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 *AMICI CURIAE* AMERICAN EXPLORATION & PRODUCTION COUNCIL, AMERICAN PETROLEUM INSTITUTE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND UTILITY WATER ACT GROUP 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.

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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## INTERESTS OF *AMICI CURIAE*

*Amici* represent a broad cross-section of U.S. industry, including public and private entities engaged in the manufacturing, petroleum, natural gas and electric energy sectors.[1] *Amici's* members undertake a wide range of activities across the nation that are vital to a thriving U.S. economy and provide much needed products, services and jobs across the country. *Amici's* members have extensive experience with regulation under the Endangered Species Act ("ESA" or the "Act"), including with the designation of areas owned or used by their members as "critical habitat" by the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, the "Services"), and with determinations by the Services whether uses or effects to such areas constitute a prohibited "adverse modification." As such, *amici* and their members have compelling interests at stake in this Court's consideration of the designation of unoccupied areas as critical habitat for the dusky gopher frog.

Designations of land and water as critical habitat can impede critical economic growth, including activities by *amici's* members necessary to sustain the U.S. economy. These burdens often occur without

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

commensurate benefits to species – including where a designation covers areas not actually occupied by, or that does not constitute habitat for, the species (or both, as in this case).

*Amici's* activities are essential to the reliable, safe and affordable supply of energy and other products and services to U.S. consumers. As such, administration of the ESA regulatory program is important not only to *amici*, but also to the public at large, whose health, safety and general welfare depend on the affordable and reliable delivery of the products and services provided by *amici's* members.

The American Exploration and Production Council ("AXPC") is a national trade association representing 31 of America's premier independent natural gas and oil exploration and production companies. AXPC's mission is to constructively and thoughtfully work for sound energy, environmental, and related domestic public policies that encourage the responsible exploration, development and production of natural gas and oil to meet the needs of consumers and fuel the nation's economy.

The American Petroleum Institute ("API") is a nationwide, non-profit trade association that represents over 600 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

The Independent Petroleum Association of America ("IPAA") represents thousands of independent oil and natural gas producers and service companies across the United States. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the U.S., representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community, and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S.

The National Rural Electric Cooperative Association ("NRECA") is the national service organization for America's Electric Cooperatives, the nation's member-owned, not-for-profit electric cooperatives that constitute a unique sector of the electric utility industry. Collectively NRECA's 897 cooperative members provide electric service over 56 percent of the nation's land area with electric distribution lines totaling 2.6 million miles. All or portions of 2,500 of the nation's 3,141 counties (approximately 80 percent) are served by electric cooperatives.

The Utility Water Act Group ("UWAG") is a voluntary, unincorporated group of 153 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the NRECA, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers.

All parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Fifth Circuit converted the Services' limited authority to designate critical habitat into an expansive power that would be unrecognizable to the Congress that enacted it. When Congress amended the ESA in 1978 to authorize the designation of critical habitat, it sought to provide additional habitat protections for listed species in specific circumstances, while ensuring that those protections balanced "other legitimate national goals and priorities such as providing energy, economic development and other benefits to the American people." S. Rep. No. 95-874, at 2 (1978), *reprinted in* S. Comm. on Env't & Pub. Works, 97th Cong., 2d Sess., A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980, at 940 (Feb. 1982) ("Legislative History").

The Fifth Circuit's decision undermines the structure and intent of the Act in two ways. First, the decision vests the Services with broad authority to designate land or water as critical habitat even if those areas are not occupied by the species and lack the "physical or biological features" required for those areas to serve as habitat for the species. Second, the decision renders unreviewable the Services' statutorily mandated consideration of economic impacts in connection with a determination whether to exclude an area from designation. Both holdings were wrong and should be reversed.

I. The Fifth Circuit failed to adhere to the plain text of the Act, including provisions that limit designation of critical habitat to areas that actually constitute "habitat" for the species, and provisions that require designated critical habitat to meet all of the statutory elements for critical habitat *at the time of designation*. The Fifth Circuit also ignored the structure of the Act which, against the backdrop of numerous other statutory mechanisms governing listed species and their habitat, demonstrates that the designation of unoccupied areas is such an extraordinary action that it requires a separate determination by the Secretary that the designation is "essential" to taking one or more "conservation" actions specified in the Act (a requirement the Secretary did not satisfy in this case).

II. Congress did not render unreviewable the Services' decision whether to exclude lands or waters from critical habitat. These decisions are governed by meaningful standards specified in the Act and are

not exempt from review. This Court's reasoning in prior cases, such as *Bennett* v. *Spear*, 520 U.S. 154 (1997), demonstrates that exclusion decisions are subject to judicial review for abuse of discretion.

