No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

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

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, THE NATIONAL ALLIANCE OF FOREST OWNERS, AND THE NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*

The American Farm Bureau Federation (Farm Bureau), the National Alliance of Forest Owners (NAFO), and the National Mining Association (NMA) respectfully submit this brief as *amici curiae* in support of the Petitioner.[1]

The *amici curiae* have a substantial interest in this case because the designation of private property as critical habitat under the Endangered Species Act (ESA) is a remarkably intrusive action that imposes significant burdens on landowners and restricts their ability to fully utilize their property. The U.S. Court of Appeals for the Fifth Circuit endorsed an expansive interpretation of critical habitat by upholding the protection of an area that is not only unoccupied but also unsuitable and uninhabitable by the species. "[T]he ramifications of this decision for national land use regulation . . . cannot be underestimated." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 637 (5th Cir. 2017) (Jones, J., dissenting).

The Farm Bureau is an independent, non-governmental, voluntary general farm organization with nearly 6 million member families in all 50 states and Puerto Rico. Established in 1919, the Farm Bureau's primary function is to advance and promote

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intent to file, and have provided either blanket or individual consent to the filing of this brief.

the interests and betterment of farming and ranching; the farming, ranching, and rural community; and the individual families engaged in farming and ranching. This effort involves protecting, promoting and representing the business, economic, social and educational interests of American farmers and ranchers.

NAFO is a trade association that represents owners and managers of over 80 million acres of private forests in 47 states. NAFO was incorporated in March 2008, and has been working aggressively since then to sustain the ecological, economic, and social values of forests, and to assure an abundance of healthy and productive forest resources for present and future generations.

NMA is the national trade association of the mining industry. NMA has more than 300 members, including those who produce most of the nation's coal, metals, industrial and agricultural minerals. The mining industry has a broad impact on the national economy, generating nearly 1.9 million jobs and contributing $225 billion to the U.S. GDP and $45 billion in federal, state, and local taxes each year. A core mission of NMA is to promote practices that foster the environmentally sound development and use of mineral resources.

The *amici curiae* have members that are engaged in timber, agricultural, and mining operations on privately owned property. They will suffer economic injury and deprivation of the full use and enjoyment of their property due to the consequential restrictions on land use activities arising from a designation of their land as critical habitat. These restrictions and

negative effects are even more alarming when, as here, the land is unoccupied by the relevant species and lacks the features making it viable habitat.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress amended the ESA in 1978 to add a narrow definition of critical habitat to restrain the prevailing practice of designating expansive areas of land with no regard to what was actually necessary for species conservation. In doing so, Congress struck a balance between the need to protect habitat for threatened and endangered species and the need to ensure that the exercise of regulatory powers affecting the economic and productive use of land is wielded with focused circumspection.

The application of the ESA is triggered when the Secretary determines that a species is either threatened or endangered. 16 U.S.C. § 1533(a)(1). Concurrent with a listing decision, to the maximum extent prudent and determinable, the Secretary shall "designate any habitat of such species which is then considered to be critical habitat." *Id*. § 1533(a)(3)(A)(i) (emphasis added). The Secretary must base any designation upon "the best scientific data available . . . after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." *Id*. § 1533(b)(2).

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[2] The *amici curiae* also support the Petition for a Writ of Certiorari in *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Service*, No. 17-74 (July 12, 2017).

Congress did not envision the designation of critical habitat "as far as the eyes can see and the mind can conceive." 124 Cong. Rec. 38,131 (1978). Rather, through the statutory definition of "critical habitat," Congress established clear standards and statutory boundaries. For occupied habitat, the Secretary may designate "specific areas within the geographical area occupied by the species, at the time it is listed . . . 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). For unoccupied habitat, Congress imposed a heightened standard—limiting designations to "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id*. § 1532(5)(A)(ii).

In the decision below, the closely divided Fifth Circuit panel upheld the designation of more than 1,500 acres of private forest land (Unit 1) in Louisiana as unoccupied critical habitat for the dusky gopher frog. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 459 (5th Cir. 2016). The U.S. Fish and Wildlife Service (FWS) conceded that Unit 1 only contains one of the three physical or biological features that comprise habitat for the species (ephemeral ponds) and that, in its present state, Unit 1 is "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. 35,118, 35,129 (June 12, 2012). Furthermore, Unit 1 is located across state lines, about 50 miles from existing populations in Mississippi, and natural dispersal of the frogs to the area is not possible. *See id*. at 35,130.

