No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc hearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Question:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

LIST OF ALL PARTIES

Petitioners here are Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC. Weyerhaeuser Company is filing a separate Petition for Writ of Certiorari.

Respondents are United States Fish and Wildlife Service; Jim Kurth, acting director of the United States Fish and Wildlife Service; United States Department of Interior; and Ryan K. Zinke, Secretary of the Department of Interior.

Respondent Intervenors are Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations,

> and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act provides in pertinent part:

> The term "critical habitat" for a threatened or endangered species means:
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:

> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

INTRODUCTION

The Fifth Circuit's decision to authorize the designation of non-habitat as critical habitat is unprecedented in its potential to expand federal authority over local land and water use. It vests federal agencies with virtually limitless power to regulate any and all areas of the Nation based solely on the government's bald assertion that the regulated areas are "essential to the conservation of a protected species." This is so, even when the designated area is unsuitable and inaccessible as species habitat. Moreover, the government may exercise this authority with impunity because under the Fifth Circuit decision the government's designation of critical habitat is unreviewable in a court of law. This alone is sufficient to warrant review by this Court. But there is more.

The Fifth Circuit decision effectively rewrites the statutory text. It conflicts with all relevant judicial decisions. It ignores controlling Supreme Court precedent. And, it raises irreconcilable constitutional conflicts.

This Court should grant review to address four issues of national importance:

First, this Court should determine whether private property that is unsuitable as habitat and does not contribute to the conservation of a listed species meets the definition of critical habitat under the Endangered Species Act.

Second, this Court should resolve the conflict the Fifth Circuit created with other lowers courts that

universally hold the designation of unoccupied critical habitat requires a more rigorous standard than the designation of occupied critical habitat.

Third, this Court should resolve the conflict between the Fifth Circuit decision and this Court's opinion in *Bennett v. Spear*, 540 U.S. 154 (1997), that held the decision to not exclude an area from critical habitat is reviewable for an abuse of discretion under the Administrative Procedure Act.

And, fourth, this Court should review this case to resolve the constitutional conflict created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources even if they have no connection with a protected species.

STATEMENT OF THE CASE

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." *Id.* at 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at A-4. At the time of listing, however, it was known to exist only in Harrison County, Mississippi. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the

Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat. *Id.* at 31387, 31395. At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." 75 Fed. Reg. 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County. *Id.*

In designating critical habitat, the Service searched for additional locations . . . that the frog could occupy. *Id.* The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* And that, "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 proposed "units" for designation as critical habitat in Mississippi. All within the DeSoto National Forest. *See id.* at 31396-31399. These included, "[f]ederal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank." *Id.* at 31394. Four of the 11 units were completely or partially occupied by the frog at the time of the Proposed Rule, whereas the remaining units were unoccupied. *See id.* at 31396-31399. Significantly, however, *all* of the unoccupied areas

were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.*

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog, but only if Unit 1 was restored and the frog were transferred there. *Id.* at 59783.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is entirely owned by private parties (the Petitioners before this Court) who intend to harvest and build on the site. Pet. App.at D-19, 20; *see also* March 2, 2012, Public Comment on Behalf of P&F Lumber, Etc. (Pet. App. at E-2; *id.* at E-1) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the

Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4 (Pet. App. at F-1) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. Pet. App. at A-5; *see also* November 23, 2011, Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (Pet App. at F-1 – F-2). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Pet. App. at B-5; *see also* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35123 (June 12, 2012). The Service expressly acknowledged it cannot compel the Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not "establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final Rule, 77 Fed. Reg. 35118. Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35118. The Service identified three "primary constituent elements" (PCEs), which are defined by regulation as "the principal biological or physical constituent elements [within a defined area] that are essential to the conservation of the species." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

These three essential PCEs are:

(1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;