III. Reversing the Fifth Circuit and enforcing the ESA's habitat provisions as written would effectuate Congress's intent, while leaving the statute's multitude of other protection mechanisms for species and their habitat undiminished, as explained by the six judges dissenting from the Fifth Circuit's denial of rehearing *en banc*. Those other protection mechanisms span a wide range of protections and programs established by the Act, and are reflected by the many examples of habitat conservation measures that *amici* and their members undertake pursuant to the Act to protect and benefit species and their habitat. The broad suite of conservation initiatives and other tools Congress provided in the Act to conserve species and their habitat confirms the ESA functions well to protect species, without any need to broadly designate unoccupied areas of land or water as critical habitat, and reinforces the extraordinary nature of a determination by the Secretary that designation of unoccupied land as critical habitat is "essential" to the ability to take "conservation" actions for a species.

## ARGUMENT

### I. The Fifth Circuit Ignored Not Only the Plain Statutory Text, But Also Key Indications That Congress Specifically and Intentionally Limited the Services' Authority to Designate Unoccupied Critical Habitat.

The Fifth Circuit failed to follow important textual limits on the Services' authority to designate unoccupied critical habitat. Pet. Br. 35. The Act's use of the plain term "critical habitat" dictates that both occupied and unoccupied areas must actually be "habitat" to be designated "critical habitat." 16 U.S.C. §§ 1532(5); 1533(a)(3)(A); 1536(a)(2). Indeed, the Act emphasizes that a designated area must be "habitat" by the placement of the word "habitat" first in the specific provision that authorizes such designations. *Id.* § 1533(a)(3)(A)(i) (Services are authorized to "designate any *habitat* of such species which is then considered to be critical habitat") (emphasis added). Equally plain, the ESA section 7(a)(2) consultation provisions – the provisions that give regulatory force to critical habitat designations – likewise focus on "habitat," specifying that consultation must insure that federal agency actions are not likely to destroy or adversely modify the "habitat of such species which is determined by the Secretary … to be critical." *Id.* § 1536(a)(2).

The Fifth Circuit also neglected the textual requirement that designated critical habitat meet all of the statutory elements for designation – such as be-

ing actual habitat for the species – *at the time of the designation*. The Act authorizes the Services, "*concurrently*" with listing a species, to designate habitat "*then* considered to be critical habitat." *Id.* § 1533(a)(3)(A)(i) (emphases added). Indeed, the Act defines critical habitat as those areas on which essential physical or biological features "are found" and areas which "are essential" for conservation of the species. *Id.* § 1532(5)(A). The Act does not authorize the Services to designate areas that may someday be habitat or someday meet the other critical habitat requirements. Instead, for areas that do not meet those requirements at the time of listing (but may meet those requirements in the future), the Act specifies that the Services may revise critical habitat designations "from time-to-time thereafter as appropriate." *Id.* § 1533(a)(3)(A)(ii).

Beyond the text of the critical habitat provisions, the Fifth Circuit ignored other strong indicators of Congress's intent to limit the Services' authority to designate unoccupied areas as critical habitat, including the extraordinary nature of such a decision. Specifically, Congress structured the ESA to focus on the listing of species as threatened or endangered, and for such listings to trigger a wide range of protections and programs for listed species and their habitat. By contrast, Congress specified separate processes and considerations for the designation of critical habitat and created a more limited role in the Act for such areas. Critically, Congress made the designation of *unoccupied* areas an action that requires a wholly separate determination by the Secre-

tary that such a designation is "essential" to undertaking the types of specific and targeted "conservation" actions that are detailed in the Act. *Id.* § 1532(3), (5)(A)(ii). The Secretary made no such determination here.

### A. Congress Created a Unique Process and Limited Role for the Designation of Critical Habitat.

The ESA principally focuses on *species*. The listing of a species triggers a wide range of statutory actions and protections for that species including, for example: the development and implementation of a recovery plan, *id.* § 1533(f); consultation on federal agency actions to ensure against jeopardy to the species, *id.* § 1536(a)(2); and the prohibition of take, import, export, possession, sale and transport of the species, *id.* §§ 1538(a), 1533(d). Designation of critical habitat, by contrast and design, plays a more limited (albeit powerful) role under the Act.

When enacted in 1973, the ESA provided for the listing and protection of threatened and endangered species, but included no requirement or process to designate critical habitat. Pub. L. No. 93-205, 87 Stat. 884 (1973). Congress amended the ESA in 1978, adding a new requirement that, "to the maximum extent prudent," the Services "specify any habitat … considered to be critical" at the time they propose to list a species. Pub. L. No. 95-632, 92 Stat. 3751, 3764 (1978) (codified at 16 U.S.C. § 1533(a)(3)(A)).