Even if the frogs were introduced into Unit 1, they would not survive.

The Fifth Circuit wrongly held that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations." *Markle*, 827 F.3d at 468. The plain language of ESA Section 4 explicitly limits critical habitat to a subset of "any habitat of such species." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). The Fifth Circuit's decision condones the designation of admittedly unsuitable and uninhabitable land based on the mere presence of one physical feature that, alone, cannot support the dusky gopher frog. This decision sets a remarkably low bar for the designation of critical habitat—no requirement for existing habitat, no requirement for suitability, and no reasonable expectation that the area will be used for the conservation of the species. The Fifth Circuit destroys the statutory distinction between occupied and unoccupied critical habitat and contravenes Congressional intent by granting the Secretary "virtually limitless" power to designate critical habitat. *Markle*, 848 F.3d at 651 (Jones, J., dissenting).

If left unrestrained by this Court, the Fifth Circuit's decision has nationwide implications. A private property owner is barred from obtaining any discretionary federal permits, authorizations, funding, or other agency actions without first being subject to a review to ensure that there will be no destruction or adverse modification of critical habitat. This "consultation" requirement imposes a federal management overlay upon private lands with significant regulatory and economic ramifications under the ESA. *See* 16 U.S.C. § 1536(a)(2). Congress

recognized these implications in 1978 and crafted an "extremely narrow definition of critical habitat" that imposed statutory safeguards to restrain the overbroad assertion of federal regulatory power. 124 Cong. Rec. 38,665 (1978). Review by this Court is necessary to restore the designation of critical habitat to the bounds that Congress intended and explicitly delineated.

ARGUMENT

I. By Bestowing "Virtually Limitless" Power to Designate Critical Habitat, the Fifth Circuit's Decision Raises an Issue of Extraordinary Public Importance

This case presents the central legal issue in unmistakably clear statutory terms—does the use of "any habitat . . . which is then considered to be critical habitat" impose a statutory limitation on the designation of critical habitat? 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). The Fifth Circuit answered this question in the negative, holding that "[t]here is no habitability requirement in the text of the ESA." *Markle*, 827 F.3d at 468. Under this interpretation, the FWS would have unfettered discretion to designate wide swaths of unoccupied lands or waters as "critical habitat" on the mere hope that somehow, some day, the area will transform into actual habitat for the species. There are more than 1,650 species currently listed as threatened or endangered within the United States, with many having actual or historic ranges that encompass multiple states (and federal circuit court boundaries). The nationwide ramifications of such an expansive interpretation warrant this Court's acceptance of the petitions for writ of certiorari to resolve whether the

Fifth Circuit's decision can be reconciled with Congress's clear statutory directive.

A. Critical Habitat Designations Impose Significant Economic and Regulatory Impacts on Landowners Nationwide

The listing of a species as threatened or endangered triggers a panoply of additional protections under the ESA. First is the obligation of the Secretary to designate critical habitat. 16 U.S.C. § 1533(a)(3)(A). In turn, Section 7 of the ESA requires each federal agency to consult with the FWS or National Marine Fisheries Service (NMFS) (collectively, the Services) on any action authorized, funded, or carried out that may affect critical habitat.[3] 16 U.S.C. § 1536(a)(2). The scope of federal agency actions that trigger consultation continues to expand rapidly and includes, for example, the provision of flood insurance and federal loan guarantees. *See Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008); *Buffalo River Watershed All. v. Dep't of Agric.*, No. 4:13-cv-450-DPM, 2014 WL 6837005, at *5 (E.D. Ark. Dec. 2, 2014). During consultation, if FWS or NMFS concludes that the action will destroy or adversely modify critical habitat, then a reasonable and prudent alternative (RPA) to the proposed action is developed to avoid the destruction or adverse modification. 16 U.S.C. § 1536(b)(4)(A). A private party applicant or partner to the federal agency action must typically implement the RPA or be subject to denial of its application or project.

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[3] The relevant regulations define "action" broadly to include the "granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid" or "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (2016).

These Section 7 consultations impose "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10,678, 10,680 (2013). There are significant costs associated with conducting biological surveys and assessments—including multiple site visits, hiring of technical experts, and subsequent analyses—that can reach hundreds of thousands of dollars. Compliance costs for measures to avoid or minimize the effects of the proposed action on designated critical habitat areas can be crippling. The consultation process itself also has economic impacts because it "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." *Id*. at 10,681. Where the federal action authorizes some activity on private land, these costs are borne by the private landowner, not by the federal agency.

