PACIFIC LEGAL FOUNDATION

May 19, 2025

**VIA ELECTRONIC DELIVERY**

Federal eRulemaking Portal
http://www.regulations.gov
Docket No. FWS-HQ-ES-2025-0034
(RIN 1018-BI38; 0648-BN93)

The Honorable Doug Burgum
Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

The Honorable Howard Lutnick
Secretary
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Ms. Maureen Foster
Chief of Staff, Exercising the Delegated Authority of the Assistant Secretary for Fish and Wildlife and Parks
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Ms. Laura Grimm
Chief of Staff, Exercising the Delegated Authority of the Under Secretary of Commerce for Oceans and Atmosphere
U.S. Department of Commerce.
1401 Constitution Avenue NW
Washington, DC 20230

**Re: Rescinding the Definition of "Harm" Under the Endangered Species Act (Docket No. FWS-HQ-ES-2025-0034)**

Dear Secretary Burgum, Secretary Lutnick, Ms. Foster, and Ms. Grimm:

Pacific Legal Foundation (PLF) submits this comment in support of the proposed rule entitled "Rescinding the Definition of 'Harm' Under the Endangered Species Act."[1] The United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the "Services") propose to rescind their respective regulatory definitions of "harm" for purposes of the ESA's take prohibition, contained at 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102.

PLF strongly supports the Services' proposal to rescind their definitions of "harm." In broadly defining "harm" to include habitat modification that might incidentally or

[1] 90 Fed. Reg. 16,102 (Apr. 17, 2025) (the "Proposed Rule").

accidentally affect ESA-listed species,[2] the Services have expanded their authority to regulate "take" to reach all manner of ordinary land-use activities on private lands. Not only is this illegal, it has placed an intolerable burden on the regulated public—converting the Services into national land-use administrators. PLF urges the Services to swiftly proceed with the proposed rescission, for three reasons discussed further below.

*First*, the Services' definitions of "harm" are unlawful and based on an egregiously wrong interpretation of the ESA. An analysis of the plain text of the ESA demonstrates that when Congress enacted the ESA, it intended the term "take" to bear its traditional common law meaning—which contemplates an affirmative action performed directly and intentionally toward a particular animal. By defining "harm" so broadly as to include habitat modification incidentally affecting species, the Services have stretched their authority well beyond the ESA's limited grant of authority to regulate "take." Simply put, the Services are compelled by law to immediately rescind their unlawful definitions of "harm," and return to an approach to ESA regulation informed by "take" as traditionally understood.

*Second*, the Services' "harm" definitions have facilitated a burdensome and exploitative regulatory regime that gives private landowners no choice but to engage with the Services on the most ordinary of projects—effectively transforming the Services into national land-use administrators. Due to these intolerable burdens—and the plain illegality of the "harm" definitions"—there can be no legitimate reliance interests in their perpetuation.

*Third*, due to the plain illegality of the "harm" definitions, and the deep flaws in the Supreme Court's majority opinion in *Sweet Home*,[3] statutory *stare decisis* principles cannot require the Services to perpetuate their "harm" definitions.[4]

For any questions or follow-up, please contact Charles T. Yates at cyates@pacificlegal.org or (916) 419-7111.

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[2] *See* 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102.

[3] *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995).

[4] PLF also provides a recommendation: that to combat abuse of the ESA's citizen suit provision by environmental special interest groups, the Services consider initiating a separate proceeding to affirmatively define "harm" consistent with the traditional common law meaning of "take."

**Pacific Legal Foundation**

Pacific Legal Foundation is the nation's leading public interest organization advocating, in courts throughout the country, for the defense of private property rights and related constitutional freedoms. Protecting the environment is a legitimate policy goal but, like any other policy goal, it cannot override citizens' fundamental liberties. As a nonprofit law firm concerned about the rights of property owners burdened by overreaching environmental regulation, PLF has extensive experience with the ESA. PLF attorneys have been counsel of record in many cases about the interaction of the ESA, property rights, and the separation of powers.[5] They have also produced substantial scholarship on these subjects.[6] And PLF attorneys often provide their expertise to policymakers through congressional testimony[7] and rulemaking petitions.[8]

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[5] *See*, *e.g.*, *N.M. Farm & Livestock Bureau v. U.S. Dep't of Interior*, 952 F.3d 1216 (10th Cir. 2020) (representing ranchers in a successful challenge to the designation of critical habitat for the endangered jaguar); *In re Washington Cattlemen's Ass'n*, No. 22-70194, 2022 WL 4393033 (9th Cir. Sept. 21, 2022) (representing ranchers and successfully seeking a writ of mandamus reinstating 2019 ESA implementing regulations); *Kan. Natural. Res. Coal. v. U.S. Fish & Wildlife Serv.*, No. 7:23-cv-00159, 2025 WL 1367834 (W.D. Tex. Mar. 29, 2025) (representing a coalition of county governments, ranchers, and private landowners in a successful challenge to an illegal ESA section 4(d) rule for the Northern distinct population segment of the lesser prairie-chicken); *N.M. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, No. 24-5075 (D.C. Cir. docketed Apr. 5, 2024) (representing ranchers in a challenge to FWS denial of a petition to delist the southwestern willow flycatcher on taxonomic grounds); *Colosi v. Charlotte County*, No. 2:24-cv-01004-JES-KCD (M.D. Fla. amended complaint filed Apr. 4, 2025) (representing a private landowner in a challenge to a county-level habitat conservation plan developed pursuant to the ESA); *Skipper v. U.S. Fish & Wildlife Serv.*, No. 1:21-cv-00094-JB-B (S.D. Ala. filed Feb. 26, 2021) (representing family timber operations in a challenge to the designation of critical habitat for the black pinesnake).

[6] *See*, *e.g.*, Damien M. Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 Envtl. L. Rep. News & Analysis 10,352 (2017); Jonathan Wood, *Take it to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015); Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 Environs: Envtl. L. & Pol'y J. 105 (2014).

[7] *See*, *e.g.*, Hearing on the Modernization of the Endangered Species Act before the House Natural Resources Committee (Sept. 26, 2018); Hearing on ESA Consultation Impediments to Economic and Infrastructure Development before the House National Resources Committee, Subcommittee on Oversight and Investigations (Mar. 28, 2017).