Congress recognized that designating entire areas of land or water as "critical habitat" is far different, and potentially far more costly and disproportionately burdensome, than listing particular species for protection. Designation of an area as critical habitat results in restrictions on uses that can be made of that area, and often leads to a substantial reduction in the economic value of that area. Accordingly, Congress required the Services to consider non-biological factors, including economic, national security, and other effects of designation, before "specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2); *see* H.R. Rep. No. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467.

The legislative history illustrates Congress's concern that, under the Services' regulations at that time (when far fewer species were listed as threatened or endangered), the Services were treating areas covering a species' entire range as "critical to the continued existence of a species." Legislative History at 948. Congress expressed concern about "the implications of this policy when extremely large land areas are involved in a critical habitat designation," and sought to balance "the [ESA's] mandate to protect and manage endangered and threatened species [with] other legitimate national goals and priorities. such as providing energy, economic development and other benefits to the American people." *Id.* at 940.

Thus, although procedurally and temporally tied to the decision to list a species, Congress specified additional considerations and requirements for designating land as critical habitat beyond those re-

quired for listing decisions. For example, unlike listing decisions, designations must be "prudent and determinable," 16 U.S.C. § 1533(a)(3)(A); "tak[e] into consideration the economic impact" of the designation, *id.* § 1533(b)(2); and consider impacts on national security and any other relevant impacts, *id.*

### B. Designation of Unoccupied Critical Habitat Requires a Specific Determination by the Secretary that the Area is "Essential" to Executing Conservation Actions.

Designation of critical habitat imposes additional restrictions on a full range of activities across the landscape. It does so through ESA section 7(a)(2), which requires federal agencies to insure, through consultation with the Services, that their actions (including issuance of federal permits) are not likely to destroy or adversely modify designated critical habitat. *Id.* § 1536(a)(2).

The term "critical habitat" is defined in ESA section 3. *Id.* § 1532(5)(A). The definition specifically identifies those habitat features and elements that must be present for designation of *occupied* critical habitat. The areas designated must be: (1) specific areas; (2) within the area occupied by the species; (3) at the time the species is listed; (4) on which are found physical or biological features; (5) essential to conservation of the species; and which (6) may require special management considerations or protection. *Id.* § 1532(5)(A). Congress thus defined "occupied" critical habitat by carefully circumscribing

those features that must be found on the area so designated, but left the procedure for such designations to ESA section 4.

By sharp contrast, the ESA section 3 definition of "critical habitat" specifies a crucial additional procedural step that the Secretary must take before designating *unoccupied* areas as critical habitat. Unoccupied areas may be designated only "upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). The structure of the Act thus demonstrates that designation of unoccupied areas is an extraordinary action requiring a separate determination by the Secretary that the area is "essential" to taking the types of "conservation" actions that Congress defined in section 3.

The definition of "conservation" reveals the precise nature of a determination by the Secretary that designation of an area is "essential for the conservation of the species." Congress defined "conservation" in ESA section 3 to convey targeted, beneficial actions for the species. Specifically, "conservation" is defined by the Act as the "use of all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided pursuant to this chapter are no longer necessary," including "activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and in … extraordinary case[s] … regulated taking." 16 U.S.C. § 1532(3). Plainly "conservation" means ac-

tion, not inaction. Thus, to determine that an unoccupied area is "essential for the conservation of the species," the Secretary must find that designation of the area is essential to carrying out the types of targeted actions specified in the definition of "conservation," such as habitat acquisition, law enforcement, research or transplantation. The Secretary failed to make such a finding here.[2]

The courts have recognized the higher standard Congress set for designating unoccupied areas as critical habitat. As the Ninth Circuit has noted, the ESA "differentiates between 'occupied' and 'unoccupied' areas, imposing 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." *Ariz. Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). Thus, the "[d]esignation of unoccupied land is a more extraordinary event tha[n] designation of occupied lands." *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 125 (D.D.C. 2004). "[W]ith unoccupied areas, it

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[2] FWS made, and the Fifth Circuit required, no such determination with respect to specific "conservation" actions that FWS intends to take within the unoccupied areas designated as critical habitat for the gopher frog. Indeed, FWS acknowledged that it has "no existing agreements with the private landowners" to create habitat conditions on the site or to move the frog to the site, and that the timber lease on the site does not expire until 2043. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), Final Rule, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

is not enough that the area's *features* be essential to conservation, *the area itself* must be essential." *Id.* at 119 (emphases added). Demonstrating that an area is "essential" to the types of "conservation" actions specified by Congress is no small undertaking.