The impacts of a critical habitat designation cannot be overstated. Pursuant to its authority under ESA Section 7, during consultation on a requested federal permit, FWS could recommend that no development occur on Unit 1 which would result in $34 million of lost economic opportunity. 77 Fed. Reg. at 35,141. But Unit 1 is concededly "unsuitable as habitat," and is uninhabitable by the dusky gopher frog. *Id.* at 35,129 & 35,132-33. The only way that Unit 1 could benefit the species is if the landowners engaged in large-scale habitat transformation and the frog was forcibly

relocated there—something that the ESA cannot require.[4] 77 Fed. Reg. at 35,123 ("property owners [not required] to undertake affirmative actions to promote the recovery of the listed species").

The specter created by this broad interpretation of what qualifies as critical habitat is unremittingly chilling in its implications for ongoing commercial activities on private property. A critical habitat designation based on a single physical or biological feature in an area that is unoccupied by the species could freeze the operations of that property in perpetuity. The fact that such restrictions are only triggered by a discretionary federal agency action subject to Section 7 consultation adds no comfort. The nexus between federal agency actions and private commercial operations is exceedingly broad, and includes Clean Water Act permitting, land management plans by the Forest Service and Bureau of Land Management, financial assistance and other programs from the National Resources Conservation Service, Small Business Administration loan guarantees, Federal Emergency Management Agency flood insurance, and other Army Corps of Engineers permits.

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[4] Congress included other authorities in the ESA to allow the Secretary to address this circumstance. 16 U.S.C. § 1534(a)(2) (authorizing the Secretary "to acquire by purchase, donation, or otherwise, lands, waters, or interest therein" to conserve fish, wildlife, and plants); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995) ("The Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species.") (emphasis added).

These impacts are not unique to Unit 1, but are occurring nationwide. For example, the government estimated that the designation of all potential critical habitat for the green sturgeon along the West Coast would have an annual economic impact of up to $578 million and affect a variety of activities, including timber sales, irrigation diversions and water conveyance, and other land management actions. 74 Fed. Reg. 52,300, 52,300 & 52,341 (Oct. 9, 2009). The designation of critical habitat for the bull trout is expected to have incremental impacts of $56.3 to $80.9 million over 20 years, and would impact water diversions, timber harvests, livestock grazing, and other floodplain activities. 75 Fed. Reg. 63,898, 63,920 & 63,943-44 (Oct. 18, 2010). The designation of critical habitat for the northern spotted owl could have up to a $6.4 million annual impact due to a decline in timber harvest volumes on federal lands. 77 Fed. Reg. 71,876, 71,946 (Dec. 4, 2012).

The designation of critical habitat, and its attendant regulatory and economic impacts, will become more significant in the future. There are currently more than 1,650 species listed in the United States—with listings in all 50 States and the District of Columbia—but only 742 species have critical habitat.[5] FWS has pending listing decisions on more than a hundred species that require resolution and, if listed, the designation of critical habitat. For those species without critical habitat, the Services have stated that

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[5] FWS, *Listed Species Summary*, https://ecos.fws.gov/ecp0/reports/box-score-report (last visited Aug. 14, 2017); FWS, *Threatened & Endangered Species Active Critical Habitat Report*, https://ecos.fws.gov/ecp/report/table/critical-habitat.html (last visited Aug. 14, 2017).

future designations "will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing." 81 Fed. Reg. 7,414, 7,435 (Feb. 11, 2016).

As recognized by this Court, an over-expansive interpretation of the ESA "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting). The issue of whether critical habitat is limited to habitat of the species must be resolved because it directly affects how landowners will manage their private lands, dictates what regulatory requirements will apply, imposes substantial economic costs and, sometimes, results in the outright rejection or cessation of ongoing activities.

B. Review Is Needed to Provide Uniform Interpretation of the ESA's Critical Habitat Requirements

This case emphasizes the compelling need for a definitive interpretation of what constitutes critical habitat to ensure consistent implementation nationwide. In recent years, there has been an increasing trend of geographically expansive critical habitat designations. These designated areas span multiple States and will be subject to inconsistent standards depending upon which lower court has jurisdiction.

