No. 17-74

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Based on deference and agency discretion, the Fifth Circuit decision grants the Government boundless authority to designate "critical habitat" wherever it will. This is the very definition of limitless power. The ramifications of this decision for national land use, the rule-of-law, and judicial review cannot be overstated.

ARGUMENT

This case does not turn on narrow technical matters or scientific fact-finding requiring deference to administrative expertise, as Respondents contend. Rather, the case raises pure legal questions involving statutory and constitutional interpretation. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat" and its designation as such exceeds congressional authority.

I

The Government's Designation of Unit 1 as "Essential" Habitat Is Due No Deference

Respondents argue that because Congress did not define the word "essential" in the Endangered Species Act (ESA), the Service may interpret the term within the bounds of *Chevron*. Fed. Opp. at 17-18. That correctly states the law. But the Government misapplied it.

Based on the best available, peer-reviewed science, the Service identified three features as

absolutely "essential" for the conservation of the gopher frog: (1) ephemeral ponds; (2) upland forests dominated by longleaf pine; and, (3) upland corridors for movement between sites. *See* Final Rule, 77 Fed. Reg. 35118, 35131 (June 12, 2012).

This is the Service's own interpretation of the word "essential." According to the Service, these combined features are the "principal biological or physical constituent elements [within a defined area] that are *essential* to the conservation of the species." *Id*. at 35128; 50 C.F.R. § 424.12(b) (emphasis added). Therefore, if the Service is due any deference under *Chevron*, it is to this interpretation.

The Service concedes, however, that Petitioners' property (Unit 1), does not contain these three elements and is unsuitable as habitat: "The uplands associated with the ponds do not currently contain the essential biological and physical features of critical habitat." Proposed Rule, 76 Fed. Reg. 59774, 59783 (Sept. 27, 2011). At most, the property contains only one "essential" element—ephemeral ponds:

> But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation.

Pet. App. at A-52 (Judge Owen, dissent).

The Service designated Unit 1 as "critical habitat" in the hope that someday someone would convert it into suitable habitat. This is a forlorn hope: "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become "essential" to the conservation of the species. *Id*. at A-51.

By designating Unit 1 as "critical habitat," the Service contradicted its own interpretation of the word "essential." Unit 1 "plays no part in the conservation" of the gopher frog. *Id*. Its "biological and physical characteristics will not support a dusky gopher frog population." *Id*. Accordingly, Unit 1 is not "essential" habitat (or habitat at all) and "[l]and that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat'" and is not subject to *Chevron* deference. *Id*.

This case raises an important legal question: Does the ESA authorize the Government to set aside "vast portions of the United States" as "critical habitat" 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 substantial modification; and, does not support the existence or conservation of the species in any way? *See id*. at A73-74.

That question not only justifies, but necessitates, review by this Court.

II

The ESA Does Not Countenance the Designation of Non-Habitat as "Critical Habitat"

Respondents acknowledge that Petitioners argued in the trial court that the Service may only designate actual habitat as "critical habitat." Fed. Opp. at 21. But they assert that Petitioners abandoned the habitability argument on appeal and cannot raise it here. The argument is without merit. The Fifth Circuit panel expressly ruled on the issue in response to Petitioners' habitability argument:

> We consider first *their argument* that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the service to designate "essential" areas without further defining "essential" to mean habitable.

Pet. App. at A-24-25 (emphasis added).

Thus, Petitioners did raise the habitability issue on appeal, which the Fifth Circuit discussed and rejected. The issue is properly before this Court and raises an independent ground for review.

Respondents argue further: (1) that "critical habit" need not be habitable because the ESA allows the designation of unoccupied areas as "critical habitat." (Fed. Opp. at 22); (2) that "critical habitat" need not contain the essential characteristics of essential habitat (*Id.*); (3) that Unit 1 actually is habitat even if it is not currently habitable (*Id.* at 23); and, (4) that if the Service cannot designate potential habitat as "critical habitat" it will hamper the agency's conservation efforts. (*Id.* at 25.)

Petitioners comprehensively refute the notion that "critical habitat" may include non-habitat in their Petition at 18-23, as required by logic and the statutory text. They are supported in this interpretation by Judge Owen and Judge Jones in their respective dissents. *See* Pet. App. at A-51, C-4. Nevertheless, they address Respondents' specific arguments below.

The first argument, that critical habitat need not be occupied by the species, is a non sequitur. Petitioners do not argue that the Service may only designate occupied areas as "critical habitat." Rather, they argue that "critical habitat" must be habitable, even if not currently occupied. Unit 1 is not occupied or habitable.

The second argument, that critical habitat does not need to include the essential characteristics of essential habitat, suffers from what Judge Owen calls a "gap in reasoning . . . that cannot be bridged." *Id.* at A-50. It is axiomatic that essential habitat must contain the characteristics essential for the species'

survival, conservation, or recovery. Unit 1 does not contain these characteristics.