When viewed within the larger statutory framework of protective measures and programs for listed species, the Services' power to designate unoccupied areas as critical habitat is designed to be limited and exercised with caution. But the Fifth Circuit's decision upends this statutory framework by affirming the Services' loose approach to designation of unoccupied areas, including where evidence demonstrates that the area is not even habitat, plays no present role in the conservation of the species, and could not play such a role now or in the future absent significant physical alternations that FWS lacks authority (and has no plans) to impose.

### C. Designations of Critical Habitat Must Be Based on Conditions at the Time the Species Is Listed, Not on Speculation About Future Conditions.

Congress plainly specified that designations of areas as critical habitat – whether occupied or unoccupied – must be based on conditions at the time the area is designated, not on speculation about future conditions. For an area that does not meet critical habitat prerequisites today, but may someday meet the criteria set forth in the Act, Congress provided a straightforward option in ESA section 4: the Service may propose to designate that area as critical habitat

at a later time when it meets these criteria. 16 U.S.C. § 1533(a)(3)(A)(ii).

Congress repeatedly used present tense terms to underscore the requirement that designated critical habitat must meet all of the statutory elements for designation – including that the area is *actually* habitat for the species – at the time of designation. The definition of critical habitat in ESA section 3 specifies that an area designated as occupied critical habitat must be an area on which physical or biological features essential to the species "*are* found." *Id.* § 1532(5)(A)(i) (emphasis added). Unoccupied lands may be designated as critical only if the Secretary finds that such areas "*are* essential" for the conservation of the species. *Id.* § 1532(5)(A)(ii) (emphasis added).

The critical habitat designation procedures specified in ESA section 4 likewise require that designations be based on present conditions. Section 4 directs the Secretary, concurrent with the listing of a species, to designate habitat "*then* considered to be critical." *Id.* § 1533(a)(3)(A)(i) (emphasis added). Recognizing that current conditions may change, the Services "may, from time-to-time thereafter as appropriate, revise such designation." *Id.* § 1533(a)(3)(A)(ii). In other words, an area may be designated if it is truly "habitat" that is "critical" today, not because it might become habitat or critical at some point in the future.

The courts have consistently observed the statutory emphasis on present-day circumstances, reject-

ing efforts by the Services to designate critical habitat based on conditions not actually in existence at the time of designation. *See Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1215, 1216-17 (E.D. Cal. 2003) (invalidating designation of areas that are "'likely to develop' essential habitat components, but do not contain them now," as occupied critical habitat); *Cape Hatteras Access Pres. All.*, 344 F. Supp. 2d at 122–23 (vacating critical habitat designation that included areas FWS determined to be "occupied" by the species, but on which primary constituent elements were not found); *Otay Mesa Prop., L.P.* v. *U.S. Dep't of the Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (vacating designation of critical habitat where record did not support determination that area was "occupied" at the time of listing).

Congress further demonstrated that designation must be based on present-day conditions by requiring critical habitat designations be based on the "best scientific data available." 16 U.S.C. § 1533(b)(2). As this Court has noted, the purpose of that requirement "is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett*, 520 U.S. at 176. Unfounded speculation about future conditions is not science, much less "best science." Critical habitat designations must be based on the best evidence available at the time of designation, not open-ended and speculative projections as to future possible conditions.

The Fifth Circuit's decision, however, upholds a designation of unoccupied areas as critical habitat

based merely on the *potential* to support the species in the future *if* certain future activities occur. That approach cannot be squared with the statute's use of the present tense, or its requirement that the Services apply the "best scientific data available." Instead, it opens the door to broad designations based on projected and theorized future conditions, including, for example, localized climate change, even though current climate change models do not provide reliable predictions of future conditions at narrow geographical scales or on short time horizons that would be sufficient to support designation of critical habitat pursuant to the ESA.[3] Indeed, FWS has pro-

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[3] FWS relied, in part, on the potential for future climate change impacts to justify the designation, explaining that:

> Unit 1 provides a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events. An example of one of these threats is climate change. … For species such as the dusky gopher frog, one of the greatest threats posed by climate change is water availability. … The designation of critical habitat, and the creation of new populations of dusky gopher frogs through reintroductions, should give the species better odds of survival and recovery given the threats posed by climate change.

77 Fed. Reg. at 35,124. Correspondingly, the Services promulgated new critical habitat regulations in 2016 that generally follow the designation criteria FWS applied here. Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, Final Rule, 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). Under the 2016 regulations, areas could be designated as critical habitat even if such areas are "unoccupied"

vided no record evidence that current climate change models can do so.[4] These significant limitations on the use of climate science to project localized or near-term effects have been recognized by the Intergovernmental Panel on Climate Change ("IPCC").[5] The IPCC describes in detail the many limitations and uncertainties that characterize current climate models.[6] IPCC AR5 at 751-55.

