No. 14-31008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARKLE INTERESTS, L.L.C.; P&F LUMBER COMPANY 2000, L.L.C; PF MONROE PROPERTIES, L.L.C.,

Plaintiffs–Appellants

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, Director of United States Fish & Wildlife Service, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Department of Interior,

Defendants–Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants–Appellees

Consolidated with No. 14-31021

WEYERHAEUSER COMPANY,

Plaintiff–Appellant

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, Director of United States Fish & Wildlife Service, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Department of Interior,

Defendants–Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants–Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NOS. 2:13-CV-234, 2:13-CV-362, 2:13-CV-413, SECTION "F," HONORABLE MARTIN L.C. FELDMAN, PRESIDING

AMICUS BRIEF OF ALABAMA AND 14 OTHER STATES IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

As states, all *amici* are governmental entities with no reportable parent companies, subsidiaries, affiliates or similar entities under Fed. R. App. P. 26.1(a).

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IDENTITY OF *AMICI CURIAE*

The *amici* States file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. Alabama and the other *amici* States have a profound interest in maintaining the delicate balance Congress struck in the Endangered Species Act ("ESA") between ensuring the recovery of threatened species and protecting the private property rights of citizens and the sovereign interests of the States.

SUMMARY OF ARGUMENT

The panel's decision raises questions of exceptional importance and is inconsistent with Supreme Court precedent. The court should grant en banc review for two reasons. First, the panel's "unprecedented and sweeping" decision would allow the Government to declare land "essential" to the conservation of a species even if that land is not and may never be habitable by that species. *Markle Interests, L.L.C. v. United States Fish & Wildlife Serv.*, No. 14-31008, 2016 WL 3568093, at *18 (5th Cir. June 30, 2016) (Owen, J., dissenting). This is contrary to the plain language of the ESA. Second, the panel adopted wholesale the reasoning of the Court of Appeals for the Ninth Circuit and declared certain critical habitat findings immune from judicial review, threatening to undermine the important cost-benefit analysis Congress built into the Endangered Species Act.[1] If allowed

[1] Alabama, joined by 22 other states, filed an amicus brief in the United States Supreme Court in support of a still-pending petition for certiorari in the most

to stand, the panel's decision would strip the States and other interested parties of their right to challenge irrational or arbitrary habitat decisions under the familiar and oft-applied standards of the Administrative Procedures Act ("APA").

ARGUMENT

I. The panel erred in assessing habitat designations of unoccupied areas.

The panel's decision gives the United States Fish and Wildlife Service ("the Service") unfettered reign to declare areas that are unsuitable for endangered species nevertheless "essential" to their conservation. The ESA defines critical habitat as areas occupied by the species "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." 16 U.S.C. § 1532(5)(A)(i). Unoccupied areas trigger an additional requirement—the Secretary must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). As other courts have noted, the statute imposes "a more onerous procedure on the designation of unoccupied areas." *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with

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recent of these decisions, *Building Industry Association of the Bay Area v. U.S. Department of Commerce*, 792 F.3d 1027 (9th Cir. 2015).

unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

The panel's decision flips this reasoning on its head. Rather than reading "essential for the conservation of the species" as an additional requirement, the panel lowers the bar for designating unoccupied habitat. If the Secretary finds occupied areas are insufficient for conservation, he may designate any unoccupied area as critical habitat, regardless of whether the area is or ever will be habitable by the species. Under the panel's reasoning, although the Secretary must show that areas *where the species is present* have physical and biological features essential to conservation, no such showing is required for unoccupied lands.

Thus, the panel's decision strips the word "essential" of all meaning, declaring habit essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator. As Judge Owen noted in her dissent, "The Government's, and the majority opinion's, interpretation of 'essential' means that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." *Markle Interests, L.L.C.*, No. 14-31008, 2016 WL 3568093, at *20 (Owen, J., dissenting).

