No. 17-71, 17-74

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

MARKLE INTERESTS, LLC, *et al.*,

Petitioners,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

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

INTERVENOR-RESPONDENTS' BRIEF IN OPPOSITION

JOHN BUSE
Counsel of Record
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway
Suite 800
Oakland, CA 94612
(510) 844-7125
jbuse@biologicaldiversity.org

Attorney for Intervenor-Respondents Center for Biological Diversity and Gulf Restoration Network

[Additional Counsel On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

COLLETTE L. ADKINS
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 595
Circle Pines, MN 55014
(651) 955-3821

RYAN SHANNON
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211
(214) 476-8755

QUESTION PRESENTED

Whether the court of appeals correctly upheld the U.S. Fish and Wildlife Service's fact-specific exercise of its scientific expertise in designating "critical habitat" for dusky gopher frogs under the Endangered Species Act.

RULE 29.6 STATEMENT

Intervenor-Respondents the Center for Biological Diversity and Gulf Restoration Network are nonprofit organizations that have no parent corporations, and no publicly-held company has any ownership interest in them.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTES, AND RULES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Petitioners seek review of the Fifth Circuit's decision upholding the U.S. Fish and Wildlife Service's ("FWS") rule designating critical habitat under the Endangered Species Act ("ESA") for highly endangered dusky gopher frogs. But Petitioners offer no convincing reason why the Court should delve into the administrative record to examine such a fact-specific issue dependent on the agency's exercise of its scientific expertise. The Fifth Circuit's decision does not conflict with a decision from any other Circuit or this Court. And its record-based, narrow decision reflects the correct application of the relevant statutory standards and deferential standard of review.

Petitioners assert that their economic interests in a two-and-a-half square mile area designated as critical habitat for the frog in St. Tammany Parish, Louisiana, outweigh the benefits for the frog. Yet even if that were true (which it is not), FWS did the requisite economic analysis, and nothing in the ESA requires FWS to exclude lands from the critical habitat designation for economic considerations. Indeed, every court that has examined the issue has found that the agency's decision not to exclude land is committed to agency discretion and unreviewable.

Nor has any appellate court ever found that an agency rule promulgated under the ESA exceeded authority under the Commerce Clause. Petitioners' arguments to the contrary have already been rejected by six different circuits and offer no need for this Court to

examine the issue. Petitioners' arguments under the Tenth Amendment similarly provide no reason for review, as they never raised these baseless arguments in the proceedings below.

At bottom, Petitioners' and Amici's requests reflect little more than their policy disagreement with the ESA and its mandate that FWS designate critical habitat for listed species. They ignore the benefits of the frog's critical habitat designation, and their claims regarding the economic impact of the designation have no basis in reality. Their policy disagreements with the designation do not raise any significant issue requiring the Court's review.

STATEMENT OF THE CASE

I. The ESA Mandates Critical Habitat Designations Based on the Best Available Science

As this Court has recognized, the ESA represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The primary purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ." 16 U.S.C. § 1531(b).

"Conservation" means the "use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at

which the measures provided pursuant to [the ESA] are no longer necessary." *Id*. § 1532(3). The ESA's goal is thus to recover endangered and threatened species.

To that end, Section 4 requires FWS to list threatened and endangered species and to timely designate critical habitat for listed species "on the basis of the best scientific data available." *Id*. §§ 1533(a)(1), (a)(3)(A)(i), (b)(1)-(2).

The ESA defines critical habitat as:

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

16 U.S.C. § 1532(5)(A) (emphasis added). At the time of the designation at issue in this litigation, FWS identified essential "features" – required for designation of occupied habitat but not unoccupied habitat – by focusing on their "primary constituent elements" or "PCEs."

Contrary to the suggestions of Petitioners and Amici, designation of critical habitat does not involve

setting aside preserves for listed species and does not prohibit, or even regulate, non-federal actions. *See, e.g.*, Weyerhaeuser Pet. 20 (criticizing the designation for "impos[ing] all the costs for creating a new frog preserve on private landowners"). The primary consequences of critical habitat occur when federal agencies must consult with FWS to ensure that the actions those agencies authorize, fund, or carry out are not likely to result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). Thus, critical habitat designations have legal effect only in connection with some other subsequent federal action. *Id*.

II. Natural History of the Dusky Gopher Frog

This case concerns the critical habitat designation for the dusky gopher frog (*Rana sevosa*). This highly endangered frog lives underground in pine forests (historically those dominated by longleaf pine) and breeds in small ephemeral ponds that lack fish. 66 Fed. Reg. 62,993, 62,994 (Dec. 4, 2001). The frog survives in just three small, isolated populations in Harrison and Jackson counties in southern Mississippi, with only one pond regularly showing reproduction by the frog. 77 Fed. Reg. 35,118, 35,136 (June 12, 2012).