[8] *See*, *e.g.*, *A petition to resolve the Endangered Species Act taxonomy debate* (Nov. 13, 2017), https://pacificlegal.org/a-petition-to-resolve-the-endangered-species-act-taxonomy-debate/; *Petitions to Repeal 50 C.F.R. § 17.31*, https://pacificlegal.org/case/national-federation-of-

## Background

### I. The Endangered Species Act

#### A. Listing of threatened and endangered Species

Section 4(a) of the ESA authorizes the Services—exercising authority delegated from the Secretaries of the Interior and Commerce[9]—to list species as "threatened" or "endangered."[10] A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range."[11] A species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[12] This determination is made with reference to several factors including those relating to habitat, overutilization and disease, or predation.[13]

#### B. The ESA's protections for threatened and endangered species

The listing of a species as threatened or endangered has significant real-world consequences. These consequences flow from the substantial protections—and significant restrictions on private conduct—attendant upon the listing of a species. These protections take four primary forms.

***First***, as an additional safeguard for endangered species, befitting their greater risk of extinction, section 9 of the ESA automatically forbids the "take" of such species.[14] Pursuant to ESA section 4(d), the Services may also extend the "take" prohibition to particular threatened species, but only if "necessary and advisable to provide for the conservation" of that species.[15] "Take" is defined in the ESA as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such

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independent-businesses-v-fish-and-wildlife-service-1-1502-washington-cattlemens-association-v-fish-and-wildlife-service-1-1514/.

[9] FWS administers the ESA as to most terrestrial and freshwater species—on behalf of the Secretary of the Interior. NMFS administers the ESA as to most marine and anadromous species—on behalf of the Secretary of Commerce.

[10] *See* 16 U.S.C. § 1533(a).

[11] *Id*. § 1532(6).

[12] *Id*. § 1532(20).

[13] *See id*. § 1533(a).

[14] *See id*. § 1538(a).

[15] *See id*. § 1533(d).

conduct."[16] The ESA's take prohibition is backed by severe civil and even criminal penalties—including strict liability civil penalties.[17] And the ESA provides for citizen enforcement of its strict take prohibition.[18] Sometimes, a landowner may seek a permit for incidental take of a species—a so-called "Incidental Take Permit" (ITP). Yet this process—authorized under ESA section 10(a)[19]—is time-consuming, costly, and burdensome.[20] Issuance of such a permit is inevitably conditioned upon a landowner agreeing to significant project modifications and expensive mitigation.[21]

***Second***, once the Services list a species as threatened or endangered, Section 4 of the ESA requires the agency to designate critical habitat for that species "to the maximum extent prudent and determinable."[22] Critical habitat may be either "occupied" or "unoccupied" by the species.[23]

***Third***, section 5 of the ESA authorizes the Services, in cooperation with the States,[24] to acquire land to aid in preserving listed species and their habitats.[25]

***Fourth***, section 7 of the ESA directs federal agencies to consult the Services to ensure that any discretionary action they authorize, fund, or carry out—such as issuance of a federal permit or the approval of a project on federal lands—"is not likely to jeopardize the continued existence of any endangered species or threatened species or result in

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[16] *Id*. § 1532(19).

[17] *See id*. § 1540(a)-(b). *See also* 89 Fed. Reg. 7295, 7296 (Feb. 2, 2024) (inflation-adjusted penalties of $63,991 per offence for "knowing" violations of take prohibition).

[18] *See* 16 U.S.C. § 1540(g).

[19] 16 U.S.C. § 1539(a).

[20] By regulation, to obtain an ITP, the property owner must develop a so-called Habitat Conservation Plan that specifies: (1) the impact that will likely result from the taking; (2) steps the property owner will take to minimize and mitigate such impacts; (3) funding available to implement such steps; (4) alternative actions considered and reasons why they are not being utilized; and (5) other measures the agency may require as necessary or appropriate. *See* 50 C.F.R. §§ 17.22, 17.32.

[21] *Cf.* Robert Gordon, "*Whatever the Cost*" *of the Endangered Species Act, It's Huge*, Competitive Enterprise Institute OnPoint No. 247, Competitive Enter. Inst., at 9 (Aug. 21, 2018), https://cei.org/studies/whatever-the-cost-of-the-endangered-species-act-its-huge/.

[22] 16 U.S.C. § 1533(a)(3)(A).

[23] *Id*. § 1532(5)(A).

[24] *See id*. § 1535.

[25] *See id*. § 1534.

the destruction or adverse modification of habitat of such species."[26] The purpose of these consultations is to determine what conditions, mitigation activities, or alternatives may be imposed on the federal agency or the federal permit or funding applicant.[27]

## II. The Services' regulatory definitions of "harm"

As noted above, the ESA defines take as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[28] Early in the ESA's history, however, the Services substantially expanded the scope of conduct subject to the take prohibition, by broadly defining "harm" via regulation. In 1975, FWS promulgated a regulatory definition of "harm" that was subsequently amended in 1981.[29] This regulatory definition of "harm" expanded the take prohibition to include not only intentional actions to harm or capture species, but also common land-use activities that might incidentally injure species through modifying their habitats. FWS' definition of harm states in full:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.[30]

In promulgating this definition, FWS argued that its regulation encompasses mere *omissions* leading to the death or injury of species,[31] and noted that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," but also refers broadly to "injury to a population."[32] NMFS has promulgated a materially identical definition of "harm," likewise broadly prohibiting habitat modification.[33]

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[26] *Id*. § 1536(a)(2).

[27] *See id*. § 1536. *See also Bennett v. Spear*, 520 U.S. 154, 157-58 (1997).

[28] *See* 16 U.S.C. § 1532(19).

[29] *See* 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975); 46 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981).

[30] *See* 50 C.F.R. § 17.3.

[31] *See* 46 Fed. Reg. at 54,750 ("'[A]ct' is inclusive of either commissions or omissions which would be prohibited by section [1538(a)(1)(B)].").

[32] *Id*. at 54,748-49.

