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

BRIEF OF ALABAMA AND 19 ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

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INTEREST OF *AMICI CURIAE*[1]

The *amici* States are deeply concerned that the federal government's expansive reading of the Endangered Species Act strips the statute of the express limitations that Congress imposed on the United States Fish and Wildlife Service with regard to the designation of "critical habitat."

Two years ago, twenty States, including these *amici*, challenged two formal rules that expressly authorized the unlawful method of critical-habitat designation the Service followed in this case. *See Alabama ex rel. Strange v. Nat'l Marine Fisheries Serv.*, No. 16-cv-593 (S.D. Ala.). The States settled that lawsuit with the Service, which agreed to "reconsider" the challenged rules by this summer. Despite the Service's agreement with the States to reconsider the challenged rules, it continues in this case to defend the expansive and erroneous theory of habitat designation that motivated their adoption in the first place. Accordingly, the real-world impact of the States' settlement may depend on the outcome of this case.

The Service's expansive reading of the existing rules and statute imposes significant costs on the States. Critical habitat determinations have serious consequences for the economic and ecological interests of the States. Designations of critical habitat that go beyond what the statute allows cost jobs and tax revenue, while the States' efforts to comply with these designations often require the expenditure of taxpayer funds.

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[1] Although the States have the right to file this brief under this Court's Rules, the parties have also consented.

The States have a profound interest in maintaining the delicate balance Congress struck in the ESA between ensuring the recovery of listed species and protecting the private property rights of citizens and the sovereign interests of the States. The Service's defense of the court of appeals upsets that balance, and this Court should reverse.

SUMMARY OF ARGUMENT

The Court should reverse the court of appeals.

On the first question presented, the plain text of the Endangered Species Act requires that unoccupied critical habitat have the physical and biological features necessary for the endangered species to survive. Critical habitat is defined as an area with the essential features necessary for the endangered species. Unoccupied critical habitat is but a sub-type of critical habitat; to designate unoccupied critical habitat the Service must make an additional finding that occupied areas are not sufficient for the species to survive. As numerous courts have recognized, the Act thus makes it harder for the Service to designate unoccupied habitat than for it to designate occupied habitat. But the court of appeals' anomalous decision here makes it easier for the Service to designate land as critical habitat if the endangered species does not, and cannot, live there.

On the second question presented, the court of appeals' decision is inconsistent with this Court's precedent. Although the Service has discretion in concluding not to exclude an area from a critical-habitat designation, that discretion does not mean that the Service's decision is unreviewable. The Service has the mandatory obligation to consider the

economic impact of its decisions. The designation at issue here imposes millions of dollars in cost with no biological benefit to the endangered species, such that any meaningful consideration of economic impact would require the Service to exclude the area.

Reaching the right answer in this case is no mere academic exercise. The Endangered Species Act is an important law that provides real and meaningful environmental benefits. But critical habitat designations also constrict human activity and impose significant economic costs on States, local governments, and private landowners. The designation at issue here goes too far, and the court of appeals should be reversed.

ARGUMENT

I. The court of appeals' expansive definition of the word "essential" ignores the plain text of the Endangered Species Act.

The Fifth Circuit's decision gives the United States Fish and Wildlife Service unfettered reign to declare areas that are unsuitable for endangered species nevertheless "essential" to their conservation.

The plain text of the Endangered Species Act imposes more stringent requirements on the designation of unoccupied land as critical habitat than on the designation of occupied land. That act 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." *Ariz. 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 unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

The Fifth Circuit's decision flips this reasoning on its head. Rather than reading "essential for the conservation of the species" as an additional requirement, the Fifth Circuit lowered 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 Fifth Circuit's reasoning, although the Secretary must show that areas *where the species is present* have all physical and biological features essential to conservation, no such showing is required for unoccupied lands. *See* Weyerhaeuser Pet. App. 23a.

Thus, the panel's decision strips the word "essential" of all meaning, declaring habitat 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 from the panel's decision, this "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." Weyerhaeuser Pet. App. 54a.

II. The Fifth Circuit's holding that habitat exclusion decisions are nonreviewable contradicts *Bennett v. Spear*.

The Fifth Circuit 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 Endangered Species Act 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 Administrative Procedure Act 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." Weyerhaeuser Pet. App. 35a (citing *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015).

But the Court has rejected that argument. In *Bennett v. Spear*. 520 U.S. 154 (1997), the Court held that § 1533(b)(2) decisions are not immune from judicial review. *Bennett* involved the Endangered Species Act's citizen-suit provision. Like the Administrative Procedure Act, it 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 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. & Exch. Comm'n 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) (explaining that the use of "a permissive term such as 'may' rather than a mandatory term such as 'shall,' . . . suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination" but that "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 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 even to consider whether the Secretary overreached, the panel relied on the 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. *Id.* 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 Endangered Species Act 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 Court has found, it is inherently irrational "to impose

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

billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2701 (2015). The decision of the Fifth Circuit allows the Secretary to do just that, with no recourse to the courts.

III. Critical-habitat designations have significant financial effects on States and private parties.

Even when critical-habitat designations benefit a species, they also come with a cost. "Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan*, 135 S. Ct. at 2707. In the context of the Endangered Species Act, it is beyond dispute that "[c]onsiderable regulatory burdens and corresponding economic costs 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 A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10678, 10680 (2013). For example, the Court's first major decision examining that act, *Tennessee Valley Authority v. Hill*, resulted in the suspension of a dam-building project that was 80 percent complete and for which Congress had spent more than $100 million of taxpayer money. 437 U.S. 153, 172 (1978).

It was a harbinger of things to come. Critical habitat designations, by their very nature, limit

human activity. That limitation almost always results in a lost economic opportunity. The impact ripples through the economy; in an average industry, every billion dollars in regulatory costs results in a loss of over 8,000 jobs. Sam Batkins & Ben Gitis, *The Cumulative Impact of Regulatory Cost Burdens on Employment*, AM. ACTION FORUM (May 8, 2014).[3] As a consequence, States also suffer a subsequent loss of tax revenue, both as a result of reduced employment as well as foreclosed industrial and recreational use of areas designated critical habitat. For instance, proposals to conserve the sage grouse "could cost up to 31,000 jobs, up to $5.6 billion in annual economic activity and more than $262 million in lost state and local revenue every year . . . ." Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST (May 11, 2014).[4] And, in the case below, as Judge Jones observed in her dissent from denial of rehearing en banc, "One shocking fact is that the landowners could suffer up to $34 million in economic impact. Another shocking fact is that there is virtually nothing on the other side of the economic ledger." Weyerhaeuser Pet. App. 158a (citation omitted). Not to mention, it is uncontested that the dusky gopher frog could not survive in Unit 1—its "critical habitat." *See* Weyerhaeuser Pet. App. 23a. Thus, there are only—at most—speculative conservation benefits to this designation.

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[3] http://www.americanactionforum.org/research/the-cumulative-impact-of-regulatory-cost-burdens-on-employment/.

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

While the ESA may certainly require sacrifices in order to preserve endangered species, the decision to impose those costs on States and the public must conform with the requirements of the statute. That did not happen here.

CONCLUSION

The Court should reverse the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF OF ALABAMA AND 19 ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS contains 2,476 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

Executed on April 30, 2018.

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