When the dusky gopher frog was listed as an endangered species, only about 100 adult frogs existed in the wild. 66 Fed. Reg. at 62,995. The frog is primarily threatened by habitat loss and disease. *Id.* at 62,997-63,000. Its small numbers also make it highly

susceptible to genetic isolation, inbreeding, and random demographic or human related events. *Id.* at 62,999.

III. Protection of the Dusky Gopher Frog under the Endangered Species Act and Required Critical Habitat Designation

In response to litigation from the Center for Biological Diversity, FWS listed the dusky gopher frog (then known as the Mississippi gopher frog) as an endangered species in December 2001. *Id*. at 62,993. Nearly a decade later, in 2010, the Center's litigation prompted FWS to propose designation of 1,957 acres of critical habitat for the frog. 75 Fed. Reg. 31,387 (June 3, 2010).

FWS subjected the 2010 proposed rule to public comment and peer review by frog experts. Every peer reviewer concluded that the amount of habitat proposed in 2010 was insufficient for the conservation of the species, with several suggesting that FWS consider other locations within the frog's historical habitat. 76 Fed. Reg. 59,774, 59,776 (Sept. 27, 2011); *see, e.g.*, ROA.1568[1] (comments from Joseph Pechmann, Associate Professor, Western Carolina University, expert on the dusky gopher frog, explaining: "I believe that it is

[1] "ROA" refers to the Record on Appeal, and these documents are included in the Record Excerpts of Defendant Intervenor-Appellees filed with the court of appeals on January 5, 2015 (Document No. 00512888581).

essential for the conservation of the species to designate critical habitat in Louisiana, and in Alabama if possible. . . .").

Comments from the peer reviewers and others, including the Center, led FWS to revise the proposed critical habitat designation. 77 Fed. Reg. 2254, 2255 (Jan. 17, 2012). The final rule designates approximately 1,544 acres in St. Tammany Parish, Louisiana ("Unit 1"), and approximately 4,933 acres in Forrest, Harrison, Jackson, and Perry counties, Mississippi. In total, approximately 6,477 acres are designated as critical habitat for the dusky gopher frog, all within its historical habitat. 77 Fed. Reg. 35,118.

Unit 1, at issue here, consists of privately owned land currently used for timber production purposes but containing a concentration of the extremely rare ephemeral ponds on which the frog depends. 77 Fed. Reg. at 35,132. Applying its scientific expertise, FWS found that Unit 1 is essential for the conservation of the frog:

> Unit 1 consists of five ponds (ephemeral wetland habitat) and their associated uplands. If dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation, which increases the chances of the long-term survival of the population. Although the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe

> them to be restorable with reasonable effort. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species is at high risk of extirpation from stochastic events, such as disease or drought. Maintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. Therefore, we have determined this unit is essential for the conservation of the species because it provides important breeding sites for recovery. It includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog.

77 Fed. Reg. at 35,135; *see also id*. at 35,132 ("We focused on the identification of ephemeral wetland habitats in our analysis because they are requisite sites for population survival and conservation and their rarity in the environment is one of the primary reasons that the frog is endangered."); *id*. at 35,133 ("[N]o group of five ponds such as these was found in any of the areas of historical occurrence that we have searched in Mississippi.").

When promulgating a final rule designating critical habitat for a listed species, FWS must "tak[e] into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as

critical habitat" and "may" exclude an area from designated critical habitat based on economic impacts. 16 U.S.C. § 1533(b)(2). Here, FWS analyzed the economic impact of the critical habitat designation on the private land in Unit 1 and considered a range of possible impacts.

Specifically, FWS concluded that Petitioners would experience *no* economic impacts if they continued to use the land as pine plantations, which do not implicate any federal actions that would require an agency to consult with FWS to avoid destruction or adverse modification of critical habitat. If, however, Petitioners sought to develop the property for residential or other uses, economic impacts would be likely only if (1) the development involved dredging of or discharges of fill to the ephemeral ponds; and (2) those ponds were federal-jurisdictional wetlands subject to Clean Water Act permitting requirements (an issue that FWS did not purport to decide). U.S. FISH & WILDLIFE SERV., ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE DUSKY GOPHER FROG ES-5 (2012) (hereinafter "Economic Analysis"), https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. If the property's development required such a permit, FWS estimated that the economic impact of the designation could amount to approximately $20 million if, upon consultation, FWS recommended that a permit be conditioned on the landowners' agreement to manage a portion of the property for conservation of the frog. *Id.*; *see also* 77 Fed. Reg. at 35,140-41. In the "worst case scenario" for Petitioners, FWS would recommend

avoidance of any development of Unit 1 that would require a permit, which would allow continued use of the property for forestry and hunting purposes but result in lost development value of $33.9 million over 20 years. *See* Economic Analysis at ES-5 – ES-6; 77 Fed. Reg. at 35,141.

