Nos. 17-71 & 17-74

IN THE
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

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

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONERS

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*[1]

[1] Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief to counsel for all parties. Petitioners' counsel of record consented to the filing of this brief by filing blanket con-

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. Many of the Chamber's members are landowners whose private property may be saddled with additional and unlawful regulatory burdens under the Endangered Species Act ("ESA") if the "critical habitat" designation authority asserted by the United States Fish and Wildlife Service ("Service") in this case is allowed to stand. And all of the Chamber's members have an interest in reaffirming courts' duty under *Chevron*[2] to engage in independent statutory interpretation, thus ensuring administrative agencies do not impose regulatory burdens that exceed statutory bounds.

SUMMARY OF ARGUMENT

The opinion below is emblematic of judicial decisions that disregard this Court's repeated insistence that *Chevron* requires courts to take seriously the statutory limits on agencies' authority and apply them rigorously in

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sents with the Clerk. Respondents' counsel of record consented to the filing of this brief. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

[2] See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (requiring judicial deference to certain executive agency statutory interpretations).

all cases. For deference under *Chevron* to be consistent with the legislative power to make law, the judicial duty to "say what the law is,"[3] and the executive obligation to faithfully execute it, the courts must exhaust the traditional tools of statutory construction to assure that the text of the statute written by Congress does not answer the question presented. Applying *Chevron* deference without first undertaking this intensive investigation violates fundamental principles of separation of powers, regardless of whether the agency offers a reasonable interpretation of the statute.

The importance of this case for the Nation's economy, landowners, and Chamber members cannot be overstated. The claim to sweeping agency power uncritically accepted by the court of appeals allows the Service to burden private property across the country with costly ESA Section 7[4] regulation virtually at will. Even worse, the lower court's fundamental misapplication of *Chevron* in this case reinforces a disturbing trend among lower courts to take a "hands off" approach to *Chevron* analysis, turning judicial review of agency action into little more than a rubberstamp of executive claims to statutory authority.

ARGUMENT

I. CERTIORARI IS WARRANTED TO REMIND FEDERAL COURTS TO CONDUCT A RIGOROUS TEXTUAL ANALYSIS UNDER *CHEVRON*

This dispute turns on the meaning of the term "critical habitat" in 16 U.S.C. § 1533(a)(3)(A)(i). In particular, the ESA provides that the Service "to the maximum extent prudent and determinable *** shall *** designate

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[3] See *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[4] See 16 U.S.C. § 1536(a)(2).

any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i).

Without first identifying any ambiguity in the operative statutory term, the court of appeals deferred under *Chevron* to the Service's interpretation, which stretches "critical habitat" to include private land that is not "habitat" at all, much less *critical* habitat. This resulted in upholding the Service's designation as "critical habitat" land that all parties agreed the endangered species cannot possibly inhabit. See Pet. App. 138a[5] (Jones, J., dissenting from denial of rehearing en banc) ("The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute."). In doing so, the Fifth Circuit ignored this Court's repeated insistence that *Chevron* deference is appropriate *only* when the court has determined—after exhausting the traditional tools of statutory construction—that the text of the statute does not resolve the question at issue. This Court should grant certiorari to reinforce that *Chevron* demands serious textual analysis from courts *before* any deference is shown to an agency's statutory interpretation.

A. *Chevron* demands careful analysis of the statutory text before deference is given

When reviewing agency interpretations of allegedly ambiguous statutory provisions, this Court often ends the *Chevron* analysis at the outset. Indeed, in recent Terms, this Court has repeatedly rejected requests for deference to an administrative interpretation because the text of the statute resolves the question at issue. See, *e.g.*, *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity

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[5] References to the "Pet. App." are to the Appendix to the Petition for Certiorari in *Weyerhaeuser Company* v. *United States Fish and Wildlife Service*, No. 17-71.

or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Coventry Health Care* v. *Nevils*, 137 S. Ct. 1190, 1198 n.3 (2017) ("Because the statute alone resolves this dispute, we need not consider whether *Chevron* deference attaches to OPM's 2015 rule."); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1979 (2016) ("Even assuming, *arguendo*, that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous."); *FERC* v. *Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 n.5 (2016) ("Because we think FERC's authority clear, we need not address the Government's alternative contention that FERC's interpretation of the statute is entitled to deference under *Chevron*."); *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron*.").[6]