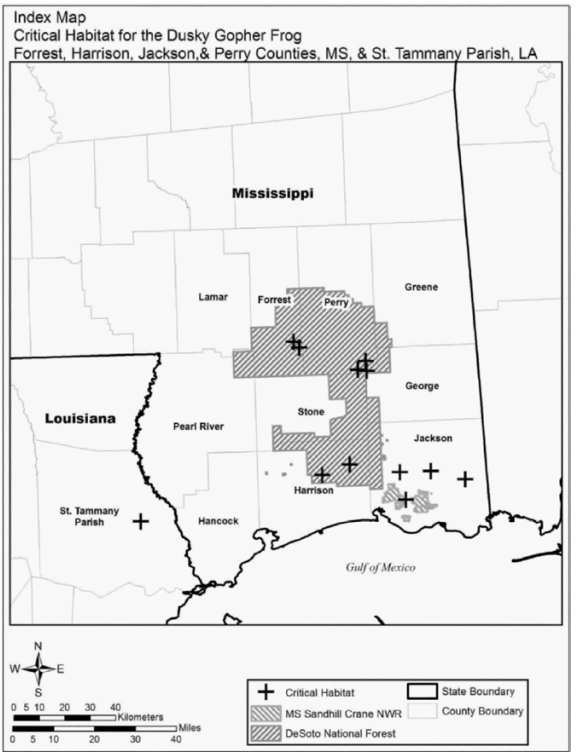
(2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and,

(3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

The Service's standards for determining critical habitat units confirm what common sense suggests—that the essential PCEs must all be present within each unit. The Service explained that its unit boundaries for the dusky gopher frog were determined by locating the frog breeding sites and buffering these locations by a radius of 621 meters. *Id.* at 35134. The

Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*." *Id.* (emphasis added). Eleven of the twelve units designated as critical habitat contain all three PCEs. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps *only one* of the PCEs and therefore lacks two of the elements essential to conserve the gopher frog.



Id. at 35146. As viewed on a map, Unit 1 in St. Tammany Parish is curiously distant and isolated from the other units. Whereas the other 11 units are

in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer catastrophic events. *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Under the ESA, the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a

[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) (Final Economic Analysis).

significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation could severely limit, or even foreclose entirely, such development.

"A critical habitat designation provides protection for threatened and endangered species by triggering what is termed a Section 7 consultation in response to actions proposed by or with a nexus to a federal agency." *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004). Under Section 7(a)(2) of the Endangered Species Act (16 U.S.C. § 1536(a)(2)), each federal agency must consult with the Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." Accordingly, any actions undertaken on Unit 1 by the landowners having a "federal nexus," including actions requiring a federal permit, would trigger a Section 7 consultation.

Because of the uncertainty concerning what type of development might ultimately occur on Unit 1, whether a federal nexus would arise, and what types of conservation measures would be required in the event of a Section 7 consultation, the Economic Analysis considered three possible scenarios:

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise

present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.

- In the second scenario, development requires a federal wetlands permit and therefore triggers a Section 7 consultation. The Service requires 60 percent of Unit 1 to be set aside and managed for the conservation of the dusky gopher frog, allowing the remaining 40% to be developed. This results in lost development value of $20.4 million over 20 years.

- In the third scenario, a Section 7 consultation is triggered and "the Service . . . recommend[s] complete avoidance of development with [Unit 1] in order to avoid adverse modification of critical habitat." This results in lost development value of $33.9 million over 20 years.

Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87).

The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years. *See* Final Rule, 77 Fed. Reg. at 35140. Therefore, under either the second or third scenario, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units are already actively managed for the recovery of the frog. *See* 75 Fed. Reg. 39396-99 (July 8, 2010).

