No. 17-71

IN THE
# Supreme Court of the United States

WEYERHAEUSER CO.,
*Petitioner,*
v.

U.S. FISH & WILDLIFE SERVICE, *et al.*,
*Respondents.*

**On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

*Amici curiae* address the second question only:

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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## INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared before this Court and other federal courts to urge adoption of environmental policies that strike an appropriate balance between environmental safety and economic well-being. *See, e.g. Murray Energy Corp. v. EPA*, No. 15-3751, *pet. dism'd for lack of jurisdiction* (6th Cir., Feb. 28, 2018) (defining "Waters of the United States" under Clean Water Act); *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427 (2014) (challenge to EPA's Clean Air Act "tailoring rule"). In particular, WLF has participated in virtually every major case that has come before this Court regarding the scope of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq*. *See, e.g., Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing.

study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions, including in *Nat'l Assoc. of Home Builders*. WLF and AEF also filed an *amicus* brief in support of the certiorari petition in this case.

*Amici* agree with Petitioner that the ESA prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation. *Amici* write separately to focus on the second question raised by Petitioner: whether Congress intended to preclude all judicial review of U.S. Fish and Wildlife Service (FWS) decisions not to exclude areas from an ESA "critical habitat" designation.

As Judge Edith Jones concluded in her dissent from denial of rehearing *en banc* (joined by five other Fifth Circuit judges), the panel's holding that FWS no-exclusion decisions are not subject to judicial review "play[s] havoc with administrative law." Pet. App. 156a. *Amici* are concerned that if that holding is allowed to stand, it will provide federal agencies with unilateral power to make a broad array of regulatory decisions, unchecked by any possibility of judicial review. *Amici* do not believe that the decision below is consistent with this Court's repeated and longstanding application of a "strong presumption" favoring judicial review of administrative action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

## STATEMENT OF THE CASE

Once a plant or animal species has been listed as "endangered," the Endangered Species Act generally requires FWS (or, in appropriate cases, the National Oceanic and Atmospheric Administration) to designate "critical habitat" for the species. 16 U.S.C. § 1533(a)(3)(A). Such designations are to be made "in accordance with" criteria set out in § 1533(b). *Ibid.*

Section 1533(b)(2) states that FWS "*shall* designate critical habitat, and make revisions thereto ... 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." (Emphasis added.) Section 1533(b)(2) includes a second sentence that provides additional details regarding how FWS is to exercise its designation authority:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such areas as critical habitat will result in the extinction of the species concerned.

In 2001, FWS listed the Mississippi gopher frog (a species of frog currently found only in Mississippi) as

an endangered species.[2] In 2011, FWS published a proposed rule that would have designated certain areas in Mississippi (but not elsewhere) as critical habitat for the species. Pet. App. 86a. In response to peer-review comments that the designated areas were insufficient for conservation of the species, FWS amended the proposed rule to include an area in Louisiana (referred to as "Unit 1") within the designation. *Id.* at 87a.

The amended proposed rule noted that FWS had prepared a draft economic analysis (DEA) of the economic impact of its proposed designation. *Designation of Critical Habitat for Mississippi Gopher Frog; Revised Proposed Rule*, 76 Fed. Reg. 59774, 59789 (Sept. 27, 2011). The DEA concluded that the designation of Unit 1 as critical habitat could decrease the value of that property by as much as $36.3 million. *Id.* at 59790. However, the amended proposed rule did not suggest that FWS had taken those costs into account in connection with its proposal to designate Unit 1. To the contrary, FWS stated that it selected sites for designation based on its determination that they were "considered essential for the conservation of the species." *Id.* at 59781. Having selected its proposed sites without considering economic impacts, FWS explained that before issuing a final rule it would consider all of the criteria set out in § 1533(b)(2) in determining whether to exclude any of the proposed sites:

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[2] FWS renamed the species the "dusky gopher frog" in 2012, soon after it first proposed the designation of areas outside of Mississippi as "critical habitat" for the species.

> In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in extinction of the species.

*Id.* at 59789. In other words, FWS reserved the right to adhere to its proposal to designate Unit 1 as critical habitat even if it ultimately determined that the benefits of non-designation outweighed the benefits of designation. FWS added, without further explanation, "We have not proposed to exclude any areas from critical habitat." *Ibid.*[3]

In its 2012 final rule, FWS continued to include Unit 1 (consisting of 1,544 acres of forested land not

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[3] The procedure employed by FWS in making its critical habitat designation—a two-step process involving a preliminary listing of potential site designations based solely on scientific criteria, followed by an evaluation based on all of the selection criteria (including economic impact) mandated by 16 U.S.C. § 1533(b)(2)—was and is consistent with FWS regulations. *See* 50 C.F.R. § 424.19. However, that two-step procedure is not provided for in § 1533(b)(2) itself. The statute simply requires FWS to take all of the listed criteria into account when considering sites for designation, without specifying the order in which the criteria are to be examined.

currently occupied by the dusky gopher frog) in the area designated as critical habitat. JA99-JA199. Petitioner Weyerhaeuser Co. owns a portion of the land included in Unit 1 and leases the remainder. It (along with other landowners) filed suit in district court in 2013, challenging the "critical habitat" designation. Among their claims: FWS's designation was arbitrary, capricious, and an abuse of discretion—in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A)—because FWS failed to exclude Unit 1 from the designation, even though the costs of inclusion vastly exceeded the benefits (if any) of inclusion.