[33] *See* 50 C.F.R. § 222.102 ("Harm in the definition of 'take' in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification

Pursuant to these definitions of harm, the Services have aggressively exercised their authority under the ESA to regulate, punish, and prohibit all manner of ordinary land-use activities on private property that might incidentally affect species (or populations of species) by modifying their habitats.[34]

## III. The Supreme Court's divided decision in *Sweet Home*

In 1995, a divided Supreme Court upheld FWS' broad regulatory definition of "harm."[35] In doing so, the Supreme Court reversed a panel of the District of Columbia Circuit which, upon rehearing, had determined that FWS' "harm" definition was inconsistent with the plain text of the ESA.[36]

Justice Stevens, writing for the majority, determined that FWS' "harm" definition was not unreasonable and therefore should be upheld under the (now defunct[37]) *Chevron* doctrine.[38] In deferring to FWS' "harm" definition under *Chevron*, the majority relied on three primary sources of information. First, the majority cited a broad dictionary definition of the term "harm" and transposed that definition to the ESA's "context."[39]

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or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.").

[34] *See*, *e.g.*, *infra* 17-19 (discussing obstacles imposed by FWS to prevent PLF client Mike Colosi from building a single-family home adjacent to alleged habitat for the Florida scrub jay); 87 Fed. Reg. 72,674, 72,749 (Nov. 25, 2022) (prohibiting cattle grazing not conducted in accordance with a site-specific grazing plan, the conversion of native grassland to cropland, the application of herbicides, and many other ordinary agricultural activities in a 4(d) rule for the threatened Northern DPS of the lesser prairie-chicken); Mark Arax, *U.S. Dismisses Charges That Farmer Killed Rare Rats: Environment: Conservatives seeking to alter the Endangered Species Act praise the move. The case will be pursued only against the man's family corporation*, L.A. Times, Jan. 18, 1995, https://www.latimes.com/archives/la-xpm-1995-01-18-mn-21314-story.html#:~:text=FRESNO%20%E2%80%94%20The%20federal%20government%20has,the%20U.S.%20Endangered%20Species%20Act (discussing the federal government's criminal prosecution of bamboo farmer for allegedly modifying Tipton kangaroo rat habitat during routine preparation of farmlands for agricultural use).

[35] *See Sweet Home*, 515 U.S. 687.

[36] *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994).

[37] *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

[38] *See Sweet Home*, 515 U.S. at 703-04 ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation." (citing *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984))).

[39] *Id.* at 697 (citing *Harm*, Webster's Third New International Dictionary 1034 (1966)).

Second, the majority relied on the "the broad purpose of the ESA" to determine that the take prohibition reasonably can include habitat modification.[40] And third, the majority relied upon subsequent enactments and legislative history to infer congressional endorsement of FWS' definition.[41]

Justice O'Connor joined the majority. Even so, she wrote separately to emphasize that her joining the majority was founded upon two understandings. First, that the regulatory definition of harm "is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals."[42] And second, that the definition's application would be limited "by ordinary principles of proximate causation, which introduce notions of foreseeability."[43] As discussed further below,[44] the Services' conduct in implementing the ESA leaves much doubt as to whether either limitation discussed by Justice O'Connor has been applied in practice.

Justice Scalia, joined by Justices Thomas and Chief Justice Rehnquist, dissented. In his dissenting opinion, Justice Scalia explained at length why the ESA's text, structure, and history foreclose FWS' broad definition of "harm" as including habitat modification.[45]

[40] *Id*. at 698-99 (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978)).

[41] *See id*. at 700-01.

[42] *Id*. at 708-09 (O'Connor, J., concurring).

[43] *Id*.

[44] *See infra* 14-19.

[45] *See Sweet Home*, 515 U.S. at 714-36 (Scalia, J., dissenting).

## Analysis

### I. Rescission of the Services' regulatory definitions of "harm" is compelled by the plain text of the ESA[46]

#### A. The Services' regulatory definitions of "harm" are inconsistent with the term "take" as traditionally understood

It is well established that where Congress uses a term with a settled meaning at common law, it intends that settled meaning to be incorporated into the statute.[47] The term "take" as it is used in the ESA is a term of art[48] deeply rooted in the common and statutory law concerning wildlife. Traditionally understood, to "take" wildlife contemplates an affirmative action performed directly and intentionally toward a particular animal.[49] Indeed, numerous dictionaries and treatises define "taking" to mean reducing an animal—by killing or capturing—to human control.[50] The Services' definitions of "harm"—which by including "habitat modification" expand the meaning

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[46] PLF submits that for all the reasons set forth in Justice Scalia's well-reasoned dissent in *Sweet Home*, 515 U.S. at 714-36 (Scalia, J., dissenting), the Services must immediately rescind their misguided regulatory definitions of "harm." Accordingly, the purpose of this subsection is to highlight the most pressing textual reasons for why the "harm" definitions are inconsistent with the unambiguous requirements of the ESA.

[47] *See Neder v. United States*, 527 U.S. 1, 21-22 (1999) ("It is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992))); *United States v. Shabani*, 513 U.S. 10, 13 (1995) ("[A]bsent contrary indications," courts presume that "Congress intends to adopt the common law definition of statutory terms."); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense[.]").

[48] *See Take*, Black's Law Dictionary (4th ed. 1968) ("The word 'take' has many shades of meaning, precise meaning which it is to bear in any case depending on the subject with respect to which it is used.").

[49] *See Sweet Home*, 515 U.S. at 718 (Scalia, J., dissenting).

[50] *See*, *e.g.*, *Take*, 11 Oxford English Dictionary (1933) ("To catch, capture (a wild beast, bird, fish, etc.)[.]"); *Take*, Webster's New International Dictionary of the English Language (2d ed. 1949) ("to catch or capture by trapping, snaring, etc., or as prey"); *Geer v. Connecticut*, 161 U.S. 519, 523 (1896) ("'[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them[.]'" (quoting the Digest of Justinian)); 2 W. Blackstone, Commentaries 411 (1766) ("Every man . . . has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae*[.]").

of "take" to encompass acts *and omissions* done indirectly and by accident to *populations* of animals—is impossible to square with this traditional understanding, which at the very least contemplates affirmative action directed towards a particular animal.