The third argument, that Unit 1 is actual habitat even though it's not habitable, goes too far. Nothing in the text of the ESA authorizes the designation of "potential habitat" as critical habitat for the obvious reason that with enough effort any area can become habitat for some species. And, Respondents provide no evidence that Unit 1 will or is likely to be converted into gopher frog habitat at any time in the future.

And, the Respondents' last argument, that the Service would be hampered in conserving the species if it cannot designate non-habitat as "critical habitat," is simply untrue. Unit 1 provides no conservation benefit to the gopher frog whatsoever. The Service concedes it cannot compel Petitioners to manage the land for gopher frog conservation and the Service has not offered to acquire Unit 1 and undertake such management itself. Excluding Unit 1 from "critical habitat" would not hamper the Service or the frog in any way. Unit 1 has no connection to the gopher frog.

Review by this Court is necessary to determine if the ESA has a habitability requirement.

III

The Fifth Circuit Decision Grants the Government Unchecked Authority To Designate "Critical Habitat" Nationwide

Respondents argue, circuitously, that the Fifth Circuit decision does not bestow "virtually limitless authority" on the Service to designate "vast portions of the United States" as "critical habitat," simply because the majority panel says it doesn't. Fed. Opp. at 25-26. That is no argument. It is an assertion belied by the facts.

Subsequent to the trial court decision in *Markle*, the Service adopted a new rule redefining "critical habitat." *See Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat*. 81 Fed. Reg. 7414 (Feb. 11, 2016). In responding to public comments that the designation of non-habitat as "critical habitat" would be unlawful and contrary to the Service's practice since 1984, the Service stated, "[t]he unoccupied areas do not have to presently contain *any* of the physical or biological features" essential to the conservation of the species (citing *Markle Interests v. USFWS*, 40 F. Supp. 3d 774 (E.D. La. 2014)). 81 Fed. Reg. 7427 (emphasis added). Contrary to Respondents' assertion that the Fifth Circuit decision is self-limiting, the response to comments shows how the agency interprets the decision in practice—as an unbounded grant of authority to the Service to designate any area the Service believes may someday be useful for species conservation.

This new "Markle" rule was challenged by 18 states in the Southern District of Alabama, *State v. Nat'l Marine Fisheries Svce.*, No. 1:16-cv-00593, and briefing in the case is stayed until March 1, 2018, pending a decision by this Court on the petition for certiorari. In another ESA case, where the Service designated "vast portions" of Utah and Colorado as "critical habitat" for the Gunnison sage-grouse, the Service recently filed a brief in opposition relying on *Markle* to justify the inclusion of thousands of acres of "potentially suitable" and potentially unsuitable areas as "critical habitat." *In re Gunnison Sage-Grouse*, No. 1:15-cv-00130 (D. Co.). These cases provide empirical evidence that the Service is applying an extreme interpretation of the *Markle* decision nationwide and that the decision does in fact bestow the Service with "virtually limitless power" to subject large portions of the country to strict federal regulation. As Judge Jones opined, despite the panel majority's disclaimers, "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Review by this Court is therefore necessary and urgent.

IV

The Fifth Circuit Decision Lowers the Bar For Designating "Critical Habitat"

For the first time in this case, Respondents argue the designation of Unit 1 as unoccupied "critical habitat" does not lower the standard for such designations. But the facts tell a different story. The designation of *occupied* "critical habitat" requires the Service to prove the existence of the physical and biological characteristics "essential to the conservation of the species." *See* 16 U.S.C. § 1532(5)(A)(i). But under Respondents' interpretation of the law, the Service can simply assert that *unoccupied* areas are "essential" and the courts must defer to that "technical determination." There could be no lower standard for designating "critical habitat," occupied or unoccupied.

Unit 1 does not contain the physical and biological features that the Service itself determined are "essential to the conservation of the species." The area is unsuited for species' use and may never be usable or accessible for species management.[1] Until the Fifth Circuit decision, every court to consider the matter held the designation of *unoccupied* "critical habitat" required a more onerous standard than the designation of *occupied* "critical habitat." *See* Petition at 24-29. It is the Fifth Circuit's contrary decision that

[1] Although Respondent Intervenors contest this characterization of Unit 1, they rely entirely on the supposition that Unit 1 can and will be modified for species use and conservation. This is wishful thinking and unsupported by the evidence.

created a conflict among the lower courts, including the Ninth Circuit, that this Court must resolve.

V

The Fifth Circuit Decision on Agency Discretion Conflicts with *Bennett v. Spear*

Respondents argue the Service has complete discretion to not exclude an area from "critical habitat"[2] and that the Fifth Circuit decision does not conflict with *Bennett v. Spear*, 520 U.S. 154, 172 (1997). In *Bennett*, this Court determined that a decision to not exclude an area from "critical habitat" is subject to judicial review for an abuse of discretion under the Administrative Procedure Act. But Respondents assert that determination was unnecessary to the decision and not binding precedent. Respondents are incorrect.

