No.

# In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

*Petitioner*,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

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.

## PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

## JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

## STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

*Ibid.* That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

**A. The Statutory and Regulatory Scheme**

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

**B. The ESA's Critical Habitat Provisions**

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, 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 * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

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[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

### C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

*1. FWS's final designation.* FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

*2. FWS's economic analysis.* ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

**D. The District Court Decision**

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

### E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra.* Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

## REASONS FOR GRANTING THE PETITION

### I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

### A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "trans-locat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

### B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *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 critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

## II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

### A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

*supra*, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

### B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

## III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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