The mere fact that Congress defined "take" in the ESA—and in doing so included the term "harm"[51]—cannot overcome the presumption that Congress intended that the term "take" carry its traditional meaning. As Justice Scalia observed, to read the ESA in this manner is to commit the fallacy of assuming that once defined, a statutory term loses any significance.[52] And in any event, the term "harm" itself is often understood in a manner consistent with the traditional understanding of "take."[53] Given this fact, the mere inclusion of the term "harm" in a statutory definition, which otherwise comports entirely with the traditional understanding of "take," can hardly supply the strong "contrary indication[]"[54] necessary to overcome the presumption that Congress legislates against the backdrop of a term's settled meaning.

### B. Additional canons of construction counsel rejection of the Services' "harm" definitions

That in enacting the ESA, Congress intended the term "take" to bear its traditional meaning is further borne out by two additional canons of construction.

As noted above, the ESA defines "take" as to "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[55] Each of these verbs—with the *possible* exception of harm[56]—unquestionably describes an affirmative act directed toward a particular subject.[57] Thus under the *noscitur a sociis*

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[51] *See Sweet Home*, 515 U.S. at 697 (citing a broad dictionary definition of the term "harm" and transposing that definition to the ESA's "context" to conclude that the inclusion of habitat modification was reasonable); *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 490 (5th Cir. 2015) ("The inclusion of . . . 'harm' modified the common law definition.").

[52] *See Sweet Home*, 515 U.S. at 718 (Scalia, J., dissenting).

[53] *See* John B. Opdycke, *Mark My Words: A Guide to Modern Usage and Expression* 330 (1949) ("*[H]arm* has in it a little of the idea of specially focused hurt or injury, as if a personal injury has been anticipated and intended."); American Heritage Dictionary 662 (1985) ("*Injure* has the widest range . . . *Harm* and *hurt* refer principally to what causes physical or mental distress to living things").

[54] *Shabani*, 513 U.S. at 13.

[55] 16 U.S.C. § 1532(19).

[56] *But see* Opdycke, *supra* note 53, at 330; American Heritage Dictionary, *supra* note 53, at 662.

[57] *See Harass*, Merriam-Webster Dictionary (online ed.) ("to annoy persistently"); *Pursue*, Merriam-Webster Dictionary (online ed.) ("to follow in order to overtake, capture, kill, or

canon—which dictates that "a word is known by the company it keeps"[58]—the term "harm" must likewise be understood as contemplating affirmative action directed towards a particular animal rather than purely incidental conduct resulting from habitat modification. The application of *noscitur a sociis* is particularly applicable to the ESA's regulation of "take" given that "this canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."[59] As discussed further below, the Services' approach to regulating take under their "harm" definitions has resulted in broad federal regulation—backed by onerous civil and criminal penalties—of all manner of routine land-use activities on private land.[60]

Likewise, to construe "harm" as broadly as the Services have, would conflict with the presumption against surplusage, which dictates "that each word Congress uses is there for a reason."[61] To construe "harm" so broadly as to include "habitat modification," and thus expand the meaning of "take" to encompass all acts *and omissions* done indirectly and by accident to populations of animals, would render superfluous every term in the statutory definition of take. Such a broad definition of "harm" naturally encompasses every additional term contained within 16 U.S.C. § 1532(19).[62]

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defeat"); *Hunt*, Merriam-Webster Dictionary (online ed.) ("to pursue with intent to capture"); *Shoot*, Merriam-Webster Dictionary (online ed.) ("to strike with a missile especially from a bow or gun"); *Wound*, Merriam-Webster Dictionary (online ed.) ("to inflict a wound"); *Kill*, Merriam-Webster Dictionary (online ed.) ("to deprive of life : cause the death of"); *Trap*, Merriam-Webster Dictionary (online ed.) ("to place in a restricted position"); *Capture*, Merriam-Webster Dictionary (online ed.) ("to take and hold (someone or something) as a captive or prisoner"); *Collect*, Merriam-Webster Dictionary (online ed.) ("to bring together into one body or place"). *See also Sweet Home*, 515 U.S. at 719-20 (Scalia, J., dissenting) ("to 'harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect' are all affirmative acts . . . which are directed immediately and intentionally against a particular animal"); *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 12 (D.C. Cir. 1993) (Sentelle, J., dissenting) ("In the present statute, all the other terms among which 'harm' finds itself keeping company relate to an act which a specifically acting human does to a specific individual representative of a wildlife species.").

[58] *McDonnell v. United States*, 579 U.S. 550, 568-69 (2016) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

[59] *Id.* at 569 (quoting *Jarecki*, 367 U.S. at 307).

[60] *See infra* 14-19. *See also supra* note 34.

[61] *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017).

[62] *See Sweet Home*, 1 F.3d at 13 (Sentelle, J., dissenting) ("If 'harm' means any 'act which actually kills or injures wildlife,' including 'habitat modification or degradation,' I can see no reason

### C. The ESA's structure counsels rejection of the Services' "harm" definitions

The overall structure of the ESA further counsels that Congress intended "take" to bear its traditional meaning, and that the Service's broad definitions of "harm" as including mere habitat modification must be rejected.[63]

The ESA contains an additional provision that is explicitly concerned with the prevention of habitat modification affecting listed species. Pursuant to ESA section 7's consultation requirements:

> Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or *adverse modification of habitat* of such species which is determined by the Secretary . . . to be critical.[64]

The ESA further defines in detail what areas of land qualify as critical habitat for purposes of section 7's consultation requirements,[65] and sets forth an intricate regulatory process for designating such land.[66] Thus, the fact that section 7 of the ESA expressly references the prevention of adverse habitat modification, whereas the ESA's provisions concerning "take" do not,[67] further counsels that Congress did not intend for "take" to be defined so broadly as to encompass habitat modification.[68]

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why Congress also included in the definition of 'take' the terms 'harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, [and] collect.'" (quoting 16 U.S.C. § 1532(19))).

[63] *See King v. Burwell*, 576 U.S. 473, 486 (2015) (holding that to determine a statute's plain meaning a reviewing court must "read the words 'in their context and with a view to their place in the overall statutory scheme'" (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

[64] 16 U.S.C. § 1536(a)(2) (emphasis added).

[65] *See id.* § 1532(5).

[66] *See id.* § 1533(b)(2).