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by the species and contain none of the "physical or biological features" required by the species. The 2016 regulations also allow designations based on speculation about future conditions, such as estimates of future species needs and projections of localized climate change impacts. After litigation brought by several of the *amici* and others, the Services are now reconsidering the 2016 critical habitat rules. *See Util. Water Act Grp., et al.* v. *Nat'l Marine Fisheries Servs., et al.*, No. 1:17-cv-00206-CG-N (S.D. Ala. voluntarily dismissed Mar. 20, 2018).

[4] In fact, in an earlier proposal to designate critical habitat for the gopher frog, FWS acknowledged that "[t]he information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the effects." Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Mississippi Gopher Frog, Proposed Rule, 75 Fed. Reg. 31,387, 31,390 (June 3, 2010).

[5] The IPCC is considered the leading international body assessing climate change and was established in 1988 by the United Nations and the World Meteorological Organization.

[6] IPCC, Climate Change 2013: The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013) ("IPCC AR5"), http://www.ipcc.ch/report/ar5/wg1. *See also* K.J. Hayhoe et al., Climate Models, Scenarios, and Projections, *in Climate Science Special Report: Fourth National Climate Assessment, Volume I*, Ch. 4, pp. 133-60 (D.J. Wuebbles et al. eds.,

The current state of climate science does not support impact projections below a continental or regional scale, and particularly not to the localized and highly complex habitat of a particular species such as the dusky gopher frog. A designation based on potential future conditions, including, *e.g.*, climate change effects, is contrary to the terms and structure of the ESA, which guard against speculation and allow review and potential revision of critical habitat designations based on actual evidence of emergence of features essential to the species.

## II. Congress Did Not Vest the Services with Unreviewable Discretion Whether to Exclude an Area from Critical Habitat.

The Fifth Circuit also erred in finding unreviewable FWS's decision not to exclude Unit 1 from the critical habitat designation. The Fifth Circuit blurred the fundamental distinction between: (1) matters that Congress has delegated to an agency for which the agency has discretion, albeit constrained by statutory requirements or standards; and (2) matters that Congress has entirely committed to agency discretion.

The Secretary's determination whether to exclude areas from designation is not wholly committed to agency discretion, and thus does not fall within the Administrative Procedure Act's ("APA") narrow ex-

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2017), U.S. Global Change Research Program, Washington, DC, USA, doi: 10.7930/J0WH2N54; https://science2017.globalchange.gov/downloads/CSSR_Ch4_Climate_Models_Scenarios_Projections.pdf.

clusion from judicial review of action "committed to agency discretion." 5 U.S.C. § 701(a). Rather, contrary to the Fifth Circuit's holding, the ESA provides meaningful standards to review the Secretary's decision whether to exclude an area from designation. Given that the economic costs of critical habitat designation were one of Congress's primary concerns when crafting the critical habitat provisions, it stands to reason that Congress did not intend to exclude the implementation of those provisions from judicial review.

### A. Critical Habitat Designation and Exclusion Decisions Are Not Wholly Committed to Agency Discretion and Are Reviewable.

Congress authorized review under the APA for a wide range of agency actions. 5 U.S.C. § 704. The APA, this Court has said, "creates a presumption favoring judicial review of administrative action." *Sackett* v. *EPA*, 566 U.S. 120, 128 (2012) (internal quotation marks omitted). By its terms, the APA provides a right to judicial review of all "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and applies universally "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a). Neither of these narrow exceptions applies here, and "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict … judicial review" of agency action. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967).

The Fifth Circuit's decision, that the Secretary's consideration of economic impacts in determining whether to exclude an area from designation is not reviewable because it is agency action committed to discretion by law, is incorrect as a matter of law. *Markle Interests, L.L.C.* v. *U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 474 (5th Cir. 2016), *cert. granted*, *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.*, 138 S. Ct. 924 (2018). The Secretary's decision does not fall within the APA's narrow exception for action "committed to agency discretion." As this Court has explained: "This is a very narrow exception … The legislative history of the [APA] indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

This Court's decision in *Bennett* confirms that the Secretary's critical habitat decision, which is subject to the statutory provisions governing critical habitat designation, is "plainly … of obligation rather than discretion: 'The Secretary *shall* designate critical habitat, and make revisions thereto, … on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.'" *Bennett*, 520 U.S. at 172 (emphasis added); 16 U.S.C. § 1533(b)(2). The cited provision of the Act for designation decisions – which requires consideration of economic and other relevant impacts of designation – is followed by the stat-

utory direction that, except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat," but *only* "if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added).[7] The Act thus specifies a balancing test that must be employed when making an exclusion decision, which naturally should account for the economic and other relevant impacts of designation that the Secretary is required to consider.