For example, FWS recently designated 38,954 square miles of critical habitat for the Canada lynx. 79 Fed. Reg. 54,782, 54,782 (Sept. 12, 2014). The designation includes areas of six states in various geographic regions of the United States (Idaho, Maine, Minnesota, Montana, Washington, and Wyoming).[6] Similarly, NMFS has proposed to designate 4,254 miles of critical habitat for the Atlantic sturgeon. *See* 81 Fed. Reg. 35,701, 35,701 (June 3, 2016); 81 Fed. Reg. 36,078, 36,078 (June 3, 2016). The designation would include portions of 28 rivers from Maine to Florida, along with unoccupied habitat upstream of currently impassable dams on several of these river systems.[7]

Until the Fifth Circuit's decision, courts have unanimously found that the designation of unoccupied habitat is a "more onerous procedure" and a "more demanding standard" than the designation of occupied habitat. *E.g.*, *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010); *Cape Hatteras Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event [than] designation of occupied lands."). The Fifth Circuit drastically diverged from these decisions by making it less difficult to designate unoccupied areas as critical habitat, *Markle*, 848 F.3d

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[6] The designation includes areas that fall within the jurisdiction of the U.S. Courts of Appeals for the First, Eighth, Ninth, and Tenth Circuits.

[7] The designation includes areas that fall within the jurisdiction of the U.S. Courts of Appeals for the First, Second, Third, Fourth, and Eleventh Circuits.

at 646 (Jones, J., dissenting), and created considerable uncertainty regarding the procedures and findings the Secretary must make regarding a designation of critical habitat.[8]

Given the Services' increasing reliance upon unoccupied areas to provide for the conservation of listed species, there is an urgent need for this Court to provide a uniform interpretation of the applicable statutory requirements governing the designation of critical habitat.

II. The Fifth Circuit Contravened Explicit Statutory Restrictions on the Designation of Unoccupied Critical Habitat

A. The ESA's Plain Language Limits Critical Habitat to Specific Areas Within Existing Habitat

The decision below gives the Secretary authority to designate almost any land or waterbody within the United States as critical habitat for an ESA-listed species, even in places where the species could not currently survive. As the Fifth Circuit erroneously held, "[t]here is no habitability requirement in the text of the ESA or the implementing regulations," and the imposition of a habitability requirement would impose an "extra-textual limit on the designation of unoccupied land." *Markle*, 827 F.3d at 468 (emphasis added). This

[8] In 2014, FWS proposed to designate critical habitat for the yellow-billed cuckoo. 79 Fed. Reg. 48,548 (Aug. 15, 2014). The proposed designation includes areas in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Texas, Utah, and Wyoming thereby directly implicating the split of authority between the Fifth and Ninth Circuits.

conclusion contravenes the ESA's explicit statutory requirements.

The plain language of Section 4 clearly delineates "critical habitat" as a subset of "habitat." The Secretary can only "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). Thus, "[w]hatever is 'critical habitat,' according to this operative provision, must first be 'any habitat of such species.'"[9] *Markle*, 848 F.3d at 640 (Jones, J., dissenting). This "clear habitability requirement" dictates the scope of the narrower designation of occupied and unoccupied areas as critical habitat for a species.

This Court has emphasized that "[t]he starting point in discerning congressional intent is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). And, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id*. As the operative text in the ESA, the use of "habitat" in Section 4 must be construed to have meaning. *E.g.*, *TRW Inc. v.*

[9] Other provisions indicate that Congress explicitly focused on conservation of species' habitat. *E.g.*, 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, ...") (emphasis added); 16 U.S.C. § 1536(a)(2) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to . . . result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . .") (emphasis added).

Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted).

Properly interpreted, critical habitat can only be designated in areas that are currently habitat for the species. While not defined in the ESA, "habitat" is commonly understood to be:

> the resources and conditions present in an area that produce occupancy—including survival and reproduction—by a given organism. Habitat is organism-specific; it relates the presence of a species, population, or individual (animal or plant) to an area's physical and biological characteristics. Habitat implies more than vegetation or vegetation structure; it is the sum of the specific resources that are needed by organisms. Wherever an organism is provided with resources that allow it to survive, that is habitat.

Linnea S. Hall, *et al.*, *The Habitat Concept and a Plea for Standard Terminology*, 25(1) Wildlife Soc'y Bulletin 173, 175 (1997); John M. Frywell, *et al.*, *Wildlife Ecology, Conservation, & Mgmt.* 427 (3d ed. 2014) ("The place where an animal or plant normally lives, often characterized by a dominant plant form or physical characteristic (e.g. soil habitat, forest habitat)."). For areas that are not currently occupied, this habitability requirement ensures that the application of the ESA does not create illogical results. As in the present case, it is axiomatic that an area where the dusky gopher

frog cannot survive (even if relocated there) cannot provide a conservation benefit to the species. By divorcing "habitat" from "critical," the Fifth Circuit's reasoning allows almost any area to be designated as critical habitat with no restrictions on scope or the attendant regulatory impositions on affected landowners. This is contrary to the explicit statutory safeguards that Congress provided.