[67] *See id.* §§ 1532(19), 1538(a)(1).

[68] *See Corley v. United States*, 556 U.S. 303, 315 (2009) (presuming that Congress uses "distinct terms . . . deliberately"); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("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." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

### D. The ESA's purpose and legislative history cannot override its plain text

The ESA's plain text compels rescission of the Services' unlawfully overbroad "harm" definitions. In contrast with the cogent textual analysis contained within Justice Scalia's dissent, the *Sweet Home* majority relied on the *Chevron* doctrine to conclude that FWS' "harm" definition was merely reasonable.[69] Even setting aside the *Sweet Home* majority's reflexive deference under the now obsolete *Chevron* doctrine, its analysis as to the "harm" definition's reasonableness dubiously relied upon "the broad purpose of the ESA,"[70] and upon subsequent enactments and legislative history from which it inferred congressional endorsement of FWS' definition.[71] This mode of analysis follows a familiar (yet as discussed below, now anachronistic) pattern of judicial conduct with respect to the ESA. Rather than analyzing the ESA's plain text, courts in ESA cases have often relied upon broad statements of purpose and legislative history to divine congressional intent.[72]

However, because "only the words on the page constitute the law adopted by Congress and approved by the President,"[73] when interpreting federal statutes, courts look to "plain statutory language [as] the most instructive and reliable indicator of Congressional intent."[74] There is no reason that the ESA should be interpreted any differently than other federal statutes. Indeed, in recent years, the circuit courts have been moving away from special treatment of the ESA. The District of Columbia Circuit has now affirmatively rejected such special treatment.[75] And even the Ninth Circuit is forging a new path.[76] Simply put, the *Sweet Home* majority's heavy reliance on statutory

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[69] *See Sweet Home*, 515 U.S. at 703-04 (citing *Chevron*, 467 U.S. 837).

[70] *Id*. at 698-99.

[71] *See id*. at 700-01.

[72] As demonstrated by the majority's reasoning in *Sweet Home*, the provenance of this interpretive approach is the misguided "species above all else" language found in the Supreme Court's opinion in *Tennessee Valley Authority v. Hill*. *See id*. at 699 ("Both our holding and the language in our opinion stressed the importance of the statutory policy." (citing *Tenn. Valley Authority*, 437 U.S. 153)).

[73] *Bostock v. Clayton Cnty*., 590 U.S. 644, 654 (2020).

[74] *Martinez v. Mukasey*, 519 F.3d 532, 543 (5th Cir. 2008).

[75] *See Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv*., 70 F.4th 582, 595, 598 (D.C. Cir. 2023) (holding that "[t]he ESA [d]oes [n]ot [r]equire a [s]ubstantive [p]resumption in [f]avor of the [s]pecies" and admonishing NMFS' reliance upon legislative history to divine a broad interpretation of the ESA as "egregiously wrong").

[76] *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv*., 67 F.4th 1027, 1036, 1038 (9th Cir. 2023) (emphasizing that the ESA's terms, like those of any other statute, are to be interpreted

purpose and legislative history "is a relic from a bygone era of statutory construction."[77] The Services must chart a new course by rescinding their atextual "harm" definitions.

## II. Rescission of the Services' illegal definitions of "harm" will provide significant relief to the regulated public; there are no legitimate reliance interests in their retention

As noted, PLF strongly supports rescission of the Services' illegal "harm" definitions in favor of limiting the definition of "take" to its traditional meaning. But it is also worth highlighting the destructive consequences for property owners that the current expansive interpretation of "harm" has caused. It has facilitated a regulatory framework enabling exactions from property owners through so-called Habitat Conservation Plans (HCPs) and has contributed to a permitting regime that can only be described as a "racket."[78] These exactions often violate the Fifth Amendment's Takings Clause and fail to advance the ESA's goals. By repealing the current "harm" definitions based on Justice Scalia's textually faithful interpretation, the Services would take a step to restore constitutional safeguards for property owners and allow for important land use activities that benefit the country.

### A. Repealing the current "harm" definitions would help curtail the existing regulatory exaction regime

The current broad definition of "harm" has created a regulatory structure that systematically undermines fundamental principles of fairness, property rights, and constitutional limitations on governmental authority. This system operates not merely as an inconvenience to landowners but as a fundamental inversion of proper legal relationships between citizens and their government.

#### 1. The Services' "harm" definitions often facilitate the abuse of permitting requirements creating constitutional violations

Under the traditional common law framework, which is protected by the Constitution, property owners possess a presumptive right to use their property—subject only to limitations necessary to prevent concrete harms to others. The current ESA regulatory

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according to their "ordinary or natural meaning" and rejecting "[t]he 'extremely broad[ ]' construction that the FWS, the Center, and the dissent advance[d]").

[77] *Maine Lobstermen's*, 70 F.4th at 598 (quoting *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019)).

[78] *See* Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 Iowa L. Rev. 407, 416 (1995).

regime, however, effectively inverts this relationship.[79] When the Services define "harm" to include mere habitat modification, they assert a presumed preemptive public right over all private land that might contain ESA-listed species. This regulatory approach transforms the limited statutory prohibition against "taking" endangered species into a sweeping authority to control land-use decisions—traditionally regulated by state governments—nationwide. In this way, the current regime reallocates property rights by taking private landowners' common-law right to land use and transfers it to "federal environmental agency bureaucrats."[80]

This regime not only inverts the common-law understanding of property rights but also leads to unconstitutional actions. Under the Constitution's Fifth and Fourteenth Amendments, government cannot take private property for public use without just compensation. Equally prohibited under these amendments, neither the federal government nor state governments may condition the constitutional right to use private property unless the condition has an "essential nexus" to that use and is "rough[ly] proportional[ ]" to the use's impact.[81] This constitutional rule applies not just to conditions that require direct land dedications, but also monetary exactions.[82] Together, these requirements establish that governments may not leverage their permitting authority to exact property or money from landowners—unless the exaction actually relates to an impact caused by the proposed development and is proportionate to that impact.