The district court granted FWS's motion for summary judgment and dismissed the complaint. Pet. App. 78a-122a. The court conceded that the landowners' challenge to FWS's economic analysis was their "most compelling issue," and it labeled "most troubling" FWS's "conclusion that the economic impacts on Unit 1 are not disproportionate." *Id.* at 113a-114a. It ultimately concluded, however, that the ESA required it to defer to FWS's decision to include Unit 1 within the critical habitat designation. *Id.* at 118a.

A divided Fifth Circuit panel affirmed. Pet. App. 1a-77a. The panel majority devoted most of its opinion to explaining its conclusion that FWS acted reasonably in determining that: (1) designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog; and (2) Unit 1 is essential for the conservation of the frog. *Id.* at 15a-32a. It then declined to review Weyerhaeuser's claim that Unit 1 should have been excluded from the critical-habitat designation on the basis of the designation's economic

costs. *Id.* at 32a-36a. It concluded that FWS decisions not to exclude areas from such designation are "decisions 'committed to agency discretion by law'" and thus "are not reviewable in federal court." *Id.* at 33a (quoting 5 U.S.C. § 701(a)(2)). To support its conclusion that Congress intended to preclude judicial review of FWS decisions not to exclude areas on the basis of economic considerations, the panel cited the word "may" in the second sentence of 16 U.S.C. § 1533(b)(2). *Ibid.*[4]

Judge Owen dissented. Pet. App. 48a-77a. She concluded that the ESA precluded inclusion of Unit 1 in the critical-habitat designation because: (1) the area's "biological and physical characteristics will not support a dusky gopher frog population"; and (2) there is no evidence that it will become "essential" to the conservation of the species because "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." *Id.* at 48a. In light of her conclusion, Judge Owen did not address the majority's holding that FWS's no-exclusion determination was not subject to judicial review.

In February 2017, the Fifth Circuit voted 8-6 to deny Weyerhaeuser's petition for rehearing *en banc.* Pet. App. 124a. Judge Jones issued an opinion (joined by five other judges) dissenting from the denial. *Id.* at

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[4] The cited sentence states, in part, that FWS "*may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." § 1533(b)(2) (emphasis added).

124a-162a.

Among the reasons cited by Judge Jones for granting rehearing was her conclusion that "[t]he panel majority play havoc with administrative law by declaring the Service's decision not to exclude Unit 1 non-judicially reviewable." *Id.* at 156a. She faulted the panel for "never recognizing or applying" the "strong presumption favoring judicial review of administrative action," a presumption that "is not easily overcome." *Id.* at 160a. She argued that the panel decision directly conflicts with this Court's decision in *Bennett v. Spear*, that FWS *must* take economic considerations into account in making critical habitat decisions, and that "its ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion." *Id.* at 161a (citing *Bennett*, 520 U.S. at 172). She concluded, "The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action." *Id.* at 162a.

## SUMMARY OF ARGUMENT

If the Court decides the first Question Presented in Weyerhaeuser's favor—and holds that Unit 1 was not properly designated as critical habitat because it is neither habitat nor essential to species conservation—the Court could overturn the FWS's critical-habitat rule without ever reaching the second Question Presented. *Amici curiae* nonetheless urge the Court to address the second question regardless how it rules on the first question. Whether FWS decisions not to exclude land from a critical-habitat designation are subject to judicial review is an issue that arises

frequently in the lower courts, and they would benefit greatly from this Court's guidance.

The Fifth Circuit's determination that Congress intended to preclude all review of FWS no-exclusion decisions conflicts sharply with this Court's case law, which creates a strong presumption of judicial review of administrative action. The Fifth Circuit held that Congress barred courts from reviewing an FWS determination to proceed with a "critical habitat" designation in the face of landowner objections that designation would impose unwarranted economic costs. Pet. App. 32a-36a. Any such congressional edict would represent an extraordinary departure from how Congress is normally presumed to legislate. That is so because "[a]bsent [judicial] review, [an agency's] compliance with the law would rest in the [agency's] hands alone." *Mach Mining, LLC v. EEOC*, 135 S Ct. 1645, 1652 (2015). The Court explained:

> We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action.

*Id*. at 1652-53.

In holding that the ESA barred judicial review of FWS critical-habitat designations, the Fifth Circuit relied on Congress's use of the word "may" rather than "shall" in the second sentence of § 1533(b)(2). That single word cannot possibly bear the weight imposed on

it by FWS and the Fifth Circuit—particularly because the previous sentence in § 1533(b)(2) states that FWS, when making critical-habitat determinations, "shall" take into consideration "the economic impact ... of specifying any particular area as critical habitat." There could have been only one purpose in requiring consideration of economic impact: to prevent an area from being designated as critical habitat when the costs of doing so significantly outweigh the benefits.

