No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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FWS contends that courts should defer to its supposedly factbound determination that an unoccupied critical habitat designation is "essential to the conservation of the species." But as Judge Jones and five other judges pointed out in dissent from denial of rehearing en banc, "[e]ach issue" in this case turns "on statutory construction, not on deference to administrative discretion or scientific factfinding." Pet. App. 126a. Under the plain language of Section 1533(a)(3)(A)(i), FWS lacks the authority to designate as "critical habitat" land that is not "habitat of such species." And private land that FWS concedes is not inhabited by the endangered species and that the species *cannot* inhabit because it contains only one of the features essential to the species' survival is not "habitat" by any plausible interpretation of the term. No issues of deference or factfinding are involved; the plain meaning of the phrase "any habitat of such species" contradicts FWS's claim that it can designate uninhabitable non-habitat as unoccupied critical habitat.

Absent this Court's intervention the Service's vast expansion of its power through this misreading of the statute will impose massive costs on landowners. It also will subvert the land-use authority of States and their subdivisions, as demonstrated by amicus briefs in support of certiorari filed by 18 States and by local governments—including the Louisiana Parish whose development plans have been thwarted by the designation here. Thirteen amicus briefs from a wide variety of business and governmental interests attest to the great importance of the questions presented.

Respondents refute none of our arguments showing that this Court's review is warranted.

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions, In Conflict With The Ninth Circuit.

1. Respondents cannot defend the Fifth Circuit's holding that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. The ESA plainly does impose a habitability requirement by restricting FWS's designation power to "habitat of [listed] species which is * * * critical habitat." 16 U.S.C. § 1533-(a)(3)(A)(i); see Pet. 15-17. CBD ignores this statutory text, and the Service (at 21) buries it deep in its argument, flouting the cardinal principle that "[s]tatutory interpretation, as [this Court] always say[s], begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016).

FWS then gives away the case by admitting (at 22) that "'habitat' and 'critical habitat'" are "distinct concepts." It follows that designated areas must be "habitat" because the ESA requires the presence of *both* "habitat" *and* "critical habitat" in designated areas.

FWS argues (at 22) that an area can be "'habitat'" without being "currently inhabit[ed]." But the plain meaning of "habitat" requires that the area allow the species to "'naturally liv[e] and gro[w].'" Pet. 16 (quoting WEBSTER'S THIRD). Habitat need not be currently inhabited; but *uninhabitable* land is not "habitat."

The Service claims that we "rely" on its "observation" that "Unit 1 does not currently contain [a]ll three of the primary constituent elements (PCEs) of frog habitat"—a requirement that FWS says (at 22) comes from the statutory definition of "occupied critical habitat." Our argument is more straightforward: It is undisputed that the frog's survival depends on "fire-

maintained, open-canopied" forests that Unit 1 lacks. 77 Fed. Reg. 35129. If the frogs were moved there, they would die. No reasonable interpretation of "habitat" includes such land.

FWS asserts (at 23) that it "never concluded that Unit 1 is not 'habitat' or is 'uninhabitable.'" But it indisputably did so. FWS concluded that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat" and that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." 77 Fed. Reg. 35129, 35135. The Fifth Circuit observed that FWS "found that" Unit 1 is "currently uninhabitable." Pet. App. 24a. The dissents agreed that "Unit 1 is uninhabitable." Pet. App. 128a (Jones, J.); see Pet. App. 48a (Owen, J.). The "factual record" contradicts FWS's newly invented claim. U.S. Br. 22.[1]

2. FWS's contention (at 21-22) that we did not preserve our habitability argument is "easily disposed of." Pet. App. 139a (Jones, J.). "[T]he landowners' argument that the ESA requires a species' critical habitat to be habitable" is "well documented." *Ibid.*

The panel expressly considered and rejected our "argu[ment]" that FWS's designation "'exceeded its statutory authority'" "because Unit 1 is not currently habitable," holding that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 21a, 23a. Indeed, CBD concedes (at 10) that the panel decided "Petitioners' argument that unoccupied critical habitat must be 'currently habitable.'" The dissents

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[1] CBD's argument (at 12) that Unit 1 qualifies as "former or historical 'habitat'" violates the plain language of the ESA, which requires that designated areas be "habitat," not *former* habitat. See Pet. 20.

refuted that holding head-on. Pet. App. 65a (Owen, J.) (criticizing the majority for "re-writ[ing]" the ESA by permitting FWS "to designate an area as 'critical habitat'" "even though the area is uninhabitable"); Pet. App. 131a-142a (Jones, J.) ("the ESA contains a clear habitability requirement").

