No. 94-859

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION, OREGON FARM BUREAU FEDERATION, AND TEXAS FARM BUREAU IN SUPPORT OF RESPONDENTS

JOHN J. RADEMACHER
General Counsel
RICHARD L. KRAUSE
Assistant Counsel
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, Illinois 60068
(708) 399-5700

TIMOTHY S. BISHOP
Counsel of Record
MICHAEL F. ROSENBLUM
JEFFREY W. SARLES
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amici Curiae

[Additional counsel listed on signature page]

QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether ordinary principles of statutory construction show that "harm" in section 3(19) of the Endangered Species Act does not encompass habitat modification.

2. Whether the Fish and Wildlife Service's regulation construing "harm" to encompass habitat modification imposes an intolerable burden on farmers, ranchers, and other landowners never intended by Congress.

3. Whether the Fish and Wildlife Service's regulation results in Fifth Amendment takings of private property that clearly were not contemplated by Congress when it enacted the Endangered Species Act.

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INTERESTS OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers.

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* Consents to the filing of this brief are on file with the Clerk.

AFBF has member organizations in all 50 states and Puerto Rico representing more than 4.4 million member families. Amici California, Oregon, and Texas Farm Bureaus are members of AFBF, representing the interests of farmers and ranchers in their respective states.

AFBF and the state Farm Bureau amici have a direct interest in the outcome of this case. Their farmer and rancher members own or lease significant amounts of property, on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. Amici's members' use of their land has been severely restricted by the Fish and Wildlife Service's interpretation of section 9 of the Endangered Species Act to encompass ordinary, everyday farming and ranching activities as prohibited "habitat modification." That unduly broad interpretation rewrites the Act to make potential criminals of vast numbers of families engaged in agriculture and ranching activities, prohibiting well-accepted agricultural practices and creating uncertainties about permissible conduct that chill the most productive and beneficial use of land.

In consequence, amici have a strong interest in affirmance of the court of appeals' ruling that the Act does not authorize FWS's regulatory definition of "harm" to include habitat modification on private land. We believe that amici's experiences with the operation of the regulation at issue—a regulation that has had an especially deleterious impact in those states whose farmers and ranchers are represented by the state Farm Bureau amici—will be helpful to this Court in reaching a decision.

SUMMARY OF ARGUMENT

1. Section 9 of the Endangered Species Act ("ESA") forbids any person to "take" a member of any of hundreds of "endangered" or "threatened" species of animals and birds (known as "listed" species). 16 U.S.C. § 1538(a)(1). Congress defined "take" in section 3(19) to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a member of a listed species, or to

attempt to do so. 16 U.S.C. § 1532(19). The standard tools of statutory interpretation used by this Court uniformly point to one, clear meaning for this provision: persons are prohibited from conduct directed at wildlife that will kill, physically hurt, or reduce to captivity a member of a protected species. FWS's regulation defining the term "harm" much more broadly to include "habitat modification" that impairs breeding, feeding, or sheltering behavior (50 C.F.R. § 17.3)—*e.g.*, normal land use activity that disturbs or destroys a single nesting site, food plant, or burrow—vastly expands the Act's prohibitions without any congressional authority and was correctly struck down by the court of appeals.

2. The severe adverse practical impact of FWS's regulation on the ordinary, productive use of private property is strong evidence that the agency has expanded the reach of the Act far beyond what Congress intended. There is absolutely no indication that Congress thought it was enacting in section 9 of the ESA a general, nation-wide land use statute of enormous consequence for the owners of hundreds of millions of acres of private land—one that would micro-manage such actions as clearing brush and plowing fields. Nor is there the least indication that Congress intended to make criminals of farmers and ranchers who in the course of working their land impact future generations of listed species in ways that only a biologist could predict.

3. FWS's view that "harm" includes habitat modification is belied as well by the Fifth Amendment consequences of that definition. In turning section 9 of the ESA into a substantial, pervasive restriction on the productive use of private land, FWS threatens to impose a significant burden on the public fisc in the form of payments of compensation to landowners mandated by the Takings Clause. That Congress clearly did not envisage the imposition of such costs by section 9 further demonstrates the utter implausibility of FWS's interpretation of "harm."

ARGUMENT

Executive branch agencies are to apply statutes, not author them. The Fish and Wildlife Service has violated this most basic principle. It has adopted a regulation—creating a new crime of habitat modification, punishable by a year in prison and a substantial fine—that flatly contradicts the intent of Congress as determined using any of the methods of statutory interpretation endorsed in this Court's precedents. Because FWS's definition of "harm" to include habitat modification is at odds with the clear meaning of the Endangered Species Act, the court of appeals' judgment striking it down should be affirmed.

Much is at stake here. FWS's regulation is preventing farmers from farming effectively, ranchers from ranching effectively, and many other landowners from enjoying the full entitlements of property ownership. Congress envisaged no such consequences when it enacted and amended the ESA. Moreover, the regulatory transformation of the ESA into a national land use code has serious constitutional ramifications. The founders of our polity built protection of private property rights into the framework of our fundamental law. They would be aghast to learn that unelected administrators have converted the plowing of fields and the clearing of trees on private land into federal crimes. Indeed, the Takings Clause of our Constitution requires that such abridgements of fundamental individual rights be justly compensated.