These cases reflect the axiom that "an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). If by "[e]mploying traditional tools of statutory construction," *INS* v. *Cardoza–Fonseca*, 480 U.S. 421, 446 (1987), the court determines that Congress has spoken clearly on the disputed question, then "that is the end of the matter," *Chevron*, 467 U.S. at 842. The agency is due no deference, for Congress has left no gap for the agency to fill. *Id.* at 842-844. Only "if the statute is silent or ambiguous with respect to the specific issue," does the Court

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[6] See also *Hawkins* v. *Cmnty. Bank of Raymore*, 761 F.3d 937, 941-942 (8th Cir. 2014) (rejecting agency interpretation as violative of statutory text and describing contrary opinion of the Sixth Circuit as "manufactur[ing] ambiguity" that did not exist), *aff'd by an equally divided court*, 136 S. Ct. 1072 (2016).

move on to ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In upholding the Service's designation of Unit 1 as "unoccupied critical habitat" based on deference to the Service, the court of appeals skated past the textual analysis required by *Chevron*. Without identifying any ambiguity in the term "critical habitat," the Fifth Circuit deferred to the Service's sweeping and unprecedented interpretation of that term to include *non*-habitat. See Pet. App. 23a. The lower court's approval of an agency's statutory interpretation that defies both common sense and ordinary English usage is emblematic of recent lower-court decisions that ignore statutory text in contravention of the *Chevron* framework.

Robust enforcement of *Chevron* safeguards the separation of powers by ensuring that courts—not agencies—say what the law is. "[B]efore a court may grant [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting). The judicial duty—and the Administrative Procedure Act's charge that courts resolve "all relevant questions of law," 5 U.S.C. § 706—demand that courts exhaust the traditional tools of construction in every case where statutory interpretation is required. See *ibid.* At the very least, that duty requires careful investigation of the ordinary meaning of the words of the statute and rigorous analysis of the statute as a whole, not a single provision viewed in isolation. See *Carcieri* v. *Salazar*, 555 U.S. 379, 387-389 (2009) (reversing lower court's application of deference that failed to analyze "the ordinary meaning" of the text and "the natural reading of the [provision in question] within the context of the [statute]"). Had the court of appeals undertaken this essen-

tial analysis, the statute's text would have resolved the issue—as it has in so many of this Court's recent decisions—without resorting to *Chevron* deference.

B. Properly applying *Chevron* would have required rejecting the Service's interpretation

As Judge Jones's dissent from denial of rehearing en banc recognized, "the panel *** neglected" "to undertake holistic statutory interpretation." Pet. App. 131a-132a. Instead, its analysis focused exclusively on the statute's definitional provision. Because that provision—viewed in a vacuum—does not "appear to require that a species actually be able to inhabit its 'unoccupied critical habitat,'" the court of appeals concluded that the Act does not contain a habitability requirement. *Id.* at 131a. As Judge Jones explained, however, that conclusion is incorrect. *Id.* at 131a-135a.

The ESA states that the Service

> shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat *** and *** may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)-(ii). The meaning of this provision dictates that whatever is "critical habitat" must first be "any habitat of such species." The fact that the separate statutory definition of "critical habitat" includes both areas occupied by the species and areas not occupied by the species does not alter the fact that all such areas must be within the "habitat of such species"—*i.e.*, they must at least be capable of habitation by that species. The majority below did not even confront this ordinary-meaning roadblock, which stems from the very provision that empowers the Service to designate "critical

habitat" in the first place. It instead peremptorily reasoned that Congress had delegated broad authority to the Service and thus proceeded to apply *Chevron* deference. Pet. App. 15a-16a.

The lower court's interpretation also overlooks the ordinary meaning of the word "habitat" itself, which is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). See also The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"). Applying that ordinary meaning here, Unit 1 cannot be "habitat" because the dusky gopher frog does not—and indeed could not—"naturally live[] and grow[]" there. Pet. App. 23a-24a. And because Unit 1 cannot be habitat, it obviously cannot be *critical* habitat. Pet. App. 60a (Owen, J., dissenting) ("An area cannot be essential for use as habitat if it is uninhabitable.") (quotation marks omitted). This Court has rejected similar agency attempts to stretch statutory terms beyond their ordinary meaning. See, *e.g.*, *Freeman* v. *Quicken Loans*, 132 S. Ct. 2034, 2041-2042 (2012) (rejecting agency's bid for deference because "it is normal usage that, in the absence of contrary indication, governs our interpretation of texts").