FWS may be entitled to leeway in how it goes about weighing costs and benefits. But nothing in the ESA suggests that courts are precluded from reviewing FWS's ultimate determination under an abuse-of-discretion standard. Indeed, the Court in *Bennett* explicitly held that ESA critical-habitat designations were subject to judicial review based on claims that FWS failed to properly consider the "economic impact" of the designations. *Bennett*, 520 U.S. at 172. The decision below cannot be squared with *Bennett*, and the United States's brief opposing certiorari did not contend otherwise.

In concluding that FWS no-exclusion determinations are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the Fifth Circuit relied on this Court's decision in *Heckler v. Cheney*, 470 U.S. 821 (1985). Pet. App. 33a. That reliance was misplaced. *Heckler* held that, in general, the decision by a federal enforcement agency not to bring an enforcement action is not subject to judicial review, primarily because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." 470 U.S. at 831. The Fifth Circuit sought to analogize FWS's decision not to

exclude a particular area from critical habitat to an agency's decision not to bring an enforcement action. That analogy makes little sense. Any FWS decision not to exclude a particular area from critical habitat is, by definition, a decision to *include* the area in the designation—thereby subjecting the area to burdensome government regulation.

Nor can FWS realistically argue that a reviewing court would have no meaningful standard against which to judge FWS's exercise of discretion—many of those standards are set forth in the text of § 1533(b)(2). Indeed, the Service readily concedes that point when the shoe is on the other foot. When an environmental group objects to an FWS decision to *exclude* a particular area from a critical-habitat designation based on a determination that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," 15 U.S.C. § 1533(b)(2), the agency decision is subject to review under an abuse-of-discretion standard. If a reviewing court has meaningful standards against which to judge an FWS decision to exclude a particular area based on a cost-benefit analysis, then it likewise has meaningful standards against which to judge an FWS no-exclusion decision.

The Fifth Circuit's decision to bar judicial review is particularly troubling because the evidence overwhelmingly supports Petitioners' contention that FWS was unable to identify *any* benefits of Unit 1 critical-habitat designation that would offset the admittedly severe economic burdens imposed on

landowners by that designation.[5] FWS's April 6, 2012 "Economic Analysis" did not identify any benefits, other than that land-use restrictions imposed as a result of the designation might preserve open space and thereby "increase adjacent or nearby property values." JA98. That "benefit" does not, of course, do anything to assist the dusky gopher frog or any other endangered species for whose benefit Congress adopted the ESA.

Given § 1533(b)(2)'s mandate that FWS consider economic impact when designating critical habitat, at some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Yet the Fifth Circuit's ruling bars courts from ever reviewing FWS's cost-benefit determinations, no matter how irrational.

The Court should go beyond simply reversing the Fifth Circuit's ruling that FWS's no-exclusion determination is not subject to judicial review. It should also hold that FWS's designation of Unit 1 as

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[5] It is difficult to imagine how the designation could be of any benefit to the dusky gopher frog, given that the frog cannot be introduced into Unit 1 without the permission of landowners (permission they have said they will not grant) and given that (as FWS concedes) Unit 1 is not currently habitable for the dusky gopher frog and could not become habitable unless landowners agreed to substantial alterations of the property.

critical habitat was arbitrary, capricious, and an abuse of discretion, in violation of 5 U.S.C. § 706(2)(A). FWS issued its 2012 final rule while operating under the mistaken belief that § 1533(b)(2) merely requires it to *investigate* economic impact and that it possesses unreviewable discretion to designate an area as critical habitat no matter how much the costs of doing so exceed the benefits. *See, e.g., Revisions to the Regulations for Impact Analyses of Critical Habitat, Final Rule*, 78 Fed. Reg. 53058, 53063 (Aug. 28, 2013). Moreover, the final rule designating Unit 1 as critical habitat, after concluding that designation could cost landowners as much as $34 million, JA189, confined its analysis of costs-versus-benefits to a single sentence: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation." JA 190. That single sentence cannot be deemed reasoned administrative decision-making of the sort demanded by the APA. The Court should vacate the final rule as arbitrary, capricious, and an abuse of discretion. Alternatively, the Court should remand the case to the Fifth Circuit with directions for the appeals court to consider in the first instance whether FWS's designation of Unit 1 as critical habitat complied with the APA.

## ARGUMENT

### I. NOTHING IN THE ENDANGERED SPECIES ACT OVERCOMES THE "STRONG PRESUMPTION" THAT AGENCY ACTION IS SUBJECT TO JUDICIAL REVIEW

Subject to very limited exceptions, the APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Court has long recognized a "strong presumption" that the actions of federal agencies are subject to judicial review. *Bowen*, 476 U.S. at 670. As the Court recently explained:

> Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a "strong presumption" favoring judicial review of administrative action.