Despite the heavy and lopsided economic impact attributable to the designation of Unit 1 that contains neither dusky gopher frogs themselves nor the essential habitat features for their continued existence, the Service could not identify any definite direct benefits to the frog from designating Unit 1. The Service's economic analysis found only ancillary benefits, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Landowners—instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

The Landowners filed separate suits against the Federal Defendants challenging the Final Rule as to Unit 1. Pet. App. at B-12. These lawsuits sought identical declaratory and injunctive relief, and were consolidated in the district court. *Id.* The Center for Biological Diversity and the Gulf Restoration Network intervened as defendants. *Id.* The district court found the Landowners had standing but rejected their challenge that Unit 1 did not qualify as critical habitat even though it was not habitable and provided no

conservation benefit to the species. *Id*. at B-2, 46. The court described the Service's critical habitat designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id.* at B-25, 27, 37, and 39. Nevertheless, the court deferred to the agency decision and affirmed the Final Rule. *Id.* at B-46, 47.

The Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. In reaching that result, the panel majority concluded the Service's designation was entitled to *Chevron* deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable will not be made in the foreseeable future, if ever. *Id.* at A-17.

In addition to their statutory claim that critical habitat must be actual habitat, the Landowners challenged the designation under the Commerce Clause. *Id.* at A-8. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the Endangered Species Act is a constitutionally permissible market regulatory scheme. *Id.* at A-39 – A-47. Next, the majority rejected the argument that the Service should have excluded Unit 1 because of the disproportionate economic impacts the Landowners will suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and "unreviewable." *Id.* at A-35 – A-39. Lastly, the court held critical habitat designations are not subject to the

National Environmental Policy Act. *Id.* at A-48 – A-50.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id.* at A-51. More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id.* In fact, Judge Owen continued, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id.* Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id.*

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id.*, Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not

> probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Id. at A-51, 52.

The full court rejected the Landowners' motion for *en banc* review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA. "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by *nor connected in any way* to the [dusky gopher frog]." *Id.* at C-4 (emphasis added). The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners $34 million in future development." *Id.* On the merits, the dissent concluded the panel decision was wrong on three counts: (1) that the ESA and its regulations have no habitability requirement; (2) that the designated area is essential to the conservation of the species in the absence of those features essential to the species survival; and (3), that the decision to not exclude Unit 1 from critical habitat is discretionary and therefore judicially unreviewable. *Id.* at C-4, 5. The dissent was unequivocal, "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at C-4.

From the panel decision and the denial of en banc review, the Landowners submit this Petition.

REASONS FOR GRANTING THE PETITION

I

This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act

For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species. "The panel decision, over Judge Owen's cogent dissent [], approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the 'shy [dusky gopher] frog.'" Pet. App. at C-4. This designation of non-habitat as critical habitat conflicts with the plain meaning of the ESA and the intent of Congress.

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at C-14 ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he

kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The statutory definition of critical habitat is consistent with the term's ordinary meaning. Under the ESA, critical habitat means:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

Subsection (i) describes occupied *habitat* while subsection (ii) describes unoccupied *habitat*. This is clear from another provision of the ESA that states:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added).

This language is clear and determinative. Under the statutory text, critical habitat is a subset of a species' larger habitat.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its

legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985).

Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here. The plain meaning of §1533(a)(3)(A)(i)–(ii) is that "critical habitat" must be, at a minimum, "habitat"—a place naturally usable and accessible to the species.

Contrary to the unprecedented position taken by the Service in this case, the agency's own regulations support the plain text of the ESA. Federal regulations implementing Section 7 of the ESA "impose[] requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added). Because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

> absurd—is to enforce it according to its terms."

Lamie, 540 U.S. at 534 (citations omitted).