I. CONGRESS DID NOT AUTHORIZE FWS'S HABITAT MODIFICATION RESTRICTIONS

A. Standard Principles Of Statutory Construction Require That The Term "Harm" Not Be Construed To Include Habitat Modification

This case hinges on whether the term "harm," as it appears in section 3(19)'s definition of "take," plausibly encompasses habitat modification. It does not. Amici agree with and will not repeat

respondents' full and careful analysis of the statute and its legislative history. However, a few well-accepted principles of statutory interpretation seem to us particularly compelling in showing that FWS's broad definition of "harm" impermissibly "goes beyond the scope of whatever ambiguity [section 3(19)] contains." *Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1594 (1994).

First, Congress well understood how to say "habitat modification" when that was what it intended. Congress mandated that in determining species to be listed, the Department of Interior should consider the "*destruction, modification, or curtailment of [a creature's] habitat*." 16 U.S.C. § 1533(a)(1)(A). ESA section 7 specifically requires that federal agencies "insure that any action authorized, funded, or carried out by such agency * * * is not likely to * * * *result in the destruction or adverse modification of habitat of [a listed] species* which is determined by the Secretary * * * to be critical." *Id.* § 1536(a)(2). And section 7 also requires conferral between the Secretary and an agency about "an agency action which is likely to * * * *result in the destruction or adverse modification of critical habitat*" proposed to be designated for a listed species. *Id.* § 1536(a)(4).

No such words or phrases appear anywhere in the "take" provisions of the statute, as they surely would if Congress had intended that section 9 should reach habitat modification. *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2040 (1993) ("`[W]here Congress includes particular language in one section of a statute but omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"); see also *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1448 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so. [Citing statutes expressly creating aiding and abetting liability.] If * * * Congress intended to impose aiding and abetting liability, we presume it would have used the ords `aid' and `abet' in the statutory text"); *Chicago* v. *Environmental*

Defense Fund, 114 S. Ct. at 1593; *Pinter* v. *Dahl*, 486 U.S. 622, 650 (1988). In light of the very different language used in different parts of the statute, the court of appeals correctly found that only section 7 of the Act, imposing obligations on the federal government but not private parties, together with section 5, which authorizes federal acquisition of land to protect habitat, are directed to habitat modification. 17 F.3d at 1466.[1]

Second, not only is the phrase "destruction or adverse modification of habitat" starkly absent from sections 9 and 3(19), but everything about the statutory definition of "take" conspires against FWS's position. The defined term—"take"—must be the starting point for understanding the import of the section 3(19) definition, and it cannot be stretched to encompass habitat modification. Not one of the definitions of "take" given in the 17 pages devoted to this elemental word in the Oxford English Dictionary comes close to the sort of incidental, otherwise-directed activity prohibited by FWS's regulation. To the contrary, the active verb in its primary meanings evokes precisely the sense of an activity directed to killing, hurting, or reducing a creature to captivity. See Oxford English Dictionary 558 (2d ed. 1989) (defining "take" as "[t]o seize, grasp, capture, catch"; "To lay hold upon"; "To catch, capture (a wild beast, bird, fish etc.)"; "To strike, hit, impinge upon").

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[1] Congress would hardly have bothered to enact elaborate provisions governing the designation and protection of "critical habitats" by federal agencies if "habitat modification" were generally prohibited, on federal and private land, by section 9. Interpretation is "`not [to] be guided by a single sentence or member of a sentence, but * * * [by] the provisions of the whole law.'" *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383-2384 (1992). FWS's definition of "harm" fails that test by rendering the "critical habitat" scheme largely otiose.

The more specific words listed in the section 3(19) definition reflect these meanings: pursue, hunt, shoot, wound, kill, trap, capture, collect. The general words that begin the definition must be read to conform to these specific words as well as to the common meaning of "take." See *Dole* v. *United Steelworkers of America*, 494 U.S. 26, 36 (1990) ("words grouped in a list should be given related meaning"); *Massachusetts* v. *Morash*, 490 U.S. 107, 114 (1989). Otherwise—as FWS's regulation perfectly illustrates—one word in a list may obtain "a meaning so broad that it is inconsistent with its accompanying words, thus giving `unintended breadth to the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, No. 93-404, slip op. at 13 (U.S. Feb. 28, 1995). FWS's regulation ignores these principles and gives "harm" a meaning essentially unrelated to either the term defined or the more specific words used to illuminate that term. That cannot be right.

In our view, these straightforward precepts, which have long guided this Court in its interpretation of statutes, should be the end of this case: they point to affirmance. The practical and constitutional implications of FWS's overbroad definition of "harm," discussed below, nevertheless serve to confirm our conclusion that "habitat modification" on private land lies outside section 9's reach. See *Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 454 (1989) ("`unreasonable to believe'" that Congress intended "`absurd results which follow from giving * * * broad meaning to [statutory] words'"); *United States* v. *Bryan*, 339 U.S. 323, 338 (1950) ("Court will not reach * * * result if it is contrary to the congressional intent and leads to absurd conclusions"); *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 470 (1994) ("we do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution").