*Mach Mining*, 135 S. Ct. at 1651 (citations omitted).

"To overcome that presumption," the Court "require[s] 'clear and convincing indications' that Congress meant to foreclose review." *SAS Institute, Inc. v. Iancu*, ___ U.S. ___, 2018 WL 1914661 at *9 (April 24, 2018) (quoting *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016)). When attempting to discern such indications, the Court looks to "specific language, specific legislative history, and inferences of intent drawn from the statute as a whole." *Cuozzo*, 136 S. Ct. at 2140 (citations omitted).

None of those sources contain evidence (let alone

"clear and convincing" evidence) that Congress intended to foreclose review of an FWS decision to designate an area as critical habitat (or, as FWS prefers to phrase the issue, a decision not to exclude an area from a critical-habitat designation). In the absence of such evidence, the Fifth Circuit's decision to deny judicial review must be reversed.

### A. The Fifth Circuit Misapplied the "Committed to Agency Discretion" Exception to Judicial Review and Misinterpreted this Court's *Heckler v. Cheney* Decision

The Fifth Circuit did not contend that any provision of the ESA explicitly precludes judicial review of an agency decision to designate ESA critical habitat. Rather, the appeals court based its no-judicial-review determination on 5 U.S.C. § 701(a)(2), which bars review when "agency action is committed to agency discretion by law." Pet. App. 33a. It concluded that Congress precluded review in this instance because there are "no meaningful standards against which to judge the agency's exercise of discretion." *Ibid* (quoting *Heckler*, 470 U.S. at 830).

The appeals court premised its invocation of § 701(a)(2) on a misunderstanding of that statute. *Amici* note initially that the panel neither recognized nor applied the strong presumption favoring judicial review. Proper application of the presumption requires a court to interpret arguably ambiguous statutes as *not* providing agencies with unreviewable discretion. An agency claiming that its actions are unreviewable "bears a heavy burden in attempting to show that

Congress prohibited all judicial review." *Mach Mining*, 135 S. Ct. at 1651. Yet the decision below includes no indication that the panel imposed any evidentiary burden on FWS or even considered interpreting statutory ambiguities in favor of permitting judicial review.

Consideration of a government claim that judicial review is barred under § 701(a)(2) "requires careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988). In this case, the relevant statute is 16 U.S.C. § 1533(b)(2). That statute includes no indications of review-preclusive intent of the sort included in statutes relied on by the Court in the very few instances in which it has barred judicial review under § 701(a)(2).

For example, in *Webster* the Court held that § 701(a)(2) barred review of an APA claim that the CIA terminated an employee in violation of his statutory rights, citing a statute that empowered the CIA director in his discretion to "terminate the employment of any officer or employee of the Agency *whenever he shall deem such termination necessary or advisable* in the interests of the United States." 50 U.S.C. § 403(c) (1988) (emphasis added).[6] In *Cuozzo*, the Court barred

[6] The Court concluded that the language of § 403(c) "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." *Webster*, 486 U.S. at 600. The Court nonetheless held that the language was insufficiently clear to demonstrate that Congress intended to preclude judicial "consideration of colorable constitutional claims" arising out of the discharge. *Id.* at 603.

judicial review of a Patent Office decision to initiate agency review of a patent, invoking 35 U.S.C. § 314(d), which states that "[t]he determination of the Director [of the Patent Office] whether to initiate an *inter partes* review under this section shall be final and nonappealable." 136 S. Ct. at 2139-42.

Section 1533(b)(2) contains no comparable language. That provision cannot be characterized as "exud[ing] deference" to FWS decisions regarding critical-habitat designations. To the contrary, it affirmatively mandates that the agency "shall" base such decisions on specified factors, including "the economic impact" of any designation. Nothing in the statute supports a finding that FWS has overcome the "strong presumption" of reviewability and has met its "heavy burden" of demonstrating a congressional intent to "prohibit[ ] all judicial review" of decisions to designate an area as critical habitat. *Mach Mining*, 135 S. Ct. at 1651.

In holding that Congress intended to preclude judicial review of FWS's designation of Unit 1 as critical habitat for the dusky gopher frog, the Fifth Circuit relied heavily on this Court's *Heckler* decision. That reliance was wholly misplaced. Properly understood, *Heckler* directly conflicts with the decision below. *Heckler* was premised on the understanding that Congress rarely provides guidelines for reviewing the propriety of an agency's decision not to initiate an enforcement action. For that reason, *Heckler* stated, "the presumption is that judicial review is *not* available" for a decision not to initiate enforcement action. 470 U.S. at 831 (emphasis added). The Court explained:

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. ... The reasons for this general unsuitability [for judicial review of agency decisions to refuse enforcement] are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.

