Nos. 17-74; 17-71

In the

Supreme Court of the United States

MARKLE INTERESTS, L.L.C., *ET AL.*,
Petitioners,

v.

U.S. FISH & WILDLIFE SERVICE, *ET AL.*,
Respondents.

WEYERHAEUSER COMPANY,
Petitioner,

v.

U.S. FISH & WILDLIFE SERVICE, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species." Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. The questions presented are as follows:

1. Does the deference given by the court below to an unelected bureaucracy violate separation of powers principles?
2. Did the court below even properly apply existing deference doctrine?
3. Is interpretive deference to an unelected agency even more problematic when the underlying statute itself presses the limits of Congress's power to regulate commerce among the states?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issues in this case that the legislative powers delegated to the national government are vested in a Congress elected by the people, not in an unelected bureaucracy, and that the power to interpret the law is vested in the judiciary, not an unelected bureaucracy. The Center has previously participated in a number of cases before this Court addressing related issues, including *U.S. Dep't of Trans. v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014); and *Rancho Viejo, LLC v. Norton*, 540 U.S. 1218 (2004).

SUMMARY OF ARGUMENT

As several members of this Court have recently acknowledged, the doctrines giving deference to unelected administrative agencies raise serious separation of powers constitutional concerns. The problem is exacerbated when, as here, the courts do not apply step one of *Chevron* with sufficient rigor, and further

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

exacerbated when the particular application of the underlying statute is itself constitutionally suspect quite apart from questions of deference. Review by this Court is warranted to address these significant constitutional concerns.

REASONS FOR GRANTING THE WRIT

I. Doctrines Giving Deference to Unelected Administrative Agencies, Including the *Chevron* Deference Doctrine Relied on By the Court Below, Are Eroding Foundational Separation-of-Powers Principles.

Several members of this Court have recently recognized the risk posed to the Constitution's core separation of power principles by various doctrines of deference to the unelected federal bureaucracy. *Auer* deference, for example—the doctrine that requires deference to an agency's interpretation of its own regulations—appears to be in this Court's crosshairs, with even the author of the opinion that gave its name to the doctrine announcing just two years ago that he would be abandoning the doctrine. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in judgment) (announcing that he would be "abandoning" the holding in *Auer v. Robbins*, 519 U.S. 452 (1997), that he himself authored); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* is . . . a dangerous permission slip for the arrogation of power" (citing *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring); Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96

Colum. L. Rev. 612 (1996)); *see also Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment) ("these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine [*Auer*'s predecessor] may be incorrect. . . . I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *Decker*, 133 S.Ct. at 1338 (Roberts, C.J., joined by Alito, J., concurring) ("It may be appropriate to reconsider that principle in an appropriate case").

The non-delegation doctrine itself—which has not resulted in the invalidation of an Act of Congress in over 80 years—has also been getting renewed attention of late. *See*, *e.g.*, *Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., joined by Ginsburg, J., dissenting) (asserting that the majority's interpretation of the Sex Offender Registration and Notification Act, 120 Stat. 590, 42 U.S.C. § 16901 et seq., as giving the Attorney General the power "to decide—with no statutory authority whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals . . . sail[ed] close to the wind with regard to the principle that legislative powers are nondelegable."); *Perez*, 135 S. Ct. at 1219 n.4 (Thomas, J., concurring in the judgment ("It is difficult to see what authority the President has 'to impose legally binding obligations or prohibitions on regulated parties'" by the adoption of interpretive rules. "That definition suggests something much closer to the legislative power, which our Constitution does not permit the Executive to exercise in this manner."); *see*

also United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (Gorsuch, J., raising non-delegation concerns about federal criminal statute that gave the Attorney General unfettered discretion to decide whether to apply its sex offender registration requirements to already-convicted sex offenders).