Subsection 4(b)(2) of the ESA states the Secretary "shall" conduct an economic analysis of designating "critical habitat." It also states the Secretary "may" exclude certain areas from the "critical habitat" designation based on that economic analysis. These provisions appear in the same subsection and are interrelated. Although *Bennett* focused on the agency's failure to conduct the mandatory economic analysis when designating

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[2] In footnote 9, Respondents argue in passing that Petitioners may not address the question of agency discretion because "they fail to identify the issue in a question presented." However, Respondents offer no explanation as to why the issue is not "fairly included" in the question presented and therefore authorized under S. Ct. Rule 14.1(a). The argument has no merit.

"critical habitat," it was both natural and necessary for this Court to address the judicial reviewability of agency action (or inaction) that relates to that analysis, including a decision to not exclude. Therefore, this Court's conclusion in *Bennett,* that a decision to not exclude an area from "critical habitat" is reviewable for an abuse of discretion under the APA, is an integral part of this Court's holding and is binding on the lower courts.

Moreover, Respondents point to no text in the ESA that expressly gives the Service sole discretion over the exclusion process. Therefore, the ESA does not mandate that the courts defer to the discretion of the agency. Instead, Respondents rely on the self-serving inference that Congress provided no standard for the courts to apply in judging the Service's decision. But they ignore the obvious—any decision can be subject to a "rule of reason." That standard would apply under the APA as the *Bennett* Court held. *See* 520 U.S. 172.

This conflict necessitates review by this Court.

VI

The Fifth Circuit Decision Violates the Constitution

Lastly, Respondents make the remarkable and unsupported argument that the body of Petitioners' petition "does not argue that the Service's application of the ESA was, in fact, unconstitutional" (Fed. Opp. at 31), but serves the sole purpose of encouraging this

Court to avoid such issues in favor of a narrow reading of the act. Respondents are grasping at straws.

The petition provides eight pages of substantive argument that the Fifth Circuit decision is "in fact, unconstitutional" and conflicts with at least four Supreme Court decisions. S*ee* Petition at 32-39 ("This Court should grant the petition to resolve the constitutional conflicts created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources that have no connection with a protected species.").

The fact that the Petition alerts the Court to the possibility of avoiding the constitutional conflicts by cabining the scope of the ESA, does not negate Petitioners' express arguments that the Fifth Circuit decision "is, in fact, unconstitutional," by exceeding the commerce power and unduly impinging on state authority to control and regulate local land and water use.

In any event, Respondents argue that *Gonzales v. Raich*, 545 U.S. 1 (2005), is controlling, that there is no split among the circuits on the constitutional issues, and that the "critical habitat" designation only regulates federal agencies and not the Petitioners' conduct.

According to Respondents, *Raich* held "intrastate activity can be regulated if it is 'an essential part of a larger regulation of economic activity.'" Fed. Opp. at 32. However, *Raich* involved a specific type of regulation—the Controlled Substances Act—that encompassed the entire market in drugs.

This case is different. Unlike the Controlled Substances Act, the ESA is not a comprehensive market scheme. Nor is the regulation of non-habitat an essential part of a larger regulation of economic activity. Therefore, *Raich* does not apply to this case.

Also, the lack of a split among the circuits on this issue is not determinative for two reasons. First, the Fifth Circuit is the first circuit court to consider the constitutionality of a "critical habitat" designation that has no connection to a protected species. As Judge Owen observed, the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." Pet. App. at A-58-59. And second, there *is* a constitutional conflict with this Court's decisions that require the regulated activity to have a substantial commerce connection. *See* Petition at 37-39 (citing *Lopez*, *Morrison*, and *Sebelius*).

Respondents' final argument is new. For the first time in the course of this litigation, Respondents argue that the designation of "critical habitat" does not directly regulate Petitioners' conduct but relies on the government's power to regulate its own agencies under Section 7 of the ESA. Below, Respondents argued variously that the aggregate effect on species from lost habitat has a substantial effect on commerce and, later, that the designation of "critical habitat" did in fact regulate Petitioners' economic conduct that involved a federal permit or approval. Now

Respondents introduce a novel theory, not addressed by the parties or courts below. This vacillating approach to identifying the constitutional authority on which the agency relies to justify strict regulation of local land and water use is the very approach this Court said "raise[s] significant constitutional questions" in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).

This Court should grant review to address the significant constitutional questions raised by the Fifth Circuit decision.

CONCLUSION

The Fifth Circuit decision gives the Government unlimited power to designate "critical habitat" nationwide. This is a dangerous precedent this Court should review and correct.

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Respectfully submitted,

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