*Ibid.*[7]

The Fifth Circuit sought to analogize FWS's decision not to exclude a particular area from critical habitat to *Heckler*'s analysis of an agency's decision not to bring an enforcement action. Pet. App. 33a. That analogy makes little sense. Any FWS decision not to exclude a particular area from critical habitat is, by definition, a decision to *include* the area in the designation—thereby subjecting the area to burdensome government regulation. As *Heckler* explained, an agency's decision not to initiate an enforcement action does not pose the same threat to liberty or property interests that can arise from the opposite decision and thus presents a less compelling

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[7] *Heckler* held that § 701(a)(2) precluded judicial review of prison inmates' suit to compel the Food and Drug Administration to take enforcement action against several States' use of lethal-injection drugs that had not been approved by FDA as "safe and effective" for human use. *Id.* at 837-38.

case for judicial intervention:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts are often called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

*Heckler*, 470 U.S. at 832 (emphasis in original).

Section 1533(b)(2) sets forth a list a factors (including "economic impact") that FWS *must* take into account when designating critical habitat. Accordingly, the Fifth Circuit's conclusion that § 1533(b)(2) provides "no meaningful standard against which to judge [FWS's] exercise of discretion" in designating critical habitat, *ibid*, is implausible and conflicts sharply with *Heckler* and other decisions of this Court regarding the meaning of § 701(a)(2). *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (stating that § 701(a)(2) "is a very narrow exception" to APA review and "is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply") (citations omitted).

### B. The Second Sentence of Section 1533(b)(2) Is a Limitation on FWS Authority, Not a Grant of Unlimited Discretion

The Fifth Circuit reached its not-reviewable decision by improperly focusing almost exclusively on the second sentence of § 1533(b)(2) to the exclusion of the first sentence. The first sentence includes a laundry list of factors (including "economic impact") that FWS "shall" "tak[e] into consideration" when determining what areas to designate as critical habitat. The second sentence states:

> 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 extinction of the species concerned.

Relying on the second sentence, the Fifth Circuit held (in agreement with FWS) that "once [FWS] has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court." Pet. App. 33a. That holding is a wholly implausible interpretation of § 1533(b)(2) because it essentially ignores the mandatory language of the provision's first sentence.

The first sentence of § 1533(b)(2) requires any critical-habitat designation to be made only "*after* taking into consideration the economic impact ... of specifying any particular area as critical habitat." (Emphasis added.) Because any critical-habitat designation *must* "tak[e] into consideration" economic impact, it cannot be true (as the Fifth Circuit held) that a decision to designate an area (or, as the Fifth Circuit phrased it, a decision not to exclude the area from designation) is left totally up to FWS's unreviewable discretion regardless of the extent of the economic impact.

The Fifth Circuit's interpretation of the statute might be plausible if FWS's § 1533(b)(2) obligation to "tak[e] into consideration the economic impact" of critical-habitat designations could be satisfied by completing an economic-impact study and then immediately discarding it.[8] But that is not a plausible interpretation of the word "consideration." *See, e.g., Webster's New Collegiate Dictionary* (G. & C. Merriam Co. 1981) ("consideration" defined as "something considered as a ground: REASON" or "a taking into account"). The requirement that FWS must take economic impact into consideration before designating any area as critical habitat requires that consideration of that economic impact must play *some* role in the designation decision. The use of the word "may" in the second sentence of § 1533(b)(2) ("the Secretary *may*

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[8] Indeed, the Fifth Circuit explicitly adopted that very narrow interpretation of the phrase "taking into consideration." *See* Pet. App. 36a (stating that FWS "fulfilled this ['taking into consideration'] requirement by commissioning an economic report by Industrial Economics, Inc.").

exclude any area from critical habitat" based on economic considerations) suggests that FWS is entitled to leeway in how it goes about weighing costs and benefits. But nothing in the ESA suggests that courts are precluded from reviewing FWS's ultimate determination under an abuse-of-discretion standard.

Section 1533(b)(2) does not provide *precise* standards by which courts can review the cost-benefit evaluations mandated by the statute. But at some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Yet the Fifth Circuit's ruling bars courts from ever reviewing FWS's cost-benefit determinations, no matter how irrational.[9]

The Fifth Circuit focused on § 1533(b)(2)'s

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[9] The lower courts are unanimous in concluding that an FWS decision not to designate an area as critical habitat is subject to APA review when the decision is based on economic considerations. *See, e.g., Bear Mountain Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015). Both the Government and the Fifth Circuit are in apparent agreement with that case law. *See, e.g.*, FWS 9th Cir. Br. 40; Pet. App. 35a. That position is inconsistent with their position in this case. If the ESA provides sufficient meaningful standards against which to judge FWS's exercise of discretion in excluding an area from a critical-habitat designation for cost-benefit reasons, then logically there also must be sufficient standards by which a court could judge FWS's decision to *include* the same area.

second sentence as the basis for its holding that FWS possesses unreviewable discretion to designate an area as critical habitat without regard to the economic impact of that designation. But properly understood, the second sentence serves to restrict FWS's discretion, not to broaden it. Its operative language prohibits FWS from relying on economic considerations as a basis for excluding an area from critical habitat, if exclusion "will result in the extinction of the species concerned." The first sentence of § 1533(b)(2)—by requiring FWS to take economic impact into consideration in all its designation decisions—already makes clear that the agency is authorized to exclude areas based on cost-benefit considerations. The second sentence's primary function is to place an "extinction" limitation on that authority.