This case involves the related doctrine of *Chevron* deference, the separation of powers problems with which have also been highlighted recently by several members of this Court. In *Michigan v. EPA*, for example, Justice Thomas expressed concern that the EPA's "request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes," citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as the source of the problem. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). In *Perez*, the late Justice Scalia noted that the Court's various deference doctrines, including *Chevron* deference, were developed "[h]eedless of the original design of the" Administrative Procedures Act. "Never mentioning . . . [the] directive [in Section 706 of the APA, 5 U.S.C. § 706] that the reviewing court . . . interpret . . . statutory provisions," he added, "we have held that agencies may authoritatively resolve ambiguities in statutes." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in judgment) (citations omitted). And while still on the U.S. Court of Appeals for the Tenth Circuit, Justice Gorsuch described *Chevron* and its corollary, *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 967 (2005), as "an elephant in the room," noting that the holdings in those cases "permit executive bureaucracies to swallow huge amounts of core judicial and legislative

power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., separately concurring from his own majority opinion).

The Fifth Circuit decision below explicitly relied on *Chevron* deference to uphold a broad, unprecedented expansion of the U.S. Fish and Wildlife Service's power to designate as endangered species "critical habitat" private land that is admittedly not currently inhabited by the species at issue, or even capable of being inhabited by the species at issue without significant alterations to the property that the government cannot force the private owners to make. As the criticisms of the deference doctrines set out above indicate, the deference given to the administrative determination by the Fifth Circuit undermines separation of powers principles in two ways. First, it confers legislative powers on an executive agency, in violation of Article I's requirement that "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. Second, it "wrests from Courts the ultimate interpretative authority to 'say what the law is . . . and hands it over to the Executive,'" in violation of Article III's vesting of the judicial power in this "supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Michigan v. E.P.A.*, 135 S. Ct. at 2712 (Thomas, J., ,concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); U.S. CONST. art. III, § 1.

Those violations of core separation of powers principles are alone worthy of this Court's consideration. That this case presents an opportunity for this Court to take up the invitation recently made by several members of the Court to reconsider the deference doctrines themselves makes the petition for certiorari even more compelling.

II. The Fifth Circuit Did Not Even Apply *Chevron* Deference Correctly, Exacerbating the Separation of Powers Problem.

Repeating a line from the district court's opinion, the Fifth Circuit panel noted that "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." App. A-16 (quoting *Markle Interests LLC v. U.S. Fish & Wildlife Serv.,* 40 F.Supp.3d 744, 760 (E.D. La. 2014)). Building on that holding by the district court, the Fifth Circuit panel held that "when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. App. A-16 (citing *Markle Interests*, 40 F.Supp.3d at 760 (in turn citing*, inter alia, Chevron,* 467 U.S. at 843 n.9 (1984))).

That is not a correct application of *Chevron*, for at least two reasons. First, the word "essential" is not ambiguous even without a specific statutory definition, particularly when read in context of the entire statutory scheme, so the court should have decided this case at *Chevron* step one without even reaching the *Chevron* step-two question whether the Service's "interpretation" was a reasonable one. As Judge

Jones persuasively noted in her opinion dissenting from the denial of the request for rehearing en banc, the power given to the Service to designate "critical habitat" extends only to "habitat," and then only to habitat that is "essential" to the preservation of the species. It unambiguously does not extend to land that is uninhabitable by the species at issue. App. C-11 to C-15. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

Many of the separation of powers concerns implicated by *Chevron* could be minimized if step one of *Chevron* was more robust, and this case presents a good opportunity to address that part of the problem.

Second, the panel below confused *application* of the law as written—a common executive function subject to non-deferential judicial review of whether the law had been interpreted correctly—with *resolving an ambiguity* in the law that would trigger *Chevron* step-two deference. Making a "determination" that some set of facts meets unambiguous statutory criteria is not an interpretive issue to which *Chevron* step two applies. The court's decision to the contrary only exacerbates the Article I non-delegation and Article III judicial role problems already inherent in *Chevron*; the opportunity to reign in at least that erroneous application of *Chevron* counsels for granting the petition here.

III. Deference to an Unelected Agency under *Chevron* Step Two Is Even More Problematic When the Statute Itself Is Already Constitutionally Suspect.