While the Secretary has discretion in deciding whether to exclude an area from a critical habitat designation, plainly that discretion is constrained. Review of a critical habitat exclusion decision for abuse of discretion is well supported by the APA, which instructs courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, [or] an *abuse of discretion*." 5 U.S.C. § 706(2)(A) (emphasis added).

Judicial review is unavailable based on commitment to agency discretion *only* "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). Contrary to

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[7] Indeed, the *Bennett* Court concluded that the Secretary's ultimate decision on designation of critical habitat *is* reviewable for abuse of discretion and that, in arriving at his decision, the Secretary must "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available." *Bennett*, 520 U.S. at 172.

the Fifth Circuit's holding, there is a clear standard governing designation of critical habitat. Once the Services initiate rulemaking to designate critical habitat, the rulemaking will be subject to carefully prescribed requirements defined by Congress and by the Services. In addition, there is a clear standard governing the Secretary's determination whether to exclude an area from a critical habitat designation: such exclusion must be based on a determination "that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2). The Services' application of the ESA's statutory standard is thus readily subject to review under the APA.

### B. Judicial Review Is Necessary to Ensure the Services Meet their Statutory Obligation to Consider the Economic Consequences of Critical Habitat Designations and Exclusions.

Congress specifically sought to balance "protect[ion] and manage[ment of] endangered and threatened species" and other national goals, including energy and economic development." Legislative History at 940. Judicial review of the Services' weighing of those priorities is essential. Critical habitat designations carry considerable regulatory burdens and corresponding economic consequences for landowners, companies, state and local governments, and others – and can be easily underestimated. Holding the Services to account for their decisions upon judicial review will help ensure the Services meet their statutory obligations.

### 1. The economic and regulatory burdens of designating critical habitat are substantial.

Once the Services propose a rule to designate critical habitat, landowners and others with an interest in the areas identified for critical habitat designation must participate in the rulemaking (as Weyerhaeuser and Markle did here) if they want to ensure that the Services consider impacts to those interests and other relevant information. 50 C.F.R. § 424.19 (addressing comment by members of the public who face negative consequences as a result of critical habitat designation).

Furthermore, under FWS's regulations, the mere *proposal* of critical habitat triggers ESA conference requirements for any federal agency action deemed "likely to … result in the destruction or adverse modification of [the] proposed critical habitat." *Id.* § 402.10(a). Once critical habitat is designated, entities that own, permit, or have other interests in land designated as critical habitat face immediate and significant restrictions on their otherwise lawful use of that land; expensive and time-consuming new procedural requirements on ongoing and future projects; litigation risk; and significant diminution in the value of the property. *See* David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics (undated), http://giannini.ucop.edu/media/are-update/files/articles/v6n6_3.pdf ("Sunding"). When an entity applies for a federal permit or if other fed-

eral action is proposed for activities within critical habitat, section 7 consultation is triggered.

The requirement to consult substantially increases the delay, cost, and uncertainty involved in securing approvals needed to complete a project. Applicants must dedicate staff resources and often must hire outside consultants and species experts to assist with consultation. For example, prior to consultation and permitting, a project applicant or its outside consultants will complete desktop and field surveys for species and critical habitat to analyze potential impacts. Both types of surveys provide a basis for route and site planning and can be used by project teams to avoid, minimize, and mitigate potential impacts on critical habitat.

As a result of section 7 consultation, permitting agencies and the Services may require additional mitigation or avoidance measures. In California, for example, FWS has required that three acres of vernal pools – ephemeral areas that are generally isolated and dry for most of the year – be created for every one vernal pool impacted. *See* Sunding at 8.

Section 7 consultation may force project proponents to redesign their project to avoid modification of areas deemed to be critical habitat. Adverse modification of critical habitat is prohibited absent an exemption from the "God Squad" (which is nearly never granted). 16 U.S.C. § 1536(a)(2). Project redesign often reduces the output of the project, imposes additional costs and uncertainty on project proponents and property owners, and has other impacts, includ-

ing causing a shortage of available land for important projects. Using the vernal pool example, additional section 7 consultation requirements consisted of avoidance of 85.7 percent of the site where vernal pools were located, allowing only 14.3 percent of the project site to be developed. *See* Sunding at 8. Likewise, here, FWS estimated that permit conditions requiring 60 percent of Unit 1 to be set aside as dusky gopher frog habitat would destroy $20.4 million of development value on that land. 77 Fed. Reg. at 35,140-41. If development were prohibited altogether, the loss would be $33.9 million. *Id.* at 35,141.