Given the uncertainty of any potential economic impacts, FWS determined that no "disproportionate costs" were likely to result from the designation. FWS determined that the designation would have significant benefits, though it did not attempt to monetize those benefits. Accordingly, FWS did not exercise its discretion to exclude Unit 1. 77 Fed. Reg. at 35,141.

In all, the final critical habitat designation was the culmination of two proposed rules; an economic analysis; two rounds of notice and comment; a scientific peer-review process, including responses from six experts; and a public hearing. *See id*. at 35,119.

IV. The Litigation Below

Markle Interests, LLC; P&F Lumber Company 2000, LLC; PF Monroe Properties, LLC; and Weyerhaeuser Company ("Petitioners") filed three separate lawsuits challenging the frog's critical habitat designation on statutory and constitutional grounds. The lawsuits were consolidated before the district court. The district court granted leave to intervene, of right, to the Center for Biological Diversity and Gulf Restoration Network (the "Center").

On August 22, 2014, the district court upheld the critical habitat designation in its entirety and entered final judgment against Petitioners on the merits. *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748 (E.D. La. 2014); Markle Pet. App. B-2.

Petitioners timely filed separate Notices of Appeal, and the Fifth Circuit consolidated the appeals. The panel, in a 2-1 decision dated June 30, 2016, affirmed the district court in its entirety. The court of appeals rejected Petitioners' argument that unoccupied critical habitat must be "currently habitable" because Petitioners' "proposed extra-textual limit on the designation of unoccupied habitat – habitability – effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land." Markle Pet. App. A-25. The court of appeals held that FWS's power to designate critical habitat has "meaningful limits" because the ESA requires FWS to base its finding of essentiality on the "best scientific data available." *Id.* at A-32 – A-33, citing 16 U.S.C. § 1533(b)(2). It reasoned that the designation of Unit 1 "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand." Markle Pet. App. A-32. As for Petitioners' pleas for a "private landowner exemption" from critical habitat designations, the court of appeals explained that Petitioners' policy concerns should be brought to Congress, not the courts. *Id.* at A-29.

In addition, the court of appeals concluded that FWS's decision to not exclude Unit 1 is unreviewable. Because the "statute is silent on a standard for reviewing the Service's decision to *not* exclude an area," that decision is committed to agency discretion. *Id.* at A-37 (emphasis in original). The court of appeals observed that its decision in this respect was consistent with every other court decision on the issue and saw "no reason to chart a new path." *Id*.

The court of appeals further concluded that binding precedent forecloses Petitioners' argument that FWS's designation of Unit 1 is unconstitutional under the Commerce Clause. *Id.* at A-39 – A-47. It held that the critical habitat provision is an "essential component" of the ESA's regulation of economic activity "[b]ecause of the link between species survival and habitat preservation." *Id.* at A-45. Therefore, it upheld the designation under the aggregation principle, which provides that intrastate activity can be regulated if it is an essential part of a larger regulation of economic activity that has a substantial effect on interstate commerce. *Id.* at A-42. The court of appeals observed that every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *Id*. at A-44 – A-45 (citations omitted).

The Fifth Circuit subsequently denied Petitioners' request for rehearing *en banc*. Markle Pet. App. C-3.

REASONS FOR DENYING THE WRIT

I. Designation of Gopher Frog Critical Habitat was a Fact-Specific Exercise of the Agency's Scientific Expertise, Which the Court of Appeals Correctly Upheld

Petitioners dispute FWS's finding that Unit 1 satisfies the definition of critical habitat. Yet a determination of whether an area is "essential for the conservation of the species" is a highly fact-specific inquiry that is not appropriate for review by this Court. Moreover, the court of appeals correctly deferred to the agency's exercise of its scientific expertise in making this determination.

Petitioners and Amici argue that Unit 1 cannot be considered "habitat" for the frog, relying on various dictionary definitions of the word. Weyerhaeuser Pet. 16; Markle Pet. 18-19; *see, e.g.*, Br. of Chamber of Commerce 8. Petitioners did not, however, preserve that issue for review by this Court because they never made that argument before the court of appeals. *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."). Their briefing before the court of appeals focused on the meaning of "essential" and never once argued inconsistency with the meaning of "habitat."