B. The Legislative History Demonstrates That Congress Intended to Limit Critical Habitat to a Subset of the Species' Habitat

As enacted in 1973, the ESA did not contain a definition of critical habitat or specify how it was to be designated.[10] In 1978, the Services promulgated regulations that defined "critical habitat" as:

> any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. . . . Critical habitat may represent <u>any portion of the present</u>

[10] The only reference to critical habitat in the 1973 ESA was the prohibition on federal agencies taking action that "jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." Endangered Species Act of 1973, Pub. L. No. 93-205 § 7, 87 Stat. 884, 892. Congress intended that critical habitat would be acquired and protected pursuant to ESA Section 5. *Id*. § 5, 87 Stat. 889; H.R. Rep. No. 93-740, at 25 (1973) ("Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire <u>habitat which is critical to the survival of those species</u>.") (emphasis added).

> habitat of a listed species and may include additional areas for reasonable population expansion.

43 Fed. Reg. 870, 874-75 (Jan. 4, 1978) (emphasis added). Shortly thereafter, this Court enjoined the construction of the Tellico Dam to protect the snail darter and prevent the destruction of its critical habitat. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."). In response to these events, and the significant economic implications, Congress amended the ESA to explicitly define critical habitat and limit the scope of such designations.

Congress's efforts demonstrate a clear intention that critical habitat designations are limited to areas that are habitable by the species and that unoccupied habitat should only be designated sparingly based upon heightened criteria. For example, House Bill 14104 defined unoccupied critical habitat as:

> specific areas periodically inhabited by the species which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act (other than any marginal habitat the species may be inhabiting because of pioneering efforts or population stress), upon a determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.

124 Cong. Rec. 38,154 (1978) (emphasis added). The House Committee on Merchant Marine and Fisheries

noted that efforts to define critical habitat were driven by the concern that "the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat."[11] H.R. Rep. No. 95-1625, at 25 (1978) (emphasis added). Instead, the Committee directed the Secretary to "be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species." *Id*. at 18 (emphasis added).

The corresponding Senate Bill 2899 also included a definition of unoccupied critical habitat, which limited it to:

> specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this act, into which the species can be expected to expand naturally upon a determination by the Secretary at the time it is listed, that such areas are essential for the conservation of the species.

[11] During floor debate on the House Bill, Representative Bowen stated that "I believe the majority of the House is in agreement on that, that the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species." 124 Cong. Rec. 38,131 (1978) (emphasis added).

124 Cong. Rec. 21,355 (1978) (emphasis added).[12] For unoccupied areas, the Senate Committee on Environment and Public Works stated that "[t]here seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species[']continued survival."[13] S. Rep. No. 95-874, at 10 (1978) (emphasis added).

The final bill passed by Congress included "[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House." 124 Cong. Rec. 38,665. That definition remains in effect today. The legislative history clearly demonstrates that Congress was focused on habitat of species which could then be designated as either occupied or unoccupied critical habitat if the area satisfied the relevant definitional criteria. *Markle*, 848 F.3d at 642 n.4 (Jones, J., dissenting) ("uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat"). Contrary to the

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[12] Regarding his amendment, Senator McClure explained that "this is in response to the difficulty of how large an area should there be established and if that species then expands beyond that area must humans then be displaced in that area." *Id.*

[13] In explaining the role of critical habitat, Senator Garn stated that "[w]hen a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of the extent and nature of the habitat that is critical to the continued existence of that species. Unless he knows the location of the specific sites on which the endangered species depends, he may irrevocably commit Federal resources, or permit the commitment of private resources to the detriment of the species in question." 124 Cong. Rec. 21,575 (1978) (emphasis added).

Fifth Circuit's conclusion, this habitability requirement was understood by Congress at the outset and incorporated into the operative provisions of the ESA.

C. To Be Essential for the Conservation of the Species, an Unoccupied Area Cannot Be Based on the Presence of a Single, Non-Determinative Feature

The Fifth Circuit found that "only occupied habitat must contain all of the relevant [physical or biological features]," and upheld the designation of the unoccupied Unit 1 despite it only containing one of the three features that are essential to the conservation of the species. *Markle*, 827 F.3d at 468 & 472 n.20. The decision illogically establishes that the same conditions—a lack of all relevant physical or biological features—can justify the designation of an unoccupied area, but not an occupied area, as critical habitat. This is contrary to Congressional intent and erroneously lowers the bar for designating unoccupied critical habitat.