B. Congress Has Not Ratified FWS's Erroneous Expansion Of "Harm" To Encompass Habitat Modification

Contrary to petitioners' assertions, the 1978 and 1982 Congresses plainly did not acquiesce in or ratify FWS's interpretation of "take" to encompass habitat modification: the amendments to ESA that they passed addressed neither the prohibition of a "take" in § 9(a)(1) nor the definition of a "take" in § 3(19). See *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21 (1969) ("Where * * * there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone * * * approval"). Rather, the amendments added new sections to the Act that provided not for a broadening of liability, but for a narrowing of liability through exemption and permit procedures. 16 U.S.C. §§ 1536(e)-(o), 1539(a). See *NLRB* v. *Health Care & Retirement Corp.*, 114 S. Ct. 1778, 1784 (1994) (finding history of legislation amending other sections of a statute not determinative of congressional intent with regard to statutory section at issue). Congress *could* have amended section 9 specifically to target habitat modification, but did not do so.

FWS resorts to a far-fetched reading of the incidental take amendment as Congress's silent incorporation of the ban on habitat modification devised by the agency. But such a reading defies the plain meaning of the provision. Allowing a permit for a taking "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity" (§ 1539(a)(1)(B)) simply creates a procedure to remove liability for nonpurposive "takes"—for example, the tripping of a trap set for a non-listed animal, or the ingestion of poisoned bait laid for non-listed pests, by a member of a protected species. The provision says not a word about broaden-

ing the meaning of "take" or "harm."[2] In these circumstances, passage of the 1978 and 1982 amendments to ESA is essentially irrelevant to the question whether "take" and "harm" include habitat modification.

FWS is thus reduced to arguing that Congress's failure to *reverse* the agency's "harm" regulation, in particular when it passed the 1978 and 1982 amendments to ESA, constituted "congressional ratification" of FWS's interpretation. Pet. Br. 40. But "`where the law is plain,'" as it is here (see pages 4-7, *supra*), it is well established that "`subsequent reenactment does not constitute an adoption of a previous administrative construction.'" *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994). Mere reenactment (or amendment of other provisions of a law) amounts to no more than "[c]ongressional silence," which "`lacks persuasive significance,' particularly where administrative regulations are inconsistent with the controlling statute." *Ibid*. And even if the text were not unambiguous, "congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent," as is the case here. *Burns* v. *United States*, 501 U.S. 129, 136 (1991).

Indeed, petitioners' elevation of congressional silence into a legislative mandate raises serious constitutional concerns. The

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[2] There is no evidence that in 1978 or 1982 Congress was aware of or sought to address the question of habitat modification in the section 9 context *at all*. This is not a case where Congress defeated a provision "specifically designed to supplant" a contested agency interpretation (*United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985)) or where "its prolonged and acute awareness" of the controversy allowed for a possible imputation of acquiescence. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 601 (1983); see also *CBS, Inc.* v. *FCC*, 453 U.S. 367, 383-384 (1981) (Congress was repeatedly "made aware" of objections and repeatedly rejected "specific proposals" to repeal offending provision).

Constitution prescribes very specific requisites for making law; clearly, "`[c]ongressional inaction cannot amend a duly enacted statute.'" *Central Bank*, 114 S. Ct. at 1453. Yet in contending that congressional inaction has validated FWS's vast expansion of the statute's prohibitions, that is precisely petitioners' position. In effect, FWS interprets Congress's inaction as a silent delegation to the agency to construe "take" broadly. But standardless delegation to executive agencies violates the principle of separation of powers (see *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607 (1980)), and silent delegation, which is inherently standardless, offends all the more.

Furthermore, there is simply no rational means to determine what, if anything, Congress intended by not amending the ESA "take" and "harm" provisions. Failure to overturn an agency interpretation of a statute "`lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.'" *Central Bank*, 114 S. Ct. at 1453, quoting *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990). In fact, failure to eliminate an offending interpretation by amendment may not signify anything substantive at all, but rather only "unawareness, preoccupation, or paralysis." *Zuber*, 396 U.S. at 185 n.21. See Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 204 n.90 (1983) (congressional rejections of efforts to change administrative interpretations may be due to "tactical or political," rather than "substantive," reasons). Here, congressional intent is particularly unfathomable because Congress was doubly silent. FWS focuses only on Congress's failure to override its regulation, ignoring Congress's simultaneous failure to add habitat modification to the definition of "take." Any attempt to decipher the "true" meaning of this tangle of non-events would necessarily be a speculative enterprise.