The appeals court relied on the word "may" in the second sentence of § 1533(b)(2) ("The Secretary *may* exclude an area from critical habitat ...") as its principal basis for holding that an FWS decision *not* to exclude an area from critical habitat is not judicially reviewable. Pet. App. 33a-35a. That reliance is misplaced. Scores of federal statutes use the word "may" in authorizing federal officials to undertake certain actions.[10] Yet *amici* have located *no* federal

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[10] *See, e.g.,* 8 U.S.C. § 1158(b)(1)(A) (immigration officials "may grant asylum to an alien who has applied for asylum in accordance with" procedures established by those officials); 8 U.S.C. § 1226(a)(2) (if an alien has been detained pending completion of removal proceedings, the Attorney General "may release the alien on bond"); 42 U.S.C. § 1988(b) (in a suit alleging violations of specified civil rights statutes, "the court, in its discretion, may allow the prevailing party, other than the United

appellate decisions citing use of the word "may" in a federal statute as the basis for concluding that 5 U.S.C. § 701(a)(2) precludes judicial review of a decision to act affirmatively in a manner contrary to the manner authorized by the statute—with the single exception of cases interpreting 16 U.S.C. § 1533(b)(2). To the contrary, courts routinely hear challenges raising claims under such statutes without questioning their authority to do so. Moreover, when the reviewability issue is raised, courts have uniformly rejected Government assertions that a statute's use of the word "may" indicates that agency action is not judicially reviewable. In rejecting one such challenge, the D.C. Circuit stated:

> When a statute uses a permissive term such as "may" rather than a mandatory term such as "shall," this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination. However, such language does not mean the matter is *committed* exclusively to agency discretion.

*Dickson v. Secretary of Defense*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (emphasis in original).

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States, a reasonable attorney's fee").

### C. The Structure and History of the ESA Demonstrate that Congress Did Not Intend to Bar Judicial Review

The Endangered Species Act's structure and history both reinforce the conclusion that Congress did not intend to foreclose judicial review of claims that FWS improperly designated areas as critical habitat for an endangered species.

Congress added 16 U.S.C. § 1533(b)(2) to the ESA in 1978. The new provision, which for the first time required consideration of "economic impact" and the weighing of costs versus benefits in critical-habitat determinations, was enacted as part of the ESA Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978). That statute was adopted in response to the Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978). *TVA* upheld an ESA injunction against completion of the almost-finished Tellico Dam because (some feared) it might eradicate an endangered fish, the snail darter—even though abandonment of the dam would have huge economic consequences.

The *TVA* decision led to a firestorm of congressional criticism, with many Members stating that the ESA had never been intended to restrict land use without regard to whether the cost of those restrictions greatly outweighed their benefits. For example, Senator Jake Garn, a leading proponent of amending the ESA, complained that *TVA* had held that Congress intended "to provide endangered or threatened wildlife and plants the highest possible degree of protection from Federal actions" and thus decreed that "[a]ll other national goals ... must fall in

the face of a threat to an endangered species." Committee on Environment & Public Works, 97th Congress, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1979, and 1980* (Cong. Res. Service eds., 1982) at 1102. Senator Garn charged that "[t]hat interpretation is ... patent nonsense, and it is not the interpretation put upon the act by the Congress in passing it." *Ibid.* *See* Damien Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas from Critical Habitat Should Be Reviewable under the APA*, 47 Envtl. L. Rep. 10352, 10354-55 (2017).

Regulations adopted by the Department of Interior prior to 1978 had very broadly defined the characteristic of "critical habitat" for an endangered or threatened species. Section 2 of the 1978 amendments adopted a more restrictive definition. In particular, the amendment clarified—in a provision now codified at 16 U.S.C. § 1532(5)(C)—that as a general rule, a species's designated "critical habitat" should not include the entirety of the area in which the species might thrive: "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." The 1978 amendments also adopted a provision—codified at 16 U.S.C. § 1533(b)(2) and discussed at length above—that established the criteria for determining which of the areas in which the species might thrive should be designated as critical habitat.

Citing these provisions, legal commentators have universally understood the ESA Amendments of 1978 as an attempt by Congress to reverse the perceived excesses of *TVA v. Hill* and to ensure that federal

agencies did not make critical-habitat designations until after considering all likely economic consequences, including possible creation of obstacles to land development. *See, e.g.,* Amy Sinden, *The Economics of Endangered Species, Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 148 (2004). As Rep. John Murphy, a principal sponsor of the amendments explained:

> The Conference Report includes the House provision mandating the Secretary to consider the economic impact of designating critical habitat for any species. The Secretary is authorized to alter the critical habitat designation based on this economic evaluation. *This provision is the most significant provision in the entire bill.*

124 Cong. Rec. H13579 (daily ed. Oct. 14, 1978) (statement of Rep. Murphy) (emphasis added).

The Fifth Circuit held that Congress, when it mandated that FWS take economic impact into consideration in connection with critical-habitat designations, simultaneously precluded courts from reviewing an FWS decision to include a disputed area within that designation—no matter how economically irrational the decision might be. That holding cannot be squared with the structure and history of the 1978 ESA Amendments. Given the amendments' widely understood purposes—to legislatively overrule *TVA v. Hill* and to ensure that the goal of preserving endangered species would no longer be pursued to the

exclusion of other goals such as economic development—the strong presumption in favor of judicial reviewability has not been overcome. A Congress intent on reining in environmental excesses would have had no reason to grant FWS free rein to act as it pleased.