Substantively, that argument fails too. Unit 1 undoubtedly qualifies as former or historical "habitat" for the frog under any meaning of the word, as Unit 1 is the site of the last known occurrence of the frog in

Louisiana. 77 Fed. Reg. at 35,124, 35,133. Petitioners and Amici repeatedly mischaracterize the record by asserting that Unit 1 has no connection to the frog. *See, e.g.*, Br. of San Juan, County Utah 4 ("The Service randomly found more acres for the dusky gopher frog in Louisiana.").[2] Moreover, it is the ESA, not the dictionary, that provides the appropriate test for whether Unit 1 qualifies as critical habitat. The ESA expressly defines critical habitat to include unoccupied areas, as long as the area is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

The ESA does not define "essential." Rather, FWS uses its expertise to determine whether habitat is essential on a case-by-case basis. Markle Pet. App. A-16, A-23. Here, FWS found that "[t]he dusky gopher frog is at high risk of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression," and it found that "establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery." 77 Fed. Reg. at 35,121. Therefore, FWS concluded that Unit 1 is "essential for the conservation of the species because it provides important breeding sites for recovery" and "includes habitat for population expansion outside of the core

[2] The frog was once found in Alabama, Mississippi, and Louisiana. 77 Fed. Reg. at 35,132, 35,134. The critical habitat designation covers 6,477 acres, which includes both current, occupied habitat and historical, unoccupied habitat designated in Mississippi, as well as the historical, unoccupied habitat designated in Louisiana. *Id*.

population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog." *Id*. at 35,135.

Based on an examination of the lengthy administrative record, the court of appeals held that FWS's finding that Unit 1 is essential was fully supported, including by frog experts outside the agency. Markle Pet. App. A-18 – A-19. For example, Dr. Joseph Pechmann from Western Carolina University, who has done extensive research on the dusky gopher frog, explained in his comments on the proposed rule: "I believe that it is essential for the conservation of the species to designate critical habitat in Louisiana, and in Alabama if possible, in addition to the habitat proposed for designation in Mississippi." ROA.1568; *see also* ROA.1588 ("I strongly agree with the Service's determination that this area is essential for the conservation of *R. sevosa*."). He identified the area where the frog was last documented in Louisiana (which FWS ultimately designated as Unit 1) and explained that it "retains the required characteristics necessary to serve as a breeding pond. . . ." ROA.1568; *see* 77 Fed. Reg. at 35,123 ("Due to the importance of ephemeral ponds to the recovery of the dusky gopher frog . . . , the Service determined that the area of Unit 1 is essential for the conservation of the dusky gopher frog. . . . Ephemeral, isolated ponds are very difficult to establish in the landscape due to their short and specific hydrology.").

Petitioners argue that Unit 1 cannot be considered "essential" because it lacks two of the PCEs or "biological features" necessary for frog survival. Weyerhaeuser Pet. 16; Markle Pet. 22-23, 25-26. But because Unit 1 is *unoccupied*, the appropriate test under the ESA is whether the entire "area" is "essential," as FWS found, not whether it contains all the essential "features" needed by the species. *Compare* 16 U.S.C. § 1532(5)(A)(ii) (criteria for designation of unoccupied critical habitat) *with id*. § 1532(5)(A)(i) (criteria for designation of occupied critical habitat); *see* Markle Pet. App. A-25 – A-26.

In seeking review from this Court, Petitioners try to contrive a conflict by pointing to case law holding that the test for unoccupied critical habitat is "more onerous" and "more demanding" than that for occupied critical habitat. Markle Pet. 27; Weyerhaeuser Pet. 24-25. Their argument is unconvincing because the court of appeals' decision is *fully consistent* with those cases. It does not matter that Unit 1 lacks two of the "essential" features because Unit 1 satisfies the standard for unoccupied habitat, which remains more rigorous because it requires that the entire "area" be essential, as FWS found. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2009) ("The statute thus 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."); 77 Fed. Reg. at

35,135 (establishing that Unit 1 is essential "because it provides important breeding sites for recovery").

Weyerhaeuser argues that Unit 1 cannot be "essential" because the frog does not currently live there, further arguing that the ESA's definition would "have no meaningful limit" without such a "habitability requirement." Weyerhaeuser Pet. 18, 29. But again, FWS's assessment of what is "essential" for frog conservation was a highly fact-specific exercise of scientific expertise that is not an appropriate issue for review by this Court. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Moreover, nothing in the ESA requires that unoccupied critical habitat be currently "habitable." While Petitioners have invented requirements not found in the statute's plain language, the ESA itself provides appropriate limits on the agency's designation of critical habitat. FWS's exercise of its scientific expertise is limited by the ESA's requirement that designations be based on the best available science. As the court of appeals explained, "[T]he Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand." Markle Pet. App. A-32.

The court of appeals thoroughly examined the administrative record and correctly applied the statutory standard in upholding FWS's finding that Unit 1 is essential. Other than their own self-serving comments,

Petitioners cannot point to a single document – out of the hundreds in the record – that contradicts the experts' finding that Unit 1 is essential for frog conservation. No more is required for the designation to fulfill the ESA's substantive requirements.