Certainly, FWS's offering of a few snippets of testimony before a congressional subcommittee cannot impart meaning to Congress's inaction. In *SEC v. Sloan*, 436 U.S. 103 (1978), this Court invalidated an agency's interpretation of a statute where, after testimony at committee hearings concerning the offending interpretation and public approval of that testimony by a committee member, Congress reenacted the statutory provision at issue without amendment. *Id.* at 119-120. This Court ruled that such "isolated statements" do not demonstrate "widespread congressional awareness" and are "not sufficient" to show acquiescence in the agency's interpretation. *Id.* at 121. See also *Health Care & Retirement Corp.*, 114 S. Ct. at 1784 ("isolated statement" in committee report is not "an authoritative interpretation" of congres-sional intent). FWS offers no more here.[3]

FWS's focus on the inaction of the 1978 and 1982 Congresses is particularly misplaced because "`the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Waterman Steamship Corp.* v. *United States*, 381 U.S. 252, 269 (1965). Even if subsequent Congresses could be deemed to have acquiesced in FWS's interpretation, this is "scarcely the sort of congressional approval" of an agency interpretation that is entitled to any weight. *Sloan*, 436 U.S. at 121; see also Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture*

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[3] Petitioners' effort to extract significance from silence is analogous to the media's apparently incurable ascription of meaning to this Court's denials of certiorari. See *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J.) ("this court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review"). Indeed, attributing meaning to congressional silence is even less defensible because, in contrast to members of this Court, who have the benefit of argument on substantive issues made in the petition for certiorari, most members of Congress are not even aware of amendments that go unadopted in committee.

into "Speculative Unrealities", 64 B.U. L. Rev. 737, 754 (1984) ("the silent acquiescence of a subsequent Congress should be accorded no weight by the courts in the search for legislative in-tent"). In short, the meaning of sections 9 and 3(19) must be deter-mined from the text and the intent of the Congress that enacted these provisions—a test on which petitioners cannot prevail.

II. FWS'S CONSTRUCTION OF ESA SECTION 9 TO ENCOMPASS HABITAT MODIFICATION HAS A SEVERE ADVERSE IMPACT ON FARMERS AND OTHER PROPERTY OWNERS

FWS's construction of the term "harm" to include "habitat modification" on private land—a concept with a vast reach into the most ordinary uses of private property—has an enormous impact on farmers and ranchers, who depend on the land for their livelihoods, and indeed on all Americans, who rely on the fruits of the land for food and other basic needs. The legislative record contains not a hint that Congress intended the sort of dire practical consequences that flow from FWS's regulation.

Under FWS's approach, restrictions on the use of private land are pervasive. There are presently over 800 listed species, of which over 78 percent have habitat on private lands. Moreover, habitat for 80 of the 105 species for which critical habitat has been designated is found on nonfederal lands. Government Accounting Office, *Endangered Species Act*: *Information on Species Protection on Nonfederal Lands* 4-6 (Jan. 20, 1995) ("*GAO Report*"). Some 2,450 counties—making up almost 90 percent of the continental United States—are home to at least one endangered species. C. Mann & M. Plummer, *Noah's Choice: The Future of Endangered Species* 14 (1995). 210 million Americans live in the vicinity of at least one listed species. *Id*. at 15.

The effect of FWS's regulation is thus to prevent commonplace land use activity on vast stretches of private property. Applying it to the spotted owl, for example, FWS has since 1990 established owl

circles radiating up to almost two miles from each nest, in which almost half the land must be left untouched. Pryne, *Clinton Plan for Logging Gets Split Reception*, Seattle Times, Dec. 11, 1993, at A12. Within a year of being instituted, the owl circles foreclosed to logging an area the size of Massachusetts and Vermont. McCoy, *U.S. Will Designate 11.6 Million Acres in Northwest to Protect Owls, Tall Trees*, Wall St. J., Apr. 29, 1991, at A8. In Washington alone, owl circles preclude foresting on over half a million acres. *FWS Announces New Owl Rules*, BNA State Envt. Daily, Feb. 8, 1995, at 1. The loss of tens of thousands of logging-related jobs is the result. McCoy, *supra*.[4] Although the adverse impact of owl circles on logging lands may be the best known effect of FWS's habitat modification rule, FWS's depredations of private property reach well beyond the forests and into the agricultural heartland of this country.

Nothing in the legislative history of the Endangered Species Act indicates that Congress intended the Act to plunge farmers and other landowners into a struggle for economic survival. Yet that will be the effect of criminalizing habitat modification. Horror stories from all over the country are accumulating rapidly.

! In California, a Taiwanese immigrant invested almost $2 million for desert scrub on which to grow Chinese vegetables. Because of the alleged presence of three listed kangaroo rats, a battalion of two dozen armed state and federal agents, accompanied by helicopters, descended on his farm, seized his tractor and other

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[4] Although the Clinton administration's new forest management plan for the Pacific Northwest may affect some of these figures, its application is limited to federal lands and thus has no bearing on the private property rights at issue in this lawsuit. See Conner, *Judge Rejects Challenges to Federal Logging Plan*, L.A. Times, Dec. 22, 1994, at A3.

equipment, and charged him with three counts of criminal destruction of habitat. Arax, *Immigrant Farmer's Woes Galvanize Conservatives*, L.A. Times, June 10, 1994, at A1; see also *id.*, Jan. 18, 1995, at A1.

! FWS sent a letter to over 500 landowners in Polk and Highlands Counties, Florida, warning them not to destroy any "scrub habitat" on their property, allegedly frequented by the listed Florida scrub jay. Only after a public outcry did FWS back off from this heavy-handed effort to prevent the most routine and necessary type of land clearance.