### D. The Fifth Circuit's Interpretation of Section 1533(b)(2) Conflicts with this Court's Decision in *Bennett*

In concluding that 5 U.S.C. § 701(a)(2) bars judicial review of FWS's no-exclusion decision, the Fifth Circuit made no mention of this Court's decision in *Bennett v. Spears*. Pet. App. 32a-36a. Yet *Bennett* addressed this precise issue and concluded that FWS economic-impact decisions were judicially reviewable under the APA.

Indeed, Judge Jones's dissent from denial of Fifth Circuit rehearing *en banc* highlighted the clear conflict between *Bennett* and the panel decision. Pet. App. 160a-161a. Neither the panel nor the judges voting to deny rehearing challenged her conclusion that *Bennett*'s holding authorizes judicial review under the circumstances of this case. In his brief opposing the certiorari petition, the Solicitor General did not dispute that the decision below conflicts with *Bennett*. Opp. Br. 30. The Solicitor General argued that review was unwarranted, characterizing *Bennett*'s statements regarding the availability of judicial review as "passing dictum." *Ibid*. But the brief neither challenged the accuracy of those statements nor stated that later Court decisions called into question their continued viability.

At issue in *Bennett* was an FWS Biological Opinion that concluded: (1) long-term operation of the Klamath Irrigation Project was likely to jeopardize two endangered species of fish; and (2) a reasonable and prudent measure to avoid that jeopardy was to require the maintenance of minimum water levels on certain reservoirs (thereby reducing the amount of water available for irrigation). The plaintiffs sought judicial review of the Biological Opinion, asserting that: (1) it implicitly designated critical habitat for the endangered fish; and (2) that designation violated § 1533(b)(2) because it was undertaken without "tak[ing] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." *Bennett*, 520 U.S. at 172.

The government sought dismissal of the claim by asserting that, under § 1533(b)(2), FWS possessed unreviewable discretion in deciding whether to exclude particular areas from a critical-habitat designation based on economic-impact considerations. The Court rejected that assertion, stating, "the terms of § 1533(b)(2) are plainly those of obligation rather than discretion." *Ibid*. The Court stated that use of the word "may" in the second sentence of § 1533(b)(2) did not alter its conclusion that courts were authorized to review—under an abuse of discretion standard—FWS's ultimate decision regarding whether to exclude particular areas from a critical-habitat designation based on cost-benefit considerations. *Ibid.*

This case arises in a posture somewhat different from that in *Bennett*, in which the Government contested the plaintiffs' *prudential standing* to challenge a critical-habitat designation. The Court

reversed a Ninth Circuit holding that the plaintiffs lacked prudential standing to allege that the designation violated § 1533(b)(2), and it held that each of the plaintiffs' claims was reviewable under either the ESA citizen-suit provisions or the APA. *Id.* at 179. The Government did not argue that 5 U.S.C. § 701(a)(2) precluded judicial review, and the Court did not address that issue. But even if *Bennett*'s statement that an FWS critical-habitat determination "is reviewable ... for abuse of discretion" is properly categorized as *dicta*, it is based on a well-reasoned analysis of § 1533(b)(2) and ought to be followed in this case. Certainly, nothing in the Fifth Circuit's decision suggests otherwise; it failed to address *Bennett*'s reviewability discussion.

## II. JUDICIAL REVIEW IS PARTICULARLY WARRANTED WHEN, AS HERE, FWS HAS FAILED TO IDENTIFY *ANY* BENEFITS DERIVED FROM A CRITICAL-HABITAT DESIGNATION

The Fifth Circuit's decision to bar judicial review is particularly troubling because the evidence overwhelmingly supports Weyerhaeuser's contention that FWS was unable to identify *any* benefits of Unit 1 critical-habitat designation that would offset the admittedly severe economic burdens imposed on landowners by that designation. Given the factual record, the Court may wish to consider declaring that FWS abused its discretion when it issued the final rule, and ordering that the case be remanded to the agency for further proceedings.

*Amici* note initially that no party contests that the designation of Unit 1 as critical habitat imposes a

sizeable economic burden on Weyerhaeuser and the other private parties who own land included within Unit 1. FWS's final rule designating Unit 1 as critical habitat acknowledged that designation could cost landowners as much as $34 million. JA189.