The ESA, its legislative history, and court precedent all unquestionably demonstrate that "an unoccupied critical habitat designation was intended to be <u>different</u> from and <u>more demanding</u> than an occupied critical habitat designation." *Markle*, 848 F.3d at 648 (Jones, J., dissenting). In defining critical habitat, Congress explicitly distinguished between occupied and unoccupied habitat. Occupied habitat requires the presence of "<u>features</u> [that are] essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Conversely, unoccupied habitat requires "specific <u>areas</u> . . . [that] are essential to the conservation of the species." *Id*. § 1532(5)(A)(ii)

(emphasis added). From a biological perspective, the use of "features" for occupied habitat and "areas" for unoccupied habitat is inherently logical. An already occupied area is, by definition, habitat for the species, so a focus on physical or biological features ensures that the critical components of that habitat are identified. Because unoccupied areas may or may not have habitat, the analysis must expand beyond mere features to consider the habitability of the area as a whole, otherwise the designation would provide no conservation benefit to the species.

The use of these disparate statutory terms—"features" versus "areas"—clearly connotes that different standards apply to the designation of occupied and unoccupied habitat. *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted). To give these terms independent meaning, the designation of unoccupied habitat must require more than the presence of a single feature.

Disregarding this statutory construct, the Fifth Circuit contradicted all relevant precedent by making "it easier to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." *Markle*, 848 F.3d at 646 (Jones, J., dissenting). In contrast, the Ninth Circuit stated:

> 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.

Ariz. Cattle Growers', 606 F.3d at 1163; *see also Home Builders*, 616 F.3d at 990 (designation of unoccupied habitat "is a more demanding standard than that of occupied critical habitat"). The district courts have also concluded that the designation of unoccupied habitat requires more than the standard for designating occupied areas. *E.g.*, *Cape Hatteras*, 344 F. Supp. 2d at 119 ("with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential"); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("ESA imposes a more onerous procedure on the designation of unoccupied areas"); *Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("more demanding [standard] than that of unoccupied habitat"). The Fifth Circuit's anomalous decision is contrary to established case law, and subverts Congressional intent and the ESA statutory criteria which impose a heightened standard for the designation of unoccupied critical habitat.[14]

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[14] In adopting the definition of "critical habitat" Congress sought to constrain the ability of the Secretary to designate unoccupied habitat. The Senate found that there is "little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species[']s continued survival." S. Rep. No. 95-874 at 10 (emphasis added). Likewise, the House directed the Secretary to be "exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species." H.R. Rep. No. 95-1625 at 18 (emphasis added).

Furthermore, the Fifth Circuit's decision extinguishes the statutory criterion that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). As informed by the definition of "essential," the designated habitat must be "of the utmost importance" or "indispensable" for the conservation of a species. *Merriam-Webster's Collegiate Dictionary* 427 (11th ed. 2005). Congress clearly understood that its use of "essential" would impose a stringent limitation on the areas that could be designated as critical habitat.[15] An area that only contains a single feature, which by itself would not sustain the species, cannot be "essential." The operative effect of this term is particularly apparent where, as here, the unoccupied area is not connected to occupied areas, would require extensive modifications and annual maintenance to become suitable habitat, and is not subject to current or anticipated restoration efforts or conservation measures. *Markle*, 827 F.3d at 481 (Owens, J., dissenting). By upholding the designation of Unit 1, the Fifth Circuit removed any principled limitation on the Secretary's ability to designate critical habitat and rendered this authority "virtually limitless."[16] *Markle*, 848 F.3d at 649-51

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[15] As Representative Duncan explained, "I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it." 124 Cong. Rec. 38,154 (emphasis added).

[16] In part, the Fifth Circuit justified its decision based upon a then-existing regulatory requirement that the Secretary could only designate an unoccupied area as critical habitat "when a designation limited to its present range would be inadequate to

(Jones, J., dissenting). This is contrary to what Congress intended and what the ESA explicitly commands.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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ensure the conservation of the species." *Markle*, 827 F.3d at 470 (citing 50 C.F.R. § 424.12(e)). The Services have subsequently deleted this requirement from their regulations. *See* 81 Fed. Reg. at 7,434.