! George Foote, a 74-year-old Texas landowner, cannot sell his land to obtain needed retirement money because it may be habitat for the golden-cheeked warbler. "That leaves me with land that has no value," he complains, "unless I want to lie to prospective buyers, and that's certainly not the thing to do." Warren, *Rural Land Owners Say Pain Goes Beyond Data*, Wall St. J. (Texas ed.), Dec. 21, 1994, at 1.

! C.D. Barrett, North Carolina Tree Farmer of the Year in 1989, could not sell his timber in 1992 because officials had identified an old cavity in one tree that had once been used by a red cockaded woodpecker. Although the nest was abandoned, it took Mr. Barrett over six months to obtain a clearance letter from FWS, the delay preventing him from selling timber during that period and compelling him to suffer a substantial financial loss. See *The Endangered Gremlins Act*, Wall St. J., June 3, 1994, at A14.

! In southern California, Native Americans were prevented from farming their fields because the listed Stephens kangaroo rat had been found on their reservation. Comment, *The Endangered Species Act: Inadequate Species Protection in the Wake of the Destruction of Property Rights*, 55 Ohio St. L.J. 453, 453 (1994).

! The Stephens kangaroo rat also prevented residents of Riverside County, California, from plowing their fields or clearing their land because they were in a 79,000-acre area designated for study of the endangered rodent. (For example, in 1990 FWS ordered fifth-generation farmers Cindy and Andy Domenigoni to cease tillage of half their 1600 tillable acres, costing them an average $70,000 in lost crops sales for each of four years, plus an additional $100,000 in biological consultation and legal fees.) When the resultant thick growth in vegetation caught fire in 1993, many Riverside landowners faced the hobson's choice of disking a firebreak in violation of FWS regulations or obeying the regulations and risking losing their homes. Only later did FWS determine that the kangaroo rats had moved out of the area *before* the fires because excessive plant growth—induced by the ban on farming—had rendered the habitat unsuitable for them. DeLong, *It's My Land, Isn't It?*, N.Y. Times, Mar. 15, 1995, at A15.

! The FWS banned farmers in southwestern Idaho from pumping groundwater in 1985 in order to maintain existing groundwater levels and thus protect the survival of a listed springsnail—despite the fact that the springsnail was not known to populate any of the affected private property. See *Idaho Farm Bureau Fed'n* v. *Babbitt*, 839 F. Supp. 739 (D. Idaho 1993).

! Minnesota farmer Dale Polzin not only cannot hay his 80-acre prairie because it is covered with a prairie bush clover, a protected habitat, but that clover also prevents him from using pesticides on nearby corn and bean fields. Sands, *How Endangered Species Could Take a Bite Out of Your Farm*, Top Producer, Mid-Mar. 1992, at 28.

! In Tulare County, California, a farmer was fined $5000 and had part of his land confiscated for allegedly destroying the habitat of a listed blunt-nosed leopard lizard. Arax, *Immigrant Farmer's Woes*, L.A. Times, June 10, 1994, at A1.

As these examples demonstrate, FWS does not apply its regulation in the "circumscribed" manner it alleges (Pet. Br. 45), but rather to justify an aggressive land use management program never authorized by Congress. ESA's liberal citizen suit provisions (16 U.S.C. § 1540(g)) broaden the impact of the FWS's regulation still further, and well beyond the enforcement power of the FWS alone. Environmental groups and other private plaintiffs are even less likely than FWS to be circumspect in alleging illegal habitat modification.

The stories noted above are not about criminals, but about hard-working Americans seeking to work their land much as our forebears have done for centuries. It is simply not conceivable that Congress intended section 9 to target the otherwise lawful endeavors of these farmers. Nor is it at all surprising that Congress should have foregone the extra step of prohibiting habitat modification on private land. FWS's construction of "harm" creates perverse incentives that Congress would reasonably have wanted to avoid. Landowners who *create* habitat favorable to listed species will be *penalized* by losing control over that portion of their property; while those who *prevent* the growth of favorable habitat will be *rewarded* with full control. Thus, one small farmer in Washington allegedly cut down old-growth trees rather than risk attracting a listed spotted owl. Taylor, *Preserving Forests May Pay Off*, Seattle Post-Intelligencer, Oct. 13, 1993, at B1. A wealthier individual reportedly reacted in similar fashion: learning that golden-cheeked warblers were to be added to the endangered species list, a development corporation owned by Ross Perot allegedly razed 333 acres of juniper trees, the birds' preferred habitat, while the birds were off on a migrating sojourn to South America. Wright, *Death to Tweety*, New Republic, July 6, 1992, at 9-10.

In other words, not only does FWS's regulation unjustly sanction routine farming and ranching activities that may interfere with listed species' habitats, but in doing so it transforms something desirable—species-preserving habitats—into a spectre that any

rational landowner must fear. Ironically, then, it is likely to undermine the FWS's goal of preserving endangered species.