Moreover, that cost estimate fails to account for economic burdens that the designation will impose on those other than the landowners. For example, the *amicus curiae* brief of St. Tammany Parish Government catalogues the numerous economic hardships that designating Unit 1 as critical habitat will have on the local government. Those hardships include: (1) interference with Parish plans to develop the area along the corridor of Highway 3241, which is now under construction; (2) loss of tax revenues if the projected development of land within Unit 1 does not materialize; and (3) environmental and health hazards that would arise if (as would be necessary in order to make Unit 1 habitable for the dusky gopher frog) fires are regularly set to remove the loblolly forest currently on the property. St. Tammany Br. 5-9. FWS's refusal to take into consideration those economic and environmental impacts is an apparent violation of its statutory duty under § 1533(b)(2); yet if the Fifth Circuit's no-review holding is upheld, administrative errors of that sort will go uncorrected.

In contrast, there is *no* evidence that the dusky gopher frog will benefit from the designation. *Amici* note initially that Unit 1 is privately owned land and that dusky gopher frogs have no means of reaching the land on their own. FWS has no right to trespass on the property for the purpose of introducing frogs, and there is no evidence that the landowners contemplate

granting FWS permission to do so. Unless FWS purchases the property from the current owners (something it has never offered to do), dusky gopher frogs will never reach Unit 1 and thus will never benefit from a critical-habitat designation.

More importantly, the evidence indicates that if dusky gopher frogs ever reached Unit 1, they could not survive there. As FWS acknowledges, the dusky gopher frog needs three things for its habitat. Two of those essential features are absent from Unit 1: (1) upland, open canopy forests close to its breeding ponds, where the frog lives when it is not breeding; and (2) upland habitat—featuring an open canopy and abundant groundcover produced by frequent fires—connecting its breeding and non-breeding grounds. Those features will continue to be absent unless the owners of Unit 1 voluntarily agree to substantial modification of their property in order to add them. But "the only evidence in the record is that the owners do not plan to do so and there is no evidence that economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1." Pet. App. 76a-77a.

Indeed, the authors of FWS's April 6, 2012 Economic Analysis conceded that they could not identify *any* "direct benefits" to the dusky gopher frog from designating Unit 1 as critical habitat:

> Quantification and monetization of species conservation benefits would require information on the incremental change in the probability of gopher frog conservation that is expected to result

> from the designation. No studies exist that provide such information for this species.

JA95. Instead, the study confined its discussion to consideration of "ancillary benefits" of designation. Even there, the only potential "ancillary benefits" identified by the study were those "related to the avoidance of development of Unit 1." JA97. And the study did not conclude any such benefits actually exist; rather, it simply speculated (contrary to the conclusion of St. Tammany Parish officials) that: (1) "[o]pen space or decreased density in development resulting from gopher frog conservation may increase adjacent or nearby property values"; (2) [s]ocial welfare gains may be associated with enhanced aesthetic quality of habitat"; and (3) "[d]ecreased development may lead to protection and improvement of water quality and preservation of natural habitat for other species." JA97-98.

Of course, similar, unsubstantiated speculation could be advanced in support of *any* critical-habitat designation. But the bottom line is that none of the speculated benefits of deterring development has anything to do with the purpose of designating critical-habitat: to ensure the survival of an endangered species. In the absence of *any* evidence that the designation of Unit 1 would benefit the dusky gopher frog, the relevant "benefits" of FWS's designation are precisely zero, and the ratio of costs to benefits is infinite.

Given § 1533(b)(2)'s mandate that FWS consider economic impact when designating critical habitat, at

some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. at 2707. Yet the Fifth Circuit's ruling bars courts from ever reviewing FWS's cost-benefit determinations that favor designation, no matter how irrational.

Moreover, given that FWS proceeded with its Unit 1 designation despite a record demonstrating an infinite cost-benefit ratio and failed to consider all relevant economic impacts, *amici* urge the Court to reach the merits of Weyerhaeuser's § 1533(b)(2) claim and hold that the designation was arbitrary, capricious, and an abuse of discretion, in violation of 5 U.S.C. § 706(a)(2).

To demonstrate its compliance with § 1533(b)(2)'s directive that it designate critical habit only *after* taking into consideration the economic impact of doing so, FWS must at a minimum "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). FWS has failed to meet that burden. Instead of providing a "satisfactory explanation" for its decision, its entire analysis of cost-benefit comparisons consisted of a single sentence: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation." JA 190. The Court should reverse with

directions that the case be remanded to FWS to provide the agency with an opportunity to provide a satisfactory explanation for its decision.

FWS failure to provide a reasoned decision was likely a product of its mistaken belief that it was entitled to unreviewable discretion to ignore economic impacts identified by its economic analyses and to designate critical habitat without regard to those impacts. As demonstrated above, FWS lacks such unreviewable discretion. Accordingly, if FWS really possesses a rational basis for making a critical habitat designation that cannot possibly benefit the dusky gopher frog, it ought to be permitted an opportunity to explain what that basis is. Alternatively, the Court should remand the case to the Fifth Circuit with directions for the appeals court to consider in the first instance whether FWS abused its discretion when it designated Unit 1 as critical habitat.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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