that the court will consider "specific legislative history that is a reliable indicator of congressional intent"). That is because the ESA's legislative history contains no specific statement supporting preclusion of judicial review under the APA of the Service's decision not to exclude land from critical habitat designations. Rather, judicial review is consistent with the purpose of the ESA which is to, among other things, "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[.]" 16 U.S.C. § 1531(b). Judicial review of the Service's decision to not exclude land.

Finally, denying judicial review of the Service's decision to not exclude Unit 1 leaves Petitioner with no means of obtaining meaningful judicial review. On several occasions, this Court explained that Congress does not intend to foreclose meaningful judicial review which would deny due process. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150-51 (2010). The Fifth Circuit's holding denying judicial review gives the Service unfettered authority to not exclude land from habitat designations, because such decisions are now completely unreviewable. Absent clear and convincing evidence of congressional intent, the Court has never precluded review of statutorily required procedures.

II. The Fifth Circuit's denial of judicial review conflicts with *Bennett v. Spear*.

The Fifth Circuit dismissed basic tenets of administrative law and this Court's precedent when it refused to review the Service's decision to not exclude Unit 1 from designation as critical habitat. As this Court explained two decades ago when it found the Service's decision to not exclude land as critical habitat reviewable: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett*, 520 U.S. at 172 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)).

Like the Service does here, in *Bennett*, the Service sought to avoid judicial review of the critical habitat designation at issue. *Id*. More specifically the Service contended that the Secretary's duty under 16 U.S.C. § 1533(b)(2) to "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" was discretionary and hence, unreviewable. *Id*. This Court rejected that argument, explaining that while the Service's ultimate decision regarding critical habitat designation "is reviewable only for abuse of discretion" the "categorical *requirement*" that the Service consider the economic impact of such a designation remains and as such, is reviewable.[2] *Id*. As Judge Jones noted in

[2] The Endangered Species Act (ESA) plainly requires the Secretary to consider the economic impact of the agency's actions. In pertinent part, 16 U.S.C. § 1533(b)(2) provides that, when designating critical habitat, the Secretary "shall" make any decision

writing for the dissent, *Bennett* is a "clear signal that the Service's decision is reviewable." *Markle Interests*, 848 F.3d at 654.

Further, the panel majority's reliance on *Heckler v. Chaney*, 470 U.S. 821 (1985), was misplaced. While this Court held that the claim before it was not reviewable because it raised a question "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the nature of the agency action involved there is entirely different from the agency action involved in this case. It explained that "an agency's decision not to take enforcement action should be presumed immune from judicial review" because it has traditionally been "committed to agency discretion. . . . " *Heckler*, 470 U.S. at 832.

Moreover, this Court observed that:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

"on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." *Id*. In addition, it states that the Secretary "may exclude any area from critical habitat" when extinction of the species is not in issue by finding that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id*.

Id. Here, as is plain, the Service exercised its powers over Petitioner's property. That affirmative exercise, whether denominated an inclusion or the refusal to exclude, is an affirmative action that is reviewable for an abuse of discretion.

This case provides the Court with an opportunity to affirm its rejection of the Service's request to exempt its discretionary acts from the "required procedures of decisionmaking." *Bennett*, 520 U.S. at 172 (citing *Chenery Corp.*, 318 U.S. at 94-95).

III. Denying judicial review of habitat exclusion decisions violates separation of powers principles.

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund*, 130 S. Ct. 3138). "[T]he authority administrative agencies now hold over our economic, social, and political activities," *id*. at 1878, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace,

negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id*. at 1879 (citation and quotation omitted).

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Members of the Supreme Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id*. at 594 (Frankfurter, J., concurring). The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id*. at 629. As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution." *Id*. at 638 (Jackson, J., concurring).

Under these principles, any action by which one branch of the federal government presumes to encroach upon the constitutionally assigned functions of

another branch presents a fundamental threat to liberty. "In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966). *See* The Federalist Nos. 47-51 (James Madison) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). See *id*. at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

Preclusion not only conflicts with the presumption of reviewability founded in common law and codified in the APA, but it runs afoul of the Constitution. As this Court has explained "a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse" than a judiciary that reviewed agency action. *Free Enter. Fund*, 130 S. Ct. at 3157 (internal quotation marks, alterations, and citations omitted). "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) (majority opinion).

There are few actions by administrative agencies that exhibit the tyranny our Founding Fathers feared more than decisions by the Service not to exclude, or rather to include, land as critical habitat under the ESA. Congress could have never predicted the vast expansion of critical habitat and the egregious violations of the Fifth Amendment that the Service has pursued since it enacted the ESA in 1973. The Service's latest attempt to expand critical habitat for the dusky gopher frog to include Unit 1, land owned by private parties which the Service itself admits is neither a current habitat or even a suitable habitat for the frog, underscores the need for judicial review.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, *amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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