These few examples—we could multiply them many times over—provide but a glimpse into the havoc being wreaked by FWS's regulation. As new species are listed as endangered or threatened, its impact will widen and worsen.[5] Upholding the court of appeals would rein in this unfettered, terribly damaging, and wholly unjustified bureaucratic license to micro-manage the use of private land.

III. FWS'S CONSTRUCTION OF ESA SECTION 9 TO ENCOMPASS HABITAT MODIFICATION LEADS TO FIFTH AMENDMENT TAKINGS FOR WHICH JUST COMPENSATION MUST BE PAID

A ban on habitat modification indisputably interferes with individuals' rights to work or otherwise use their land. Because FWS's regulation prevents landowners from enjoying all the elements of the bundle of rights that is property ownership, it causes "takings" of property that, under the Fifth Amendment, must be compensated. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945) ("private property" encompasses the bundle of rights "to possess, use and dispose of" land). There is no sign, however, that Congress thought it was creating in the ESA an enormous, unfunded obligation of this sort for federal agencies (and ultimately for taxpayers). The absence of any mention in the legislative history of the ESA of constitutional protections for property rights or of the compensation requirement provides strong evidence that Congress never envisioned that a "take" of a listed an-imal could occur through habitat modification on private land.

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[5] In the first six months of 1994, FWS added 72 species to the list and proposed adding another 27. Mann & Plummer, *Noah's Choice*, *supra*, at 246.

A. FWS's Prohibition Of Habitat Modification Grossly Interferes With Historically-Protected Uses Of Private Property

Ownership of a farm without the right to farm the land is not the sort of property right our forebears had in mind when they ratified the Fifth Amendment. The Framers viewed property as a fundamental restraint on a government of limited powers, not as a limited privilege revocable by government. As John Adams put it, "[p]roperty must be secured or liberty cannot exist." *Discourses on Davila*, quoted in James Ely, Jr., *The Guardian of Every Other Right* 43 (1992).

The Framers included numerous protections for private property in the Constitution. Most notably, they gave it two entries in the Bill of Rights—the Due Process and Takings Clauses. But they also, for example, shielded landed wealth from federal taxation (Article I, § 9, cl. 4), twice singled out homes for protection (Amendments 3 and 4), and even limited forfeitures of property for the heinous crime of treason. Article III, § 3, cl. 3. In so doing, they recognized that property is an important guarantee of liberty. As James Madison put it, "just governments will equally respect the rights of property and the property in rights." Madison, *Property*, in 14 *The Papers of James Madison* 266 (Rutland & Mason, eds. 1983). See also Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87, 95 (1993).

In opinions written by contemporaries of the Framers, this Court recognized that "a right of land * * * includes the right to * * * receive the issues and profits arising from it." *Green* v. *Biddle*, 21 U.S. 1, 75 (1823). A law which "clogs [the owner's] recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing * * *, impairs his right to, and interest in, the property." *Id.* at 75-76. This dominion over one's property was to be limited only by respect for the rights of

others. *Sexton* v. *Wheaton*, 21 U.S. 229, 242 (1823) (property owner has "absolute power [to] make any disposition of it which does not interfere with the existing rights of others").

This Court has continued to recognize that protection of property rights is "a vital principle of republican institutions" (*Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 235 (1897)), that "rights in property are basic civil rights," and that "a fundamental interdependence exists between the personal right to liberty and the personal right in property." *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 552 (1972); see also *Dennis* v. *Higgins*, 498 U.S. 439, 446 (1991) ("`dichotomy between personal liberties and property rights is a false one'").

Over the years, the Court has allowed government to restrain uses of property without paying just compensation in but two situations—where the restrained use amounts to a nuisance, and where the restraint promotes a "reciprocity of advantage" so that the burden on the owner as individual is eclipsed by the benefit derived as a member of the public. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 (1987). Neither exception applies here. Clearing or otherwise working one's land has never been viewed as a nuisance. A private nuisance is an activity that "renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable." *Camfield* v. *United States*, 167 U.S. 518, 523 (1897). A public nuisance has a similar effect on a wider circle of the community. FWS's enjoinder of habitat modification is not directed to an activity that could conceivably have any such effect. Nor is reciprocity of advantage implicated where there is such a gross disparity between the debilitating ban on using one's own property and any benefits derived from an incremental increase in the likelihood that a listed species inhabiting one's property will continue to exist.

Moreover, the FWS regulation unquestionably generates confusion among landowners as to what they may do with their

property. As one prominent environmentalist has conceded, "it is impossible for most landowners to translate [FWS's "harm" regulation] into clear and readily understandable rules regarding what they can or cannot do on their property." M. Bean *et al.*, *Reconciling Conflicts Under the Endangered Species Act: The Habitat Conservation Planning Experience* 43 (1991). A landowner often will lack the knowledge to determine if his activities are modifying the habitat of a listed species. Even if a landowner might suspect that his activity is degrading habitat, a non-biologist can surely not know whether existing animals will be killed or injured as a result. Still less can the landowner know whether "essential behavioral patterns, including breeding, feeding, or sheltering" would be "significantly impair[ed]" and so "kill or injure" future generations of wildlife in the eyes of FWS. 50 C.F.R. § 17.3. A regulation that requires a landowner to obtain a biology degree in order to appreciate the dangers of working his or her land—or face criminal prosecution—creates intolerable and wholly unfair uncertainty and defeats the security promised by ownership of private property.