The court of appeals' conclusion that the ESA contains no habitability requirement demonstrates the problems that arise when courts fail to apply the rigorous textual analysis required by *Chevron*. The court of appeals deferred to the Service's wrongheaded interpretation of the ESA without even pausing to ask whether any statutory ambiguity justified doing so. By breezing past that essential question, the court of appeals ignored the plain meaning of the word "habitat" and the essential limit Congress placed on the Service's discretion by using that term consistently throughout the statutory scheme. *Id.*

at 2044 (holding that there is no "warrant for expanding [a statutory provision] beyond the field to which it is unambiguously limited").

Instead of paying attention to the words Congress used to cabin the agency's discretion, the court of appeals mistakenly focused on the Service's expertise and its various scientific findings allegedly justifying its conclusion that Unit 1 is "essential to the conservation" of the frog. See Pet App. 162a (Jones, J.) ("The panel majority's nontextual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats."). But no amount of expertise can give an agency license to rewrite the terms of a statute. See *Chevron*, 467 U.S. at 842-843 & n.9 (If, by "employing traditional tools of statutory construction," the court determines that Congress' intent is clear, "that is the end of the matter."). No matter how much scientific analysis supported the Service's conclusion that Unit 1 is "essential to the conservation" of the frog, if Unit 1 is not "habitat," the Service lacks authority to designate it as "critical habitat."

Nor does the fact that *other* aspects of the ESA might be ambiguous change the analysis. The court of appeals apparently assumed that the phrase "essential to the conservation of the species" is ambiguous. Even if that is so, however, it is irrelevant because only *habitat* "essential to the conservation of the species" is eligible for designation, and Unit 1 cannot be habitat. The lower court's error—ignoring a textual limitation on agency power in the name of deference triggered by a secondary textual ambiguity—is symptomatic of a broader misapplication of *Chevron* that has been the subject of close attention by this Court in recent years. See, *e.g.*, *Kingdomware Techs., Inc.*, 136 S. Ct. at 1978 (rejecting lower court's reliance on statute's "prefatory clause" to "change the scope of the [statute's] operative clause"); *Cuomo* v.

Clearing House Ass'n, L.L.C., 557 U.S. 519, 525 (2009) ("[T]he presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of [the statute]").

This case provides a much-needed opportunity for the Court to further clarify the proper approach to statutory interpretation under the *Chevron* framework.

II. THE FIFTH CIRCUIT'S DECISION CONTRAVENES THIS COURT'S TEACHING THAT A VIGOROUS APPLICATION OF *CHEVRON*'S REASONABLENESS TEST IS AN ESSENTIAL PROTECTION AGAINST ULTRA VIRES AGENCY ACTION

The lower court's fundamental misapplication of *Chevron*'s reasonableness analysis further underscores the need for this Court to refine the second step of the *Chevron* rubric.

This Court has emphasized that "[e]ven under [*Chevron*']s deferential standard, *** 'agencies must operate within the bounds of reasonable interpretation.'" *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015). Thus, "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Id.* at 2708. Put another way, "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *City of Arlington*, 133 S. Ct. at 1874.

The Court enforced this boundary in *AT&T Corp.* v. *Iowa Utilities Board*, holding an agency interpretation unreasonable because it was "not in accord with the ordinary and fair meaning" of the statutory terms. 525 U.S. 366, 389-390 (1999). Likewise, in *Department of Treasury* v. *FLRA*, this Court set aside the Department's interpretation as "not reasonable" because it was "flatly

contradicted by the language" and the "plain text" of the statute. 494 U.S. 922, 928 (1990).

As Judge Silberman recently put it: "Much of the recent expressed concern about *Chevron* ignores that *Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Global Tel*Link* v. *FCC*, No. 15-1461, 2017 WL 3380543, at *16 (D.C. Cir. Aug. 4, 2017) (Silberman, J., concurring). This case presents yet another example of "those kinds of agency tactics." *Ibid.*

Even assuming the relevant statutory terms are ambiguous, the interpretation embraced by the opinion below leads to absurd results—results that run afoul of *Chevron*'s litmus test of reasonable interpretation. As Judge Jones explained:

> Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C.* v. *U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.
>
> According to the panel majority, however, Unit 1 is "critical habitat" despite being unoccupied by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"),

> the panel majority make it easier to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land.