Thus, our "preservation of the habitability issue is anything but inadequate." Pet. App. 139a (Jones, J.). And the fact that the issue "was addressed by the court below" in any event preserves it for review. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The issue is case-dispositive and properly presented.

3. Alternatively, respondents also fail to justify the designation under the statutory requirement that unoccupied critical habitat must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). They call such designations "factbound" and "within the bounds of *Chevron*." U.S. Br. 16-18; see CBD Br. 12. But *Chevron* "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2708 (2015).

Respondents' reading clashes with the statutory definition of "occupied" "critical habitat," which requires "those physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). "[A]reas" that lack "those * * * features" that are "essential to the conservation of the species" cannot possibly be "essential for the conservation of the species." *Id.* § 1532(5)(A). Respondents' contrary interpretation is absurd, for it would make it *easier* to designate areas as critical habitat if the species *does not* and *cannot* live there. "[T]he test for unoccupied critical habitat is designed to be *more* stringent than

the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

No reasonable interpretation of the phrase "essential for the conservation of the species" includes Unit 1, which "plays no part in the conservation" of the frog and "will not support" the frog in the future. Pet. App. 48a (Owen, J.). To sidestep this commonsense conclusion, FWS misrepresents (at 20) that it is merely "likely" that Unit 1 will "require modifications to the surrounding uplands" to support the frog. But, as FWS admits (at 6), it found that "three" features are "needed" for the frog to survive and that only "one" of those features exists on Unit 1. 77 Fed. Reg. 35131.

FWS's further claim (at 20) that we do "not disput[e]" that it is "readily feasible" to convert Unit 1 into habitat is astonishing. Unit 1 *cannot* serve as frog habitat *unless* petitioners:

- chop down their "closed-canopy" "loblolly" trees and plant "open-canopied" "longleaf" pines;
- burn Unit 1 with "frequent fires" to "support a diverse ground cover of herbaceous plants" despite "acknowledge[d]" "landowner concern" and "negative impacts" of such fires;
- terminate "on-going timber management of the site, which precludes burning or planting longleaf pine trees";
- allow "60 percent" or "100 percent" of Unit 1 to be "managed" as "refuge for the frog," at a cost of "$20.4 million" or "$33.9 million" in "lost development value"; *and*
- agree "voluntar[ily]" to "frog translocations."

77 Fed. Reg. 35123-24, 35126, 35129, 35141. "[T]here is no evidence" that these "substantial alterations" "will,

or are likely to, occur," confirming that Unit 1 is "not 'essential' for conservation." Pet. App. 48a (Owen, J.).

4. Other ESA provisions, which respondents ignore, confirm that the Fifth Circuit misinterpreted the ESA's critical habitat provisions. Pet. 18-20. Respondents are silent too on the legislative history documented in the petition (at 21). Our un-rebutted arguments based on statutory structure and context leave no doubt that the designation is unlawful.

5. FWS acknowledges (at 31 n.10), but never responds to, our argument (at 21-23) that the ESA must be read narrowly to avoid significant constitutional doubts that the designation raises under the Commerce Clause and Tenth Amendment. It also is conspicuously mute about the federalism concerns discussed in the petition and reinforced by amicus briefs of 18 States, St. Tammany Parish, San Juan County, Utah, and the San Luis and Delta-Mendota Water Authority, among others.