Preventing landowners from working their land is a truly unprecedented intrusion by the federal government into the private domain. The record provides no hint that Congress intended such a startling upheaval in settled expectations. FWS cannot take upon itself to redefine the privileges and boundaries of property ownership. Upholding the court of appeals will sustain "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972).

B. FWS's Construction Of Section 9 Causes Takings Of Private Property Requiring Just Compensation

FWS's edict making habitat modification one of the acts proscribed by section 9 "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). FWS's regulation, by requiring

private landowners to maintain potentially significant portions of their land in an undisturbed state, prevents the use and enjoyment of land and thus inevitably results in takings requiring compensation under the Fifth Amendment. It is inconceivable that Congress would not have noted and addressed this concern had it believed that the ESA could give rise to Fifth Amendment takings. It is also appropriate for this Court to scrutinize strictly a regulation which has so widespread and devastating an effect on property rights. See *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (construing statute narrowly to defeat administrative order that would necessarily give rise to unconstitutional takings); see also *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988) (narrowing agency's construction of statute that gives rise to "serious constitutional concerns").

This Court has recognized two types of categorical takings—where the government effects a physical occupation of real property and where it deprives the owner of all economic use of his land. Although at first blush 50 C.F.R. § 17.3 might appear to fit neither category, a closer look reveals otherwise.

1. Physical takings. A physical occupation takes place where "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." *Nollan* v. *California Coastal Comm'n*, 485 U.S. 825, 832 (1987). The occupiers need not be government officials or agents for the land to be deemed taken. See *ibid.*; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979). Nor need the occupation be particularly physically intrusive, or involve persons rather than objects. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

FWS's regulation allows selected animals to "pass to and fro" and in fact to set up a home base on private property free from the owner's interference. To a farmer prevented from farming, there is no practical distinction between being hampered by sauntering

tourists (identified as a taking in *Nollan* and *Kaiser Aetna*) or by aviating or nesting birds (as here). See *Kaiser Aetna*, 444 U.S. at 180 (imposition of servitude allowing access to third parties is "actual physical invasion" of property); Comment, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. Chi. L. Rev. 1101, 1114 (1991) ("The ESA, by stifling preventive efforts, works a compensable taking through the physically intrusive and destructive actions of governmentally protected species"); *Christy* v. *Lujan*, 490 U.S. 1114, 1115-1116 (1989) (White, J., dissenting from denial of certiorari) (ESA authorizes the "constitutional equivalent" of a physical taking). FWS's "habitat modification" regulation at a minimum imposes negative easements on private lands, preventing farmers and other owners from meaningfully using parts of their property.[6]

2. Destruction of beneficial use. Whether or not it effects a physical occupation, the challenged regulation will destroy all beneficial use of some properties. A landowner forced "to leave his property idle" has suffered a categorical taking. *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992). Given that the home range for a single nesting pair of owls, for example, is 3-5 thousand acres (Flournoy, *Beyond the "Spotted Owl Problem": Learning from the Old-Growth Controversy*, 17 Harv. Envtl. L.

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[6] Moreover, a farm impeded from being farmed by the presence of listed species is not likely to be transferable. See Warren, *Rural Land Owners Say Pain Goes Beyond Data*, Wall. St. J. (Texas ed.), Dec. 21, 1994, at 1 ("property that's encumbered by endangered species might be impossible to sell at any price"); *Olson* v. *United States*, 292 U.S. 246, 256-258 (1934) (physical possibility of alternate uses for land does not preclude a taking where there is no demand for those alternate uses). The practical destruction of the right-to-transfer stick from the bundle of property rights should entitle the owner to just compensation. *Hodel* v. *Irving*, 481 U.S. 704, 716 n.2 (1987).

Rev. 261, 268 (1993)), the regulation may paralyze entire farms, ranches, and logging enterprises. See *Boise Cascade Corp.* v. *Board of Forestry*, 886 P.2d 1033 (Or. Ct. App. 1994) (state's refusal to permit logging operations due to presence of spotted owl nesting site may deprive land of all economic value); *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 127 (1978) (rendering property commercially impracticable may have same effect as complete destruction of property rights); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.) (height restriction rendering property wholly useless is a compensable taking).

3. Significant diminution in value. Even if FWS's regulation would not render a property 100% worthless, a substantial loss of value is sufficient to qualify as a taking. A portion of a farm, for example a field or just the apple trees or citrus groves, may be deprived of all economic value, and such a "partial taking" should not be exempted from the requirements of the Fifth Amendment. See *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994). More generally, FWS's regulation effects so great an economic impact and such a defeat of investment-backed expectations as to constitute a taking.