Pet. App. 143a.

That bizarre arrangement is at odds with uniform precedent interpreting the ESA, the statute's purpose, and its legislative history, all of which demonstrate that an unoccupied critical habitat designation was "intended to be *different* from and *more demanding* than an occupied critical habitat designation." *Id.* at 149a; see *id.* at 145a-150a. But because the court of appeals treated *Chevron* as a mere speed bump, it ignored all of the relevant interpretive evidence and accepted an interpretation that makes it easier to designate as critical habitat land on which the species cannot survive (like Unit 1) than land which is occupied by the species. That approach to *Chevron* ignores this Court's repeated holdings that the framework should be applied rigorously to discipline unreasonable agency interpretations—even those eligible for deference—to prevent blatant executive overreach. Pet. App. 49a (Owen, J.) ("The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government.").

Judge Owen's dissent further underscores the impermissibility of the Service's (and the panel majority's) interpretation. As she explained, that interpretation "depends entirely on adding words to the Act that are not there." Pet. App. 63a. Specifically, the "linchpin to the majority's holding" is that the Service must have "unfettered discretion to designate land as 'critical habitat' so long as *** at least one physical or biological feature[ ]

*** essential to the conservation of the species' [is] present" on the land. *Id.* at 63a-64a (quotation marks omitted). But by permitting "the Service to designate an area as 'critical habitat' if it has '*a critical feature*,'" the opinion below allowed the Service to "re-write[ ] the Endangered Species Act." *Id.* at 65a (emphasis in original).

This Court has consistently rejected agency attempts to "rewrit[e] statutory thresholds [as] impermissible." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2445 (2014); *id.* at 2446 ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). By "recogniz[ing] the authority claimed by [the Service]," the decision below "deal[t] a severe blow to the Constitution's separation of powers." *Id.* at 2446.

The Service's interpretation exceeds the bounds of permissible interpretation and thus fails under *Chevron*. Instead of uncritically deferring to it, the court of appeals should have been "alarmed that [the Service] felt sufficiently emboldened by [this Court's *Chevron*] precedents to make the bid for deference that it did here." *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring). Certiorari is warranted to address the emasculation of *Chevron* that has become all too common among the lower courts. See *Global Tel*Link*, 2017 WL 3380543, at *16 (Silberman, J., concurring).

III. The Decision Below Will Have Far-Reaching Implications For Landowners Across The Country

Petitioners present recurring issues with serious national ramifications. This case's importance extends beyond the core doctrines of administrative law discussed above to practical issues of ESA enforcement that affect myriad landowners across the Nation.

Resolving the Service's proper role with respect to "critical habitat" designations is vital. "Designation of

private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to result in the destruction or adverse modification of critical habitat." *Otay Mesa Prop., L.P.* v. *U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quotation marks omitted). In this case alone, the agency's sweeping and unprecedented interpretation allowed it to impose $34 million in costs on the landowner petitioners merely because the Service found a single feature essential to the dusky gopher frog's survival on their land. Pet. App. 158a-159a. In the view of the Chamber and its many landowner members, petitioner Weyerhaeuser is correct to warn that the Service's "single essential feature" rule will likely impose billions of dollars in costs on landowners across the country. Weyerhaeuser Pet. 4. As Judge Owen's dissent explained, the decision below threatens to subject large swaths of the United States to intensive federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Pet App. 49a. Even worse, under the lower court's holding, the Service's designations are largely immune from judicial review. *Id.* at 31a-34a (majority opinion); Weyerhaeuser Pet. 31-33.

As Judge Jones explained, if the opinion below evades further review, the Service will be "encourage[d]" to pursue "aggressive, tenuously based interference with property rights." Pet. App. 162a. Because the court of appeals—and the Service—relied on "non-textual interpre-

tations of the ESA" in violation of *Chevron*, this Court should grant certiorari and enforce "Congress's efforts to prescribe limits on the designation of endangered species' habitats." *Ibid.*

CONCLUSION

The Chamber respectfully requests that the petitions for writs of certiorari be granted.

Respectfully submitted.

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