In this case, it is the government's reading of the statutory text, contrary to its plain language, that is absurd. The Service and the panel majority ignored the limiting text of 16 U.S.C. § 1533(a)(3)(A)(i)–(ii) and focused exclusively on that portion of the definition of critical habitat that authorizes the Secretary to designate areas "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). But the Secretary's authority is not without bounds. As Judge Owen stated, the word "essential" vests the Service with significant discretion in determining which areas are necessary for the conservation of a species, "but there are limits to a word's meaning and hence the Service's discretion." Pet. App. at A-59. In this case, the Service's interpretation of essential "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." *Id.* Therefore, as this Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id.* (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Even if the Secretary may deem an area "essential for the conservation of the species," that falls outside the species' actual habitat, the Secretary erred when he designated Unit 1 as critical habitat in this case because that area provides no conservation benefit to the dusky gopher frog whatsoever. The land

is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and, it does not support the existence or conservation of the species in any way. *Id*. at A-51, 52. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory (and regulatory) text.

Unit 1 provides no conservation benefit to the dusky gopher frog. Those benefits are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi.

In effect, the Service and the panel majority wrote "habitat" and "essential" out of the ESA. To uphold the intent of Congress, as expressed in the plain language of the Act, this Court should grant the Petition for a Writ of Certiorari to determine whether private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, constitutes critical habitat under the ESA.

II

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat

The ESA defines critical habitat in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The first subsection (i) defines "occupied" critical habitat in terms of the physical and biological features the area must possess. The Service calls these features primary constituent elements, or PCEs. The Service identified three PCEs for the dusky gopher frog:

> (1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;
>
> (2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and
>
> (3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

All three of these PCEs must be present for the frog to survive. Eleven areas designated as critical

habitat for the dusky gopher frog contain all three PCEs; Unit 1 does not. *Id.* at 35146. That unit contains only one (if any) of the required PCEs—ephemeral ponds. *Id.* Unit 1 does not contain the upland features necessary for the frog's survival. *Id.*

The second subsection (ii) defines "unoccupied" habitat in terms that require the Secretary to determine if the area is "essential for the conservation of the species" before the Secretary may designate the area as critical habitat.

According to Judge Jones, and the 5 other judges who joined her dissent to the denial of rehearing en banc, Congress established a separate, stricter standard for designating unoccupied areas as critical habitat for the express purpose of limiting the agency's historically overbroad critical habitat designations. "When Congress took up the critical habitat issue in 1978, members of both houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat." Pet. App. at C-27. Therefore, Congress "took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions." *Id.* at C-27, 28. Thus, "Congress intentionally curtailed unoccupied critical habitat designation." *Id.* at C-28.

In addition to the legislative history, the dissent surveyed all of the relevant case law and cited a decision by the Ninth Circuit wherein the court held:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010).

Later, that court reiterated in *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (cert. denied), that the unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat."

As the Jones' dissent observed, the district courts have come to the same conclusion:

> *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the

> species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

Pet. App. at C-29, 30.

Every court to consider the matter holds that the showing the Secretary must make to designate unoccupied areas as critical habitat is *more* onerous than designating occupied areas that contain all of the PCEs essential for the species' survival. However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the PCEs. This approach makes it *less* onerous to designate unoccupied areas as critical habitat contrary to the intent of Congress and the relevant case law.

But the district and circuit courts ignored this argument, perhaps because there is no credible response. The designation of Unit 1, based on the presence of a single PCE, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does

not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." Pet. App. at C-30). Accordingly, "the panel majority misconstrue[d] the statute and create[d] a conflict with *all* relevant precedent." *Id*.

To resolve this conflict, this Court should grant the Petition for a Writ of Certiorari.

III

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear*

Before the Secretary of Interior may designate critical habitat, the Secretary must consider the economic and other impacts the designation would have on any particular area:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any

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

16 U.S.C. § 1533(b)(2) (emphasis added).

The Secretary completed an economic analysis of Unit 1 as critical habitat, but the weighing of benefits was virtually nonexistent and the conclusion that the benefits of inclusion outweighed the impacts on the landowners was clearly arbitrary. "One shocking fact is that the landowners could suffer up to $34 million in economic impact." Pet. App. at C-39. "Another shocking fact is that there is virtually nothing on the other side of the economic ledger." *Id*. But more importantly