The section 7 consultation process often takes months or years, significantly delaying projects and resulting in substantial additional costs, if not destroying the projects' economic viability. Delay affects project developers by pushing project deliverables further into the future. Delay could impact *amici's* members' ability to undertake, for example, utility line and pipeline construction and maintenance, with potentially significant adverse impacts on their customers' access to reliable and secure energy supplies at a reasonable cost. Thus, for any proposed action that has a federal nexus, *amici's* members can be required to engage in lengthy and expensive consultation processes with the Services that may result in modification, delay, or other changes to their projects.

### 2. The designation of critical habitat can impose costs even where there is no federal nexus.

Designation of critical habitat can impose costs on project proponents even if their project is not within designated critical habitat at all. Significant time, expertise, and expense are required to determine whether a parcel may contain critical habitat, or whether a project may have offsite (or indirect) effects on critical habitat.

Critical habitat designation can also increase market prices for land not so designated (and, correspondingly, decrease the property value of land so designated). Designation thus may impede a project proponent from undertaking a particular enterprise or locating a facility where most needed, or may reduce the scope of a proposed project in order to stay within a budget, including critical and time-sensitive utility projects that have already been determined to be necessary and in the public interest. Designation can result in especially large costs where other numerous regulatory constraints bear on site selection. Moreover, critical habitat designations can create unfair economic advantages and disadvantages to companies within the same industry where, for example, one project is – and another project is not – subject to regulatory burdens from critical habitat designations.

### 3. Decisions to designate critical habitat have consequential impacts on land and water use nationwide.

The expanse of a critical habitat designation for any particular species can be extensive, and can overlap with critical habitat for other species, often covering thousands or millions of acres of land. As of January 2015, critical habitat has been designated for 704 of the more than 1,500 species listed as threatened or endangered. FWS, Endangered Species, Listing and Critical Habitat|Critical Habitat|Frequently Asked Questions, https://www.fws.gov/endangered/what-we-do/critical-habitats-faq.html (last visited Apr. 27, 2018). The Services can potentially designate critical habitat for any or all of these species, and any additional species listed in the future.

The total economic losses from critical habitat designations could be $1 million per acre of habitat conserved. *See* Sunding at 9. The process of land development and land use is complex, and numerous factors are involved. If land is set aside, or if the scale of the project is reduced, due to the presence of designated critical habitat, there could be market and regional effects from the designation. Other land will not necessarily be available or otherwise make up for project site reductions or losses due to critical habitat designations.

Thus, the consequences of designation of critical habitat multiplied by the number of species across the country for which critical habitat could be desig-

nated are vast, and decisions whether or not to designate a particular area as critical habitat will have important consequences for land use nationwide. The costs associated with designation of critical habitat are relevant both to the designation and to the decision whether to exclude certain areas, and demonstrate the importance of judicial review of these determinations for abuse of discretion.

## III. The ESA's Other Habitat Conservation Mechanisms Underscore the Importance of Recognizing the Limits Congress Imposed on the Designation of Unoccupied Critical Habitat.

The Act establishes numerous conservation mechanisms outside of the designation of critical habitat. It encourages "States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs." 16 U.S.C. § 1531(a)(5). It authorizes or requires: acquisition of lands and waters to conserve listed species, *id*. § 1534(a); cooperative agreements between the Services and states for the administration and management of areas established for the conservation of listed species, *id*. § 1535(b); and federal agency programs for the conservation of listed species, *id*. § 1536(a)(1). The Act also creates strong incentives for private parties to conserve habitat by requiring the development and implementation of habitat conservation plans ("HCPs") in order to receive permits authorizing the incidental taking of listed species. *Id*. § 1539(a)(2)(A).

*Amici's* members are committed to minimizing impacts from their activities on the environment, including wildlife and habitat, through responsible planning, permitting, and practices, including under important ESA-based programs. A conservation plan can be developed by private entities either with no Service involvement, or in partnership with the Services for the purposes of obtaining an incidental take permit under section 10 of the ESA. Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, Notice of Final Policy, 81 Fed. Reg. 7226, 7229 (Feb. 11, 2016). Such partnerships include HCPs, candidate conservation agreements with assurances ("CCAAs"), and safe harbor agreements.

The Services support these public-private conservation partnerships because they implement conservation actions that the Services would be unable to accomplish without private landowners. *Id.* at 7230. Private parties participate in voluntary conservation measures to protect the species and their habitat at the outset, and thereby avoid unnecessary listings and designations of critical habitat. Indeed, voluntary conservation measures can provide equal or better protections without the burdens associated with an ESA listing and designation of critical habitat.