Further review of the agency's inclusion of Unit 1 is particularly unwarranted because FWS has since amended the regulations that governed the gopher frog habitat designation. *See* 50 C.F.R. § 424.12 (2016); 81 Fed. Reg. 7414 (Feb. 11, 2016). For unoccupied critical habitat, the new regulations provide guidance not included in the previous regulations, now specifying that FWS should identify essential "specific areas" by "considering the life history, status, and conservation needs of the species based on the best available scientific data." *Compare* 50 C.F.R. § 424.12(b)(2) (2016) *with* 50 C.F.R. § 424.12(e) (2010); *see* 81 Fed. Reg. at 7434. For occupied critical habitat, the new regulations remove all references to PCEs, 50 C.F.R. § 424.12; 81 Fed. Reg. at 7431-32, and instead provide a formal definition of the statutory term "[p]hysical or biological features," 50 C.F.R. § 424.02. The new regulations have themselves been challenged as unlawful, and the court stayed that challenge through November 10, 2017. *See* Endorsed Order, *Alabama v. Nat'l Marine Fisheries Serv.*, No. 16-593 (S.D. Ala. Sept. 12, 2017), ECF No. 49 (granting Third Unopposed Motion to Continue Stay of Proceedings). That review, in combination with the changes that have already been made, substantially limits the prospective importance of the decision below,

which applied a now-superseded version of the regulations.

In summary, the court of appeals' fact-bound conclusion is correct and does not warrant this Court's review.

II. The Court of Appeals' Conclusion about Reviewability of FWS's Decision Not to Exclude Unit 1 is Correct and Does Not Conflict with Any Other Court

The court of appeals correctly concluded that FWS's decision not to exclude Unit 1 is judicially unreviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, 702, 704, because it is committed to agency discretion by law. Markle Pet. App. A-36. An agency action is committed to agency discretion by law when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Section 4(b)(2) of the ESA gives FWS discretion to exclude an area from a critical habitat designation if it "determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). Because that sentence provides standards governing when FWS *cannot* exclude an

area from a designation (i.e., when the benefits of inclusion outweigh the benefits of exclusion or when exclusion would result in extinction of the species), decisions to exclude an area from a designation are reviewable. But Section 4(b)(2) *does not require* FWS to exercise its discretion to exclude any area and provides no standards that a court could use to judge when FWS should exercise such discretion to *not* exclude. Markle Pet. App. A-36 – A-37.

Moreover, the issue may be merely hypothetical in this case because FWS never made the requisite finding – "that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat" – that would have given it discretion to exclude Unit 1. 16 U.S.C. § 1533(b)(2). Instead, FWS merely found that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." 77 Fed. Reg. at 35,141. Petitioners do not claim that the question of whether benefits would outweigh costs is itself a question that merits this Court's review.

Petitioners mischaracterize the law in arguing that the court of appeals' decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). *Bennett* involved a claim that "imposition of minimum water elevations constituted an implicit determination of critical habitat" for an endangered fish that violated Section 4(b)(2) of the ESA "because it failed to take into consideration the designation's economic impact." 520 U.S. at 160. The question considered and decided in *Bennett* was whether designation

of critical habitat pursuant to Section 4(b)(2) is purely discretionary, a question the Court considered to determine whether the ESA's citizen suit provision (not the APA) applied. *Id.* at 171-72. The Supreme Court held that such a determination is not *wholly* discretionary because the first sentence of Section 4(b)(2) provides that FWS must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact. . . ." *Id*. at 172 (quoting 16 U.S.C. § 1533(b)(2)).

Because *Bennett* did not involve a claim that the agency should have excluded areas from the designation, the Court was not presented with the question of whether FWS's decision *not* to exclude is reviewable under the APA. Therefore, the *Bennett* Court's statement that the "ultimate decision" to designate critical habitat "is reviewable only for abuse of discretion," 520 U.S. at 172, does not directly speak to that question.

In any event, the court of appeals followed *Bennett* and recognized that "the ESA explicitly mandates 'consideration' of 'economic impact'" when the agency designates critical habitat. Markle Pet. App. A-38 (citing 16 U.S.C. § 1533(b)(2); *Bennett*, 520 U.S. at 172).[3] In

[3] The Amici are wrong to argue that a contradiction exists between the ESA's requirement for FWS to consider economic impacts and the discretion it provides FWS on whether to exclude specific areas. *See* Br. of Wash. Legal Found., *et al*. 18. Rather, Congress gave FWS, the expert wildlife agency charged with conservation of endangered species, the discretion to prioritize conservation and refuse to exclude certain areas essential to species survival and recovery, even if economic considerations weigh against it.

reviewing under the APA FWS's ultimate decision to designate critical habitat for the frog, the court of appeals held that FWS "fulfilled this requirement by commissioning an economic report. . . ." Markle Pet. App. A-38; *see id.* A-6 – A-7 (explaining that its review under the APA asks whether the designation was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