The Service (at 32) thinks it enough to avoid Commerce Clause concerns that the panel concluded that "'the ESA is an economic regulatory scheme' and that 'designating critical habitat is an essential part'" of that scheme. But the Government said the same of the individual mandate. See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 548-549. FWS argues (at 32) that "there is no circuit split" while ignoring considerable dissent. See *Rancho Viejo, LLC* v. *Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J.); *id.* at 1158 (Sentelle, J.); *GDF Realty Investments, Ltd.* v. *Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J.); *Gibbs* v. *Babbitt*, 214 F.3d 483, 486 (4th Cir. 2000) (Luttig, J.). And it claims (at 33) that this case is a "poor vehicle" to consider our Commerce Clause argument because a designation is "not the direct regulation of petitioners' conduct." But,

as FWS and the panel noted, the designation "'immediately'" reduced Unit 1's value. Pet. App. 13a. The time to question the constitutionality of a designation is when, as here, FWS issues a "Final Rule" (77 Fed. Reg. 35118) designating the land.[2]

Because the designation tests the boundaries of federal powers under the Commerce Clause and Tenth Amendment, the constitutional avoidance canon requires a narrow reading of the ESA. Pet. 21-23. The Fifth Circuit should have "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation." *SWANCC*, 531 U.S. at 174.[3]

5. The panel's ruling "conflict[s] with *all* relevant precedent." Pet. App. 149a (Jones, J.). FWS concedes (at 27) that the Ninth Circuit has twice held that the ESA imposes a "more onerous" and "more demanding standard" for the designation of unoccupied critical habitat than for occupied critical habitat. FWS's suggestion (at 26) that the Fifth Circuit "nowhere stated that it was 'impos[ing] a *lower* standard on the designation of unoccupied critical habitat'" is nonsense. The Fifth Circuit held that "*unoccupied* land" need not

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[2] Contrary to CBD's suggestion (at 27), FWS identified no interstate commerce in the frog. Nor does CBD claim that anyone travels to Unit 1 to view the frog, which would be trespass on private land where the frog does not live and cannot survive.

[3] CBD (at 26) tries to distinguish *SWANCC* as a "Clean Water Act" case decided on "statutory" grounds. As in *SWANCC*, our argument is statutory, and the avoidance canon applies because FWS's interpretation raises significant constitutional concerns and is not compelled by "unmistakably clear" "language of the statute." *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002). CBD's inability (at 26) to cite *statutory* language proves that the ESA does not overcome the canon's clear statement rule.

be "habitab[le]" but "*occupied* land" must be habitable. Pet. App. 23a. That is a *lower* standard that conflicts with Ninth Circuit precedent. Pet. 24-25.

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

1. The Service does not deny that designations impose significant costs on private landowners with no quantifiable benefits to listed species. See Pet. 26-30.[4] Nor does it acknowledge *any* of the 13 amicus briefs in support of the petition that lay bare the extraordinary, nationwide importance of this case.

2. Respondents identify no limiting principle to the Fifth Circuit's ruling. FWS denies (at 20) that the Fifth Circuit held that FWS may designate an area if it contains just "one of the 'physical or biological features' essential to the conservation of the species." But "that is precisely the import of its holding." Pet. App. 68a-69a (Owen, J.). The Fifth Circuit held that, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the [frog's] conservation." Pet. App. 30a-31a n.20. That holding allows FWS to designate any uninhabitable land as critical habitat by identifying one "essential" "featur[e]," such as "trees with potential nesting platforms," "upland areas," and "natural light regime[s]"—"features" that FWS "routinely lists" in its designations. Pet. App. 155a-156a (Jones, J.).

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[4] Contrary to CBD's assertion (at 30), the Economic Analysis only pointed to speculative "potential benefits" from designation, all of which "derive[d]" from "the avoidance of development in Unit 1." Final Econ. Analysis at 5-2, ¶ 112. And in its Final Rule, FWS decided that all benefits were "best expressed" in unquantifiable "biological terms." 77 Fed. Reg. 35127.