Yet the Services often run afoul of these precedents through the HCP process. These plans are ostensibly authorized under ESA section 10(a),[83] which as discussed above, provides a pathway for private property owners to obtain an Incidental Take Permit—a permit that insulates property owners from liability for taking a species—if certain conditions are met.[84]

HCPs can vary dramatically in size and scope, ranging from small, single-landowner plans covering a few acres to large-scale, multi-species plans encompassing entire counties or regions. Implementation typically involves a combination of on-site

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[79] Jason Scott Johnston, *Environmental Permits: Public Property Rights in Private Lands and the Extraction and Redistribution of Private Wealth*, 96 Notre Dame L. Rev. 1559, 1559 (2021).

[80] *Id*. at 1572.

[81] *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

[82] *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013).

[83] 16 U.S.C. § 1539(a).

[84] *See supra* notes 19-20 and surrounding text.

conservation measures and off-site mitigation, which may include habitat preservation, restoration, enhancement, or the purchase of credits from conservation banks. The process for developing these plans and obtaining a permit, in many cases, is prohibitively time consuming and expensive.

The current regulatory definition of "harm" exacerbates the constitutional, economic, and practical problems associated with HCPs by dramatically increasing both the scope of activities requiring incidental take permits and the leverage agencies have in negotiating the terms of those permits. Indeed, by defining "harm" to include habitat modification, the Services have exponentially expanded the range of ordinary land uses that potentially trigger section 9 liability. Under this interpretation, virtually any modification of land that might be considered habitat for a listed species—regardless of whether any protected animals are present or would be directly affected by the actual use of the land—can trigger the need for an ITP and HCP and potentially subject property owners to increased civil and criminal penalties if not obtained.[85] This sweeping definition thus forces property owners to create HCPs for routine activities with minimal or speculative impacts on protected species, increasing the number of required permits and the associated costs.

Perhaps most problematic, the current definition of "harm" gives the Services broad leverage in HCP negotiations because of the draconian consequences for violating the statute. Because habitat modification alone can trigger criminal liability with civil penalties up to $63,991 per violation,[86] property owners face overwhelming pressure to accept whatever mitigation requirements agencies demand, regardless of their proportionality to actual species impacts.[87] This fundamentally distorts the negotiation process, leading to mitigation requirements that "go too far" and extract private property without corresponding conservation benefits.[88]

The vague standard of "significant habitat modification" similarly provides agencies with broad discretion to determine what constitutes a "take," creating significant uncertainty for landowners who must either accept potentially excessive mitigation demands or risk criminal prosecution and steep fines if they proceed without a permit. This regulatory dynamic explains why many HCPs can coerce property owners to

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[85] *Sweet Home*, 515 U.S. at 714-15 (Scalia, J., dissenting) (noting that the regulatory definition "impermissibly extends the statute beyond harm caused by direct application of force against protected species").

[86] *See supra* note 17.

[87] *See* Johnston, *supra* note 79, at 1574-76.

[88] *Id*. at 1576.

dedicate much of their land to conservation or pay exorbitant mitigation fees—not because such measures are necessary to protect species, but because the threat of criminal and civil liability gives landowners little choice but to accept these demands. In effect, the current interpretation of "harm" transforms HCPs from a tool for balancing species protection with economic development into nothing but a mechanism for extracting private property through regulatory coercion.

At bottom, this dynamic means that the price landowners pay for permits often bears little relationship to either the environmental harm their activities might cause or the environmental benefits of mitigation measures. Instead, the price is primarily determined by the landowners' willingness to be exposed to penalties and litigation costs—a factor entirely unrelated to conservation considerations.

### 2. *Colosi v. Charlotte County*: A case study in HCPs and exactions

Under section 10 of the ESA, county governments can obtain ITPs based on HCPs they develop. These county-wide HCPs are ostensibly designed to streamline the permitting process for landowners while protecting listed species. Counties obtain these permits by identifying areas within their jurisdiction where protected species are present or potentially present, developing a conservation strategy that includes mitigation measures, creating a funding mechanism (typically through development fees), and obtaining approval from the Services.[89]

Once established, these county-level HCPs often become the *de facto* only option for property owners within the plan area. While participation is theoretically "voluntary," property owners face an unenviable dilemma: either pay the county's mitigation fees or attempt to obtain their own ITP directly from the Services—a process that is typically more expensive, time-consuming, and burdensome (likely by design).

As noted, the Supreme Court's decisions in *Nollan*, *Dolan*, and *Koontz* establish that government-imposed conditions on development must bear an "essential nexus" and "rough proportionality" to the impacts of the proposed development—even if those conditions are monetary. But many county-level HCPs fail this constitutional test by imposing standardized, tiered fees based on arbitrary factors like the overall size of a parcel—rather than conducting individualized assessments of actual impacts a project might have on a species.[90]

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[89] *See*, *e.g.*, County-wide Florida Scrub-Jay (*Aphelocoma coerulescens*) Habitat Conservation Plan, Charlotte County (Mar. 2013), *available at* https://www.charlottecountyfl.gov/file/409/charlotte-county-hcp-final.pdf.

[90] *Cf. id.*

*Colosi v. Charlotte County* provides a compelling illustration of how county-level HCPs can impose these unconstitutional conditions on property owners—aided by the potential for "harm" to a species caused by "habitat modification." In December 2014, Charlotte County, Florida, obtained a 30-year ITP based on an HCP it developed to address "impacts" to the Florida scrub-jay, a threatened species under the ESA.[91] The County's HCP established a tiered fee schedule based on the total acreage of parcels, regardless of the actual impact to scrub-jay habitat or even whether suitable habitat exists on a given property.