II. The panel erred in finding habitat exclusion decisions nonreviewable.

The panel also erred in declaring certain critical habitat decisions immune from judicial challenge. Congress, recognizing the significant economic and environmental impacts critical habitat designations entail, amended the ESA to include a mandatory cost-benefit analysis of critical habitat decisions:

> The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he 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).

The panel found these decisions nonreviewable because the APA forbids judicial review of choices "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The panel explained, "[Section 1533(b)(2)] establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation." *Markle Interests, L.L.C.*, No. 14-31008, 2016 WL 3568093, at *13.

But the Supreme Court rejected the argument that § 1533(b)(2) decisions are immune from review in *Bennett v. Spear*. 520 U.S. 154 (1997). *Bennett* involved the ESA's citizen-suit provision. Like the APA, the ESA precludes challenges to

decisions that are "discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). In *Bennett*, the Government sought to dismiss the underlying action on the basis that the duties of § 1533(b)(2) are discretionary and thus nonreviewable. 520 U.S. at 172. The Court rejected that argument: "[T]he terms of § 1533(b)(2) are plainly those of obligation rather than discretion…" *Id.*

The Court found Section 1533(b)(2) decisions are reviewable, notwithstanding the discretion granted by the "may" clause. The Court explained, "[T]he fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). On this point the Court was emphatic: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.* (citing *SEC v. Chenery Corp*., 318 U.S. 80, 94-95 (1943)); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) ("When a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination. However, such language does not mean the matter is *committed*

exclusively to agency discretion."). Thus the Court concluded that a "§ 1533 claim is reviewable." *Bennett*, 520 U.S. at 172.

The lower court did not examine the reviewability question in light of *Bennett*, mentioning the case only once in passing. The panel's failure to conduct any kind of searching inquiry into the application of *Bennett* to this case underscores the need for en banc review. The decision to designate critical habitat and the decision to exclude certain areas from that designation have far-reaching implications. In both instances, the Secretary is exercising the coercive power of the government over private property. When the Secretary abuses her discretion, the courts must have the power to correct that overreach.

In refusing to even consider whether the Secretary overreached, the panel relied on the Supreme Court's decision in *Heckler v. Chaney*, the leading case on nonreviewability. 470 U.S. 821 (1985). In finding nonreviewable an agency's decision not to employ its prosecutorial powers, the *Heckler* Court noted that an agency "generally does not exercise its coercive power . . . and thus does not infringe upon areas that courts often are called upon to protect" when it refuses to act. 470 U.S. at 832. But when the Secretary refuses to exclude areas from a critical habitat designation, she is not refusing to act in the sense used by the *Heckler* Court. Rather, she is exercising her coercive power to the fullest. When she does so, her action touches upon the most basic property rights of those within

the critical habitat designation. Although the ESA is "a noble effort," it is one that has "the ability to ruin individuals' lives . . . [M]ost Americans do not realize that hundreds of thousands of rural citizens face the potential loss of their livelihoods stemming from FWS designations of [critical habitat] under the ESA." Matthew Groban, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give A Hoot About the Public Interest It "Claims" to Protect?*, 22 Vill. Envtl. L.J. 259, 279 (2011). It also has costs for the States, both in reduced tax revenue and jobs lost. *See* Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, Wash. Post, May 11, 2014.[2]

The Secretary cannot ignore these costs or impose them without a commensurate benefit. As the Supreme Court has found, it is inherently irrational "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2701 (2015). The decision of the panel would allow the Secretary to do just that, with no recourse to the courts.

CONCLUSION

The court should grant en banc review.

[2] https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains seven pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The foregoing complies with Fed. R. App. P. 32(a)(5)'s typeface requirements and Fed. R. App. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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I hereby certify that, in this brief was filed using the Fifth Circuit CM/ECF document filing system: (1) the privacy redactions required by Fifth Circuit Rule 25.2.13 have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of AVG Internet Security Business Edition and is free of viruses.

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I hereby certify that on August 5, 2016, an electronic copy of the foregoing Brief of Alabama, and 14 Other States in Support of Rehearing En Banc was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by either by the appellate CM/ECF system or by U.S. Mail to the following:

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