Furthermore, the Fifth Circuit's decision is consistent with the only other circuit court that has confronted the issue. *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 990 (9th Cir. 2015). In *Bear Valley Mut. Water Co.*, the Ninth Circuit explained that the ESA "cannot be read to say that the FWS is ever obligated to exclude habitat that it has found to be essential. Such a decision is always discretionary and the statute 'provides absolutely no standards that constrain the Service's discretion' not to exclude. . . ." *Id*.[4]

---

[4] Every district court to consider the question has also reached the same conclusion. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude [an area] from designation, which is committed to the agency's discretion."); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 28-29 (D.D.C. 2010) (while acknowledging the "strong presumption that agency action is reviewable," finding that "[t]he plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat"); *Home Builders Ass'n v. U.S. Fish & Wildlife Serv.*, No. S-05-0629 WBS-GGH, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) (concluding that the ESA "provides a standard by which to measure an agency's choice to exclude an area based on economic or other considerations," but provides "no substantive standards by which to review the FWS's decisions not to

Given the consistency of the only two appellate decisions to have addressed the issue, this case presents no conflict for this Court to resolve and no reason for this Court to grant the petitions.

III. The Court of Appeals' Conclusion that the Designation of Critical Habitat is Constitutional is Correct and Consistent with All Other Appellate Decisions

Petitioners argue that the designation of Unit 1 violates the Commerce Clause and the Tenth Amendment, but their baseless arguments provide no reason for the Court to grant certiorari. Some of Petitioners' arguments were never raised prior to their Petitions, and this Court should decline to consider them. Regardless, Petitioners' arguments go against all prior appellate jurisprudence and lack sufficient support to merit review in the face of the judicial consensus rejecting them.

Every circuit court to consider the issue has upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See* Markle Pet. App. A-44 – A-45; *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1008 (10th Cir. 2017) (holding that the Commerce Clause authorizes FWS to prohibit "take" of the Utah prairie dog, a purely

---

exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion"), *modified on other grounds*, 2007 WL 201248 (E.D. Cal. Jan. 24, 2007).

intrastate species, on nonfederal land), *petition for reh'g en banc denied*, No. 14-4151 (10th Cir. Aug. 8, 2017), *petition for cert. filed*, No. 17-465 (Sept. 26, 2017); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1174-77 (9th Cir. 2011) (upholding regulation of take of purely intrastate, noncommercial delta smelt as essential part of ESA's comprehensive regulatory scheme), *cert. denied sub nom.*, *Orchards v. Salazar*, 565 U.S. 1009 (2011); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1271-74 (11th Cir. 2007) (upholding regulation of purely intrastate, noncommercial Alabama sturgeon as essential part of ESA's comprehensive regulatory scheme), *cert. denied*, 552 U.S. 1097 (2008); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006) (upholding the ESA as a Constitutional exercise of Congressional authority under the Commerce Clause); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 638-41 (5th Cir. 2003) (upholding regulation of take of a purely intrastate cave species as essential to ESA's comprehensive regulatory scheme), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (upholding the regulation of take of a purely intrastate toad and finding that "invalidating this application of the ESA would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans") (quotation marks and citation omitted), *cert. denied*, 540 U.S. 1218 (2004); *Gibbs v. Babbitt*, 214 F.3d 483, 492-98 (4th Cir. 2000) (holding that take of purely intrastate red wolves is economic activity that substantially affects interstate commerce, and that regulation

of that take is an essential part of ESA's comprehensive regulatory scheme), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049-57 (D.C. Cir. 1997) (stating that regulation of take of a purely intrastate fly species substantially affects interstate commerce by preventing loss of biodiversity and regulating interstate commercial development), *cert. denied*, 524 U.S. 937 (1998).

In keeping with every other appellate court to consider the issue, the court of appeals upheld the constitutionality of the critical habitat designation under the aggregation principle, which provides that intrastate activity can be regulated if it is an essential part of a larger regulation of economic activity with a substantial effect on interstate commerce. Markle Pet. App. A-42; *see United States v. Lopez*, 514 U.S. 549, 558-59 (1995).[5] Rejecting the Petitioners' narrow framing of the issue as to whether *the designation of Unit 1* as critical habitat had a substantial effect on interstate commerce, the court of appeals found that the designation of critical habitat *in general* was a valid exercise

---

[5] The fact that only federal action triggers the ESA's consultation requirement differentiates the ESA from the Gun-Free School Zones Act of 1990, at issue in *Lopez*, in which there was "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Lopez*, 514 U.S. at 561. Petitioners' constitutional objections to the designation of Unit 1 are undermined by the fact that any federal action on Unit 1 triggering Section 7 consultation would have to rest on its own independent Commerce Clause basis.

of Commerce Clause authority because it was an essential part of an economic regulatory scheme with a substantial effect on interstate commerce. Markle Pet. App. A-39 – A-47, n.23. That such an economic regulatory scheme "ensnares some purely intrastate activity is of no moment." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