PLF client Michael Colosi purchased a vacant 5.07-acre parcel in Charlotte County, intending to build a single-family home.[92] The property fell within the Florida scrub-jay permit boundary, subjecting it to the conditions of the county's HCP. Mr. Colosi planned to develop only 1-2 acres of his property, but the County nevertheless demanded a $139,440 "Scrub-jay Fee"—the amount required to develop all 5.07 acres—before Mr. Colosi could obtain necessary permits to build his home.[93] This fee was based solely on the total size of his property (5.07 acres), not on any individualized assessment of actual impact to the species. Had his property been just 0.07 acres smaller, the applicable fee would have been dramatically less at $61,993.[94]

While theoretically Mr. Colosi could have pursued an individual ITP from FWS, this alternative proved illusory. In January 2024, the FWS explicitly told Mr. Colosi that it "can't issue an [individual ITP] that would undermine the County's ability to fulfill the terms of their existing [HCP]" and that it "can't issue a release letter for [his] property regardless of the results of any environmental survey."[95] A county official further confirmed the lack of alternatives, stating that "[FWS] has taken the stance they will not review parcels in our county since they issued us a county wide take permit. Your only other option would be not to buy anything in a scrub jay area because there is no other alternative besides our plan at this time."[96] Even if Mr. Colosi could have pursued an individual ITP, FWS officials indicated the process would be more expensive and burdensome than the county's already costly fee, requiring: development of his own HCP, establishment of a conservation easement in perpetuity, payment of habitat management fees, and mitigation at a 2:1 ratio costing approximately $180,000-

[91] First Amended Verified Complaint for Declaratory and Injunctive Relief, *Colosi v. Charlotte County*, No. 2:24-cv-01004-JES-KCD (M.D. Fla. Apr. 4, 2025), ECF No. 38, ¶¶ 6, 23.

[92] *Id.* ¶¶ 5, 40, 42.

[93] *Id.* ¶ 46.

[94] *Id.* ¶ 47.

[95] *Id.* ¶ 37 (citation omitted).

[96] *Id.* ¶ 38 (citation omitted).

$198,930.[97] After Mr. Colosi filed suit, FWS reversed its position in February 2025, stating it would process individual permit applications in Charlotte County.[98] Yet this reversal came only after litigation commenced and does not change the fundamental constitutional problem with the county's fee structure.

Mr. Colosi's case demonstrates how the Services' broad interpretation of "harm" in the ESA, combined with the proliferation of county-level HCPs, has created a regulatory environment that enables unconstitutional conditions on property rights. By requiring property owners to pay excessive, standardized fees without individualized assessments of actual impacts—based on the potential "harm" habitat modification could cause—these HCPs violate the "essential nexus" and "rough proportionality" tests established in *Nollan* and *Dolan*.

At bottom, rescinding the current "harm" regulation and adhering to the traditional definition of "take" would help reform this flawed system while maintaining the protections for endangered species that Congress prescribed. It would limit ESA enforcement to direct actions that injure identifiable animals and help restore the proper constitutional balance between governmental authority and private property rights.

### B. Repealing the current "harm" definitions would be consistent with current policy announcements

The Proposed Rule aligns with several executive policy directives aimed at reducing regulatory burdens and promoting economic growth. For example, repealing the "harm" regulation would implement the principles set forth in Executive Order 14294, which directs agencies to examine their criminal regulatory offenses and ensure that criminal enforcement is reserved for situations where defendants knowingly violate the law.[99] The current definition of "harm" creates the exact type of potentially over-broad criminal liability that Executive Order 14294 seeks to curtail. Similarly, Executive Order 14192 on reducing regulatory burdens and promoting economic liberty supports rescinding the overbroad definition.[100] By removing an unreasonable impediment to productive land use, the proposed rule advances both regulatory efficiency and economic liberty without sacrificing environmental protection objectives actually authorized by Congress. Finally, repealing the "harm" regulation would promote policies that could potentially promote "American Energy" by reducing burdensome

[97] *Id.* ¶¶ 34-36.

[98] *Id.* ¶ 56.

[99] *See* Exec. Order No. 14294, 90 Fed. Reg. 20,363, 20,363-64 (May 14, 2025).

[100] *See* Exec. Order No. 14192, 90 Fed. Reg. 9065 (Feb. 6, 2025).

permitting requirements, reducing regulatory red tape, and streamlining federal approvals of land-use.[101]

### C. Repealing the current "harm" rule would not upset reliance interests

Contrary to potential claims, there are no legitimate reliance interests that would be disrupted by adopting the proposed rule. The regulated public—private landowners and businesses—have no reliance interest in maintaining an overbroad definition that has imposed significant costs and uncertainty on them. Indeed, rescinding the definition would enhance regulatory certainty for property owners by providing clearer guidance about what activities are prohibited under the ESA.

As for environmental organizations, local government, and agencies that may claim reliance interests, those claims would be unfounded. No one can claim a legitimate reliance interest in an agency interpretation that exceeds statutory authority. As the Supreme Court has explained, it would be "unconscionable" to permit individual rights—here property rights—to be violated in perpetuity to preserve the status quo.[102] Indeed, as the proposed rule observes, "because it is the President's duty to see that the laws are faithfully executed, in all but the most unusual cases . . . reliance interests likely will be outweighed by the constitutional interest in repealing regulations that do not reflect the best reading of the statute."[103]

## III. Statutory *stare decisis* poses no threat to the proposed rescission

In *Loper Bright*, the Supreme Court ended its 40-year *Chevron* deference misadventure. At the same time, however, the Court extended a precedential shield to controversies decided at *Chevron* "step two," such as *Sweet Home*.[104] According to the Court in *Loper Bright*, "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology."[105]

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[101] *See* Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

[102] *Janus v. AFSCME*, 585 U.S. 878, 927 (2018). *See also Arizona v. Gant*, 556 U.S. 332, 349 (2009) ("[I]f it is clear that a practice is unlawful," as it is with the current "harm" regulation, then "individuals' interest in its discontinuance clearly outweighs any . . . entitlement to its persistence.").

[103] 90 Fed. Reg. at 16,104.

[104] *See Sweet Home*, 515 U.S. at 703-04 ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation." (citing *Chevron*, 467 U.S. 837)).

[105] *Loper Bright Enters.*, 603 U.S. at 412.

In this "superpowered form of *stare decisis*," the Court requires "a superspecial justification to warrant reversing" the statutory precedent.[106] The doctrine is grounded in legislative supremacy. The idea is that those who think the judiciary wrongly decided the issue "can take their objections across the street, and Congress can correct any mistake it sees."[107]

It remains unclear how statutory *stare decisis* will play out in the context of prior *Chevron* decisions.[108] Nevertheless, the doctrine does not threaten the lawfulness of the Proposed Rule. In *Sweet Home*, the majority decided that interpreting "harm" in the ESA "involves a complex policy choice," over which "Congress has entrusted the Secretary with broad discretion."[109] As the Services correctly observe, "*Sweet Home* held only that the existing regulation is a permissible reading of the ESA, not the only possible such reading."[110] It would defy reason if Congress impliedly delegated discretion to adopt an expansive definition of "harm," but not the authority to rescind it. Under any theory of *stare decisis*, no matter how strong, *Sweet Home* is consonant with the Services' proposal.