The application of the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. § 1531 *et seq*. to *noncommercial*, *wholly intrastate* species such as the Mississippi Gopher Frog at issue here, pursuant to Congress's power to regulate "commerce" "among the states," is itself constitutionally suspect. Allowing even further extension of the law's reach, through *Chevron* step-two deference to unelected bureaucrats, is therefore simply untenable.

In the wake of this Court's landmark decision in *United States v. Lopez*, 514 U.S. 549 (1995), reaffirming the foundational principle that the national government has only limited, enumerated powers, the lower courts were faced with Commerce Clause challenges to a number of federal statutes and regulations aimed at conduct that had nothing to do with interstate commerce. *See, e.g.*, Glen H. Reynolds & Brannon P. Denning, Lower Court Readings of *Lopez*, Or What If The Supreme Court Held A Constitutional Revolution And Nobody Came?, 2000 Wisc. L. Rev. 369 (2000) (citing cases). Among them were several cases in which the appellate courts, over vigorous, well-reasoned dissents, upheld the extension of the Endangered Species Act to wholly intrastate, noncommercial species against Commerce Clause challenges. *See*, *e.g.*, *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1158 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of rehearing en banc) ("The court's opinion in this case continues a divergence

from contemporary Supreme Court Commerce Clause jurisprudence"); *id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc) (noting that the panel decision's approach "seems inconsistent with the Supreme Court's holdings in [*Lopez*], and *United States v. Morrison*, 529 U.S. 598 (2000)); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004) (Jones, J.,, joined by Jolly, Smith, DeMoss, Clement, and Pickering, JJ., dissenting from denial of rehearing en banc); *National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041 (D.C. Cir. 1997); *id.* at 1060 (Sentelle, J., dissenting).

Although this Court declined to take up the issue at the time, *see Rancho Viejo, LLC v. Norton*, 540 U.S. 1218 (2004) (denying petition for certiorari); *GDF Realty Investments, Ltd. v. Norton*, 545 U.S. 1114 (2005) (denying petition for certiorari); *National Ass'n of Home Builders v. Babbitt*, 524 U.S. 937 (1998) (denying petition for certiorari), this Court subsequently reaffirmed that the Commerce Clause has limits on grounds somewhat similar to those advanced by the dissenting circuit judges in each case. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547-62 (2012) (opinion of Roberts, C.J., holding that the individual mandate in the Affordable Care Act was not a valid exercise of Congress's Commerce Clause power); *id.* at 649-57 (Scalia, Kennedy, Thomas, Alito, Jj., joint dissent) (agreeing that the individual mandate exceeded Congress's power under the Commerce Clause). Whether the Endangered Species Act itself can be extended to wholly intrastate, non-commercial species therefore remains an open question in this Court and is still being addressed in the lower courts. *See, e.g.*, *People for Ethical Treatment of Prop. Owners v. U.S.*

Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 1346 (D. Utah 2014) (holding such an extension to be unconstitutional), *rev'd and remanded sub nom. People for Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017) (upholding the extension).

In this case, the Service itself, apparently emboldened by deference doctrines, extended the Endangered Species Act's reach even further. Under its interpretation, to which the panel gave deference, the Act reaches not just to wholly intrastate, non-commercial species, their occupied habitat, and their unoccupied habitat, but even to lands that are presently *uninhabitable* by the species. Troubling enough were Congress itself to have pressed the limits of Commerce Clause authority in such a fashion, it is simply intolerable in a system of limited, representative government for an unelected bureaucracy to expand its own power in such a fashion. The Commerce Clause problem, exacerbated when conjoined with the *Chevron* deference problem, is in particular need of this Court's review.

CONCLUSION

Several members of this Court have already acknowledged the significant separation of powers problems that result from the increasingly broad reliance on deference doctrines by the unelected administrative bureaucracy. Those problems are exacerbated when the underlying statute is itself constitutionally suspect. The petition for writ of certiorari should be granted so that this Court can restore the separation of powers principles that lie at the core of our constitutional system of government.

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