The court of appeals found that the ESA is an economic regulatory scheme that is designed to preserve imperiled species and their habitats, specifically noting that "habitat protection and management – which often intersect with commercial development – underscore the economic nature of the ESA and its critical-habitat provision." Markle Pet. App. A-43. The court of appeals then found the designation of critical habitat essential to that scheme because of the clear link between species survival and preservation of the habitat on which those species depend. *Id.* at A-45. Given that courts are not free to "excise individual components of [a] larger scheme," *Raich*, 545 U.S. at 22, the court of appeals ruled that "[a]llowing a particular habitat – one that the Service has already found to be essential for the conservation of the species – to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat." Markle Pet. App. A-45 – A-46. Therefore, the court of appeals found the designation of Unit 1 constitutional, noting that Petitioners conceded that the critical habitat provision of the ESA is a lawful exercise of Commerce Clause authority. *Id.* at A-47.

Petitioners do not take issue with the substance of the court of appeals' commerce clause analysis. Instead, Petitioners grasp at straws without any supporting ESA case, and rely on a Clean Water Act case to argue that designation of Unit 1 "creates a line-drawing problem that implicates the outer boundaries of constitutional power." Markle Pet. 36-37 (citing *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (hereinafter *SWANCC*)); *see* Weyerhaeuser Pet. 22 (similar). But *SWANCC* has no relevance here, as it decided the extent of the Clean Water Act's definition of "navigable waters" on statutory – not constitutional – grounds. *SWANCC*, 531 U.S. at 171-72; *see also Rancho Viejo*, 323 F.3d at 1071 (noting that the Supreme Court "expressly declined" to reach the question of whether the designation of certain wetlands were within the U.S. Army Corps of Engineer's constitutional authority).

Additionally, Congress did not clearly indicate it meant the Clean Water Act to "invoke[] the outer limits of Congress' power," *SWANCC*, 531 U.S. at 172, while conversely, it is "abundantly clear" that Congress designed the ESA "to halt and reverse the trend toward species extinction, *whatever the cost*." *Tenn. Valley Auth.*, 437 U.S. at 184 (emphasis added). Therefore, the ESA reflects Congress' intent to invoke the full extent of its authority to protect imperiled species. *Tenn. Valley Auth.*, 437 U.S. at 184.

Moreover, the effect on interstate commerce is much stronger here than in other cases for which this Court has declined certiorari, such as *GDF Realty*, in

which the Fifth Circuit found a substantial aggregate effect from subterranean invertebrate cave species found only in Texas. 326 F.3d at 638-41. Unlike the cave species at issue in *GDF Realty*, the gopher frog attracts people to travel across state lines to view it in the wild and in a zoo in New Orleans.[6] 326 F.3d at 638 ("[T]here is no historic trade in the Cave Species, nor do tourists come to Texas to view them."). In addition, the gopher frog is not purely intrastate. It was historically found across three states, and FWS designated critical habitat in two states. 77 Fed. Reg. at 35,124, 35,134.

Petitioners also argue that the designation of unoccupied critical habitat on private land somehow runs afoul of the Tenth Amendment. But this argument does not warrant review either. First, Petitioners never raised it below. The complaints lack any Tenth Amendment claims; neither the district court nor the court of appeals considered Tenth Amendment arguments, and the Tenth Amendment was never the basis for any opinion issued in this case, dissenting or otherwise. In keeping with its well-established tradition, this Court should decline to hear issues not brought to the lower courts. *See Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

---

[6] *See* ROA.14-31008.2554 at ¶¶ 7-8 (Greenwald Decl.) (travelling from Oregon to view wild gopher frogs in Mississippi); ROA.14-31008.2559-60 at ¶¶ 7-9 (Demoss Roberts Decl.) (travelling from Louisiana to view wild gopher frogs in Mississippi and viewing captive gopher frogs at the Audubon Zoo in New Orleans).

Regardless, Petitioners cite no authority to support their new argument. Rather, Petitioners cite *SWANCC* for the proposition that the designation of unoccupied habitat encroaches "upon a traditional state power." 531 U.S. at 173; Markle Pet. 39, Weyerhaeuser Pet. 22. But *SWANCC* is irrelevant, as it never addressed the Tenth Amendment.

The Tenth Amendment only gives States "powers not delegated to the United States by the Constitution." U.S. CONST. amend. X. And "[i]t is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." *Raich*, 545 U.S. at 29 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)); *see also*, *e.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 338-39 (1979) (finding that a state's control over wildlife within its borders must yield to the federal commerce power). Indeed, "[t]he Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981) (citations omitted).

Therefore, because the Commerce Clause allows FWS to designate critical habitat, it is immaterial if the agency's designation might somehow encroach upon a traditional state power.