On statutory stare decisis grounds, therefore, *Sweet Home* presents no obstacle to the Services' proposed rescission. But that does not mean that the case was correctly decided—to the contrary, the *Sweet Home* majority missed the mark. As explained above, the majority's flawed purposive methodology, which leaned heavily on legislative history, cannot override the statute's plain text.[111] The ESA does *not* authorize an expansive definition of "harm" that includes incidental take caused by habitat modification. Under the ESA's plain terms, the "single, best" reading of "harm" reaches only affirmative acts performed directly and intentionally toward a particular animal.[112]

When applied to *Sweet Home*, statutory *stare decisis* preserves a discretion that turns out to be unlawful upon a proper analysis. Though perhaps counterintuitive, there is no conflict here. The sine qua non of *stare decisis*, after all, is for judges to maintain precedent they think is wrong, which is inherently counterintuitive. Under any

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[106] *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

[107] *See id.* at 456.

[108] *See, e.g.*, Jonathan R. Nash, *Chevron Stare Decisis in a Post-Loper Bright World*, Iowa L. Rev. Online, forthcoming at 12 (describing the framework as "ambiguous" and "unworkable").

[109] *See Sweet Home*, 515 U.S. at 708 (citing *Chevron*, 467 U.S. at 865-66).

[110] 90 Fed. Reg. at 16,103.

[111] *See supra* 9-13.

[112] *See id.*

conception of post-*Loper* statutory *stare decisis*, the Services maintain the ability to determine the "single, best" meaning of the ESA.

## IV. Environmental special interest citizen suits threaten the purposes of the proposed rescission, and the Services should consider a subsequent rulemaking to affirmatively define "harm"

Although statutory *stare decisis* presents no obstacle to the proposed rescission, the absence of an affirmative interpretation opens the door for environmental special interest groups to try to undermine the Services' purposes with this proposed rescission.

It is obvious that the agencies believe Justice Scalia's *Sweet Home* dissent sets forth the "single, best meaning" of the ESA. They are right—Justice Scalia's analysis is correct, as explained above.[113] Yet the Proposed Rule never comes out and unequivocally says as much.

According to the Proposed Rule, the Services do not intend to promulgate a replacement definition of "harm."[114] Instead, the Services state that "further elaborating on . . . 'harm'. . . is unnecessary in light of the comprehensive statutory definition" of "take" in the ESA.[115] The Services are correct. There is no question that in enacting the ESA, Congress intended the term "take" to bear its traditional common law meaning,[116] and it should not be necessary to promulgate an interpretative rule to clarify this obvious point. Nevertheless, declining to affirmatively define "harm" presents the risk of losing the interpretive initiative to environmental special interests seeking to undermine the Services' laudable goals.

The potential problem is that the federal government does not exercise exclusive prosecutorial control over the ESA. Under the statute's "citizen suit" provision, "any person" may sue in federal district court to enjoin anyone who is alleged to be in violation of the ESA.[117] In practice, these citizen suits are the primary mechanism by which the ESA is enforced against private entities.

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[113] *See supra* 9-13.

[114] 90 Fed. Reg. at 16,103.

[115] *Id*.

[116] *See supra* 9-13.

[117] *See* 16 U.S.C. § 1540(g).

Historically, the federal government has been reluctant to bring ESA enforcement cases alleging incidental harm wrought by habitat modification.[118] Environmental non-profits, on the other hand, frequently file such suits.[119] Thus, these groups dominate the field in this area of the law.

After *Loper Bright*, these special interests will continue to bring these suits. Invariably, lower courts will be presented with the question of how to interpret "harm" in this context. Undoubtedly, the environmental plaintiffs will argue that the "single, best" reading of the statute in *Sweet Home* is that "harm" includes incidental take via habitat modification. In the alternative, if a court instead read *Sweet Home* (incorrectly) to hold that the ESA impliedly delegates interpretive discretion to the Services, then presumably the court would tackle this legal question de novo. Unless the Department of Justice is willing to be involved in every such case, the Services' recission of the existing rule, by itself, might prove illusory to landowners targeted by ESA "citizen suits."

Given the looming threat posed by such special interest lawsuits. The Services should consider affirmatively defining "harm" consistent with the traditional common law meaning of "take," in a separate proceeding. Notice-and-comment would be unnecessary.[120] The Services would need only to provide notice of their reasoning. Such a notice would provide a significant deterrent to the environmental special interests who are intent on undermining the Services' worthy purpose in this proceeding.

**Conclusion**

PLF strongly supports the Services' proposal to rescind their definitions of "harm." In broadly defining "harm" to include habitat modification, the Services have expanded their authority to regulate "take" to reach all manner of ordinary land-use activities on private lands. Not only is this illegal, it has placed an intolerable burden on the

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[118] Instead, as discussed above, the Services' primary mechanism for enforcing their unlawfully broad "harm" definition has been via extorting landowners through the ITP process. *See supra* 14-19.

[119] *See*, *e.g.*, *Cascadia Wildlands v. Scott Timber Co.*, 105 F.4th 1144 (9th Cir. 2024) (affirming permanent injunction on habitat modification to prevent "harm"). *See also* Letter from Taylor McKinnon, Sw. Dir., Ctr. for Biological Diversity, to Sonqiang Chen, Registered Agent, Sino Vantage Grp., Inc. (Apr. 15, 2024), *available at* https://biologicaldiversity.org/species/birds/Mexican_spotted_owl/pdfs/Center-Notice-of-Intent-to-Sue-Gold-Paradise-Mine-et-al.pdf.

[120] *See* 5 U.S.C. § 553(b)(A) (exempting interpretative rules from the Administrative Procedure Act's notice and comment procedures).

regulated public—converting the Services into national land-use administrators. PLF urges the Services to swiftly proceed with the proposed rescission. PLF further encourages the Services to consider initiating a separate rulemaking to affirmatively define "harm" consistent with the traditional common law meaning of "take."

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