For these reasons, the Services have acknowledged that conservation plans and programs can warrant exclusion of an area from a critical habitat designation. In their final policy regarding how existing conservation plans and programs should be considered when determining whether to designate critical habitat, the Services recognized that on-the-

ground conservation actions that benefit species reduce the regulatory benefit of critical habitat designation because the designation may be redundant, or may provide little more conservation benefit compared to what is already being provided through the conservation plan or program. *Id.* at 7228. *See also Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.*, No. Civ. S-05-0629 WBS-GGH, 2006 WL 3190518, at *31 (E.D. Cal. Nov. 2, 2006) ("[T]he designation of critical habitat is not only less powerful of a protection than an HCP, but also can adversely affect [local and private] partnerships … by imposing duplicative regulatory burdens…."). These public-private partnerships, contemplated by the statute and regulations, thus promote conservation efforts that significantly reduce or eliminate the need for future listings and designations of critical habitat and should be encouraged.

The following examples of voluntary habitat conservation measures that *amici* and their members undertake to protect and benefit species and their habitat confirm that the ESA functions well to protect species, without any need to broadly designate vast unoccupied areas of land and water as critical habitat.

**Voluntary Conservation Measures for the benefit of the Lesser Prairie-Chicken ("LPC").** Public and private stakeholders, including *amici* and their members, are implementing extensive and important voluntary conservation measures to ensure that the LPC and its habitat are protected, without any need for a listing under the ESA. Across multiple

states, there has been and continues to be substantial investment by a wide range of industry and local governments. Over 10 million acres (more than half of which is privately owned land) are currently under protections for the benefit of the LPC. Western Association of Fish and Wildlife Agencies ("WAFWA"), The 2015 Lesser Prairie-Chicken Range-wide Conservation Plan Annual Progress Report at 54, tbl. 13 (William E. Van Pelt ed., Mar. 2016). This huge swath of land grows each year, and the resources available to organizations, such as the WAFWA, to protect the LPC's habitat and range also grow.

The Range-wide plan, for example, represents a cooperative conservation effort by five states, state fish and wildlife agencies, stakeholders, and property owners, with input from the public and FWS. The Range-wide plan is a conservation strategy that provides the population and habitat needed to expand and sustain LPC. Under the Range-wide plan, private landowners, including *amici's* members, voluntarily enter into formal agreements, such as the WAFWA Conservation Agreement and various CCAAs with FWS to maintain and enhance land within the LPC range. Since the inception of the Range-wide plan, WAFWA has invoiced approximately $49.9 million in enrollment and impact fees, of which 87.5 percent, or $43.6 million, is restricted for conservation efforts. *Id.* at 85.

Voluntary conservation programs have helped protect LPC habitat, while improving habitat quality and connectivity, and contributing to the resiliency of the species. Indeed, survey results confirm that LPC

populations have stabilized and are growing in key areas, demonstrating that the LPC and its habitat are well protected without any listing of the species or designation of critical habitat. These areas also serve as key habitat for the dune sagebrush lizard and the Texas hornshell mussel, and thus provide additional species benefits.

**HCP for the Florida scrub-jay ("FSJ").** The FSJ HCP provides a blueprint for public-private partnerships by which *amici's* members coordinate land management activities with state and local governmental agencies. As a result of the HCP and coordination, the FSJ metapopulation, which would have likely been extirpated, has been steadily increasing.

**Gopher Tortoise Memorandum of Agreement ("MOA").** One of *amici's* members has recently entered into a MOA with the Florida Fish and Wildlife Conservation Commission to protect the state-listed gopher tortoise, considered a candidate species by the FWS, by placing conservation easements on over 1,000 acres of gopher tortoise habitat, with more lands to be permanently protected over the next 30 years. All lands preserved by conservation easements will be managed as gopher tortoise habitat in perpetuity. Through the course of the MOA, the company will place conservation easements on over 2,000 additional acres, and will provide millions of dollars to conservation groups performing land management on public and/or private lands in Florida.

Voluntary conservation measures, such as those undertaken by *amici's* members, often provide more protection than a critical habitat designation, without imposing unnecessary regulatory burdens. These efforts by the Services, states, local governments, and private partners thus demonstrate that overbroad designations of critical habitat are not necessary or appropriate. Indeed, such voluntary efforts should not be discouraged by any overly broad interpretation of the statute that would allow designation of uninhabitable areas as critical habitat.

The extent and value of other means Congress provided to conserve listed species and their habitat draws into sharp relief whether and when designation of unoccupied land (in this case uninhabitable land) as critical habitat is truly "essential" to taking conservation actions for a species – a question the Secretary elided for the dusky gopher frog.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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