In Austin, Texas, the lack of a clearance letter from FWS stating that no golden-cheeked warblers nor suitable habitat are present on one's property wrests 25 percent from the market value of the property. Mann & Plummer, *Noah's Choice*, *supra*, at 202. The harsh economic impact of not being able to farm sections of one's farm hardly needs elaboration. See *Penn Central Transp. Co.*, 438 U.S. at 127 (a "use restriction" may be a taking if it has "unduly harsh impact upon the owner's use of the property"). And certainly most farmers had no reason to expect, when they acquired their land, that the government would prevent them from the effective use of their farm because its trees attract certain birds or

its fields are home to certain rodents. See *Lucas*, 112 S. Ct. at 2894 n.7 (farmers' reasonable expectations have "a rich tradition of protection at common law").

4. Incidental take permits. The permitting scheme set forth in section 10(a), 16 U.S.C. § 1539(a), does not avert the confiscatory character of FWS's restrictions on "habitat modification." Of course, amici recognize that a permitting scheme does not in itself take property, because its very existence allows for the possibility of obtaining permission to freely use and enjoy one's land. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). But while FWS's regulation does not by itself constitute a Fifth Amendment taking, takings clearly *do* occur through the *operation* of the regulation. ESA's permitting process in no way means that Fifth Amendment takings will not occur. To the contrary, the nature of that process *guarantees* that temporary takings, at least, will be common. The complete absence of any indication that Congress conceived ESA would have these results is highly relevant to the issue of statutory interpretation in this case.

To obtain an incidental take permit, a landowner must submit a habitat conservation plan (HCP), including an environmental impact statement, a description of proposed mitigation techniques and funding for them, and an analysis of alternatives. There follows a public comment period. Thereafter, the Secretary must, before issuing a permit, develop detailed findings as to the nature of the "take," the mitigation efforts and their funding, the impact on listed species, and other concerns. Finally, even after the permit is issued, the property owner must meet extensive reporting requirements. 16 U.S.C. § 1539(a).

This permitting process is "arduous[,] * * * expensive and time-consuming"—taking up to three years. Dolan, *Endangered Species Act Battles for Its Own Survival*, L.A. Times, Dec. 21, 1992, at A1; *GAO Report* at 9. Farmers (and most other landown

ers) are often poorly equipped to engage in the bureaucratic paperwork contemplated by section 10(a). Usually, they must hire both an attorney and biological consultants to assist in preparing the HCP. It is no surprise, then, that as of June 1994 FWS had issued only 31 HCP permits. *GAO Report* at 9. In the unlikely event that a property owner eventually obtains a permit, the affected property will have been tied up for a significant length of time, so a temporary taking will have occurred for which compensation must be paid. *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318-319 (1987). The permitting process is no answer, then, to our showing that FWS's regulation has practical and Fifth Amendment implications that make it thoroughly implausible to suppose that when Congress enacted the ESA it had in mind to prohibit habitat modification on private land.

We do not dispute that preserving the habitat of some animals may be a cause worthy of public attention. But even if Congress had forbidden habitat modification by private individuals (which it plainly did not), private property may not be "pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 112 S. Ct. at 2895. Congress was careful to respect this principle in the ESA; as the court of appeals noted, it imposed "very broad burdens" on the federal government and "relatively narrow ones" on individuals. 17 F.3d at 1466.[7] Thus, the floor manager of the House Bill explained that the Act provided for habitat preservation by individuals only via cooperation by "willing landowners." 119 Cong. Rec. 30162 (Sept. 18, 1973) (statement of Rep. Sullivan). The FWS has ignored that scheme and thereby paved the way for countless compensable takings.

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[7] Notably, the Act's requirements upheld by this Court in *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153 (1978), were imposed on the federal government.

If farmers are to sacrifice their land for the good of the public interest in preserving listed species, the government has a constitutional duty to compensate them. See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (the Framers "designed [the Just Compensation Clause] to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). Congress must be presumed to be aware of this obligation, and if it had intended "take" to encompass habitat modification it would surely have explored the fiscal consequences and would have made its policy judgment clear. Its failure to do so shows what is in any event obvious from the language of the Act: neither "take" nor "harm" may legitimately be stretched to include "habitat modification" on private land.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted.

JOHN J. RADEMACHER
General Counsel
RICHARD L. KRAUSE
Assistant Counsel
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, Illinois 60068
(708) 399-5700

TIMOTHY S. BISHOP
Counsel of Record
MICHAEL F. ROSENBLUM
JEFFREY W. SARLES
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

NANCY N. MCDONOUGH
General Counsel
CAROLYN S. RICHARDSON
Director, Department of Environmental Advocacy
California Farm Bureau Federation
1601 Exposition Boulevard
Sacramento, California 95815
(916) 924-4000

JOSEPH H. HOBSON, JR.
Lien, Hobson & Johnson
4855 River Road N.
Keizer, Oregon 97303
(503) 390-1635

RIDGELY HILL PATE
Legal Director
STEPHANIE CARTER MCMULL
Assistant Legal Director
Texas Farm Bureau
7420 Fish Pond Road
Waco, Texas 76710
(817) 772-3030

DOUGLAS G. CAROOM
SYDNEY W. FALK, JR.
JOHN H. KNOX
Bickerstaff, Heath & Smiley, L.L.P.
98 San Jacinto Boulevard
Suite 1800
Austin, Texas 78701
(512) 472-8021

Counsel for Amici Curiae

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