IV. FWS Found the Gopher Frog Critical Habitat Designation Would Have Several Benefits, and Petitioners' and Amici's Claims Regarding the Costs are Exaggerated

Petitioners and Amici offer policy arguments to claim that FWS's statutory requirement to designate critical habitat is overly burdensome and does not reflect a valid balancing of costs and benefits. *See, e.g.*, Weyerhaeuser Pet. 28-29; Br. of Coal. for a Sustainable Delta, *et al.* 5-8. Those arguments are properly directed to Congress rather than this Court and do not provide a basis for review of the court of appeals' decision. *See* Markle Pet. App. B-42.

Petitioners and Amici also argue that it was inappropriate for FWS to designate Unit 1 in particular because the designation has "no benefits" for the frog but would enact substantial costs on Petitioners and Amici. *See, e.g.*, Weyerhaeuser Pet. 26-27; Markle Pet. 22-23. In so arguing, Petitioners and Amici simply ignore explicit statements in the final rule and the Economic Analysis regarding the benefits of the designation and make claims regarding the economic impact of the designation that have no basis in reality.

FWS articulated in the final rule numerous benefits to gopher frog conservation from designation of Unit 1. For example, FWS explained that "[m]aintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for

the species' eventual recovery." 77 Fed. Reg. at 35,135. In other words, Unit 1 helps ensure against extinction by providing another area within the species' historical habitat where the frogs could live if the area in Mississippi becomes uninhabitable due to disease, drought, natural disaster, or other threats.

The Economic Analysis also articulated numerous economic benefits of the critical habitat designation, including increased property values for nearby landowners and aesthetic benefits. *See* Economic Analysis 5-2. The Economic Analysis further identified ecosystem services provided by the preservation of Unit 1, including promoting high water quality and providing habitat for other rare species. *Id*.; *see also* 77 Fed. Reg. at 35,141.

Petitioners' and Amici's contentions about the economic and societal impact of the designation are similarly disingenuous. They try to create the impression that the gopher frog critical habitat designation will foreclose any economically valuable use of Unit 1 altogether. *See, e.g.*, Br. of St. Tammany Parish 1. This suggestion is incorrect.

The designation means only that the *federal* government must ensure that actions it funds, carries out, or permits that affect gopher frog critical habitat will not destroy or adversely modify that habitat, which federal agencies will do through Section 7 consultation with FWS. 16 U.S.C. § 1536(a)(2). Yet consultation almost never stops projects. *See* Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions about a*

Controversial Provision of the U.S. Endangered Species Act, 112 PNAS 15844 (2015), http://www.pnas.org/content/112/52/15844. Rather, consultation may conclude informally when the federal agency taking the action determines the action is not likely to adversely affect critical habitat and FWS concurs in writing. 50 C.F.R. § 402.13. Or, if adverse impacts to critical habitat might occur, formal consultation is initiated, which culminates in a biological opinion in which FWS determines whether the federal action is likely to result in adverse modification to critical habitat. 50 C.F.R. § 402.14. If consultation results in an adverse modification determination, FWS develops measures that can be incorporated into the project to mitigate its impacts on the affected habitat and allow the project to go forward. 16 U.S.C. § 1536(b)(3)(A). In this way, the consultation process can steer development away from the most sensitive areas and help ensure any remaining significant impacts are properly mitigated.

Here, FWS determined that designation of Unit 1 could potentially result in loss of development ranging from $0 to $33.9 million over 20 years. 77 Fed. Reg. at 35,140-41. This potential loss depends on a number of contingencies, including whether development projects are proposed, whether any federal agency approval may be required for those projects, and possible limits FWS might impose after any consultation that accompanies federal action. *Id*.

Importantly, Petitioners mischaracterize the record when they complain of a loss of $34 million. *See, e.g.*, Markle Pet. 32; Weyerhaeuser Pet. 4. They fail to

acknowledge that the designation could have *no* economic impact at all if the land continues to be used for timber production (because no federal nexus would trigger the consultation requirement), or if other forms of development do not require federal permission because they do not result in dredging or filling of federal jurisdictional waters. 77 Fed. Reg. at 35,123. Their claims of other costs, including to the national economy, are even more unsubstantiated. Weyerhaeuser Pet. 4. Both the district court and the court of appeals upheld the Service's economic impact analysis. Markle Pet. App. A-38 – A-39; B-38 – B-42.

In short, Petitioners' and Amici's fears that the designation would prohibit all economic uses of Unit 1 are overblown and provide no reason for the Court to hear this case.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,
November 13, 2017

JOHN BUSE
Counsel of Record
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
Oakland, CA 94612
(510) 844-7125
jbuse@biologicaldiversity.org

COLLETTE L. ADKINS
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 595
Circle Pines, MN 55014
(651) 955-3821

RYAN SHANNON
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211
(214) 476-8755

Attorneys for Intervenor-Respondents
Center for Biological Diversity and
Gulf Restoration Network