And FWS piles on limits to challenging a designation based on a single habitat feature. FWS claims (at 21) a "scientific consensus" regarding the "rarity" of the ponds. And it says landowners challenging designations must overcome "particular deference" to such "scientific determination[s]," which are subject to a "narrow" standard of review. U.S. Br. 17. CBD even claims (at 12) that this "highly fact-specific inquiry" is "not appropriate for review by this Court." Thus a designation of non-habitat, based on the presence of just one of multiple features that an endangered species must have to survive, becomes effectively unchallengeable. Landowners have no judicial recourse under these "toothless" standards, making FWS's designation power "virtually limitless." Pet. App. 142a, 155a (Jones, J.).

3. FWS promulgated a new regulation that mirrors the standards it used to designate Weyerhaueser's land and relies on the decision in this case to justify the rule. Pet. 30-31. Respondents suggest (U.S. Br. 19 n.6; CBD Br. 17) that pending challenges to this regulation reduce the importance of certiorari. But as FWS explains (at 18 n.6), those challenges "have repeatedly been stayed," at least through February 2018, and FWS has not answered the complaints or moved to dismiss. FWS's speculation about a potential settlement of the rule challenge should be given no credence at all when in this case it has vigorously maintained its view that it can designate uninhabitable non-habitat based on the presence of a single habitat feature, and when the rule challenge has been stayed until after this petition is ruled on by this Court. Notably, the same States that have challenged the new rule have filed an amicus brief in support of review here. Br. Amicus Curiae of Alabama and 17 Additional States, at 1.

As FWS admits (at 19 n.6), the rule challenges "do not affect" the "designation of critical habitat for the dusky gopher frog." Nor do they reduce the compelling need for review in this case. FWS's designation violated the *statute*, which no regulation can cure. The Court should grant certiorari to resolve this important statutory issue now, in this concrete, particularized context. Reversal here also would effectively decide the rule challenges. Pet. 30-31.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

The Service hardly defends the panel's ruling that FWS decisions *not* to "exclude any area from critical habitat" are judicially unreviewable. 16 U.S.C. § 1533(b)(2). FWS maintains (at 28) that "the statute affords 'no meaningful standard against which to judge the agency's exercise of discretion,'" but that is plainly wrong. The statute provides that areas may be excluded if "the benefits of such exclusion outweigh the benefits of [designation]." 16 U.S.C. § 1533(b)(2). The ESA thus requires agency cost-benefit analysis, which courts routinely review for abuse of discretion under the APA. See Pet. 32-33. Indeed, CBD admits (at 19) that courts may review this analysis when FWS "deci[des] to exclude an area from a designation." The same review of the same analysis should occur when FWS decides not to exclude the area. FWS also argues (at 29) that the ESA does "not impose any 'standards for when areas *must* be excluded from designation,'" but that simply shows that FWS's decision is discretionary. Review for abuse of *discretion* answers FWS's objection.

Not only do respondents' arguments fail under the "'strong presumption' favoring judicial review of administrative action" (*Mach Mining*, 135 S. Ct. at 1651), but they lead to absurd results. Under their reasoning, it is insignificant that FWS found up to $34 million in landowner costs and only unquantifiable "biological" benefits from designating uninhabitable land. Nor would it matter if FWS found $1 trillion in costs or declined to exclude the island of Manhattan from unoccupied critical habitat. Courts would be forced to accept that FWS appropriately weighed costs and benefits, a result that is "insupportable and an abdication of [courts'] responsibility to oversee, according to the APA, agency action." Pet. App. 162a (Jones, J.).

Respondents fail to explain away the conflict with *Bennett* v. *Spear*. There, this Court stated that FWS's "ultimate decision" under Section 1533(b)(2) "is reviewable" for "abuse of discretion" and explained that an "objective" of the ESA "is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 172-173, 176-177. FWS (at 30) calls this unanimous Court's "reasoning" a "passing *dictum*." But it was "holding." Pet. App. 161a (Jones, J.). Moreover, *Bennett* provides this Court's *only* statement on reviewability under Section 1533(b)(2), which the panel "never confront[ed], much less distinguish[ed]." *Ibid.* Because the panel "decided an important federal question in a way that conflicts with relevant decisions of this Court" (Sup. Ct. R. 10(c)), review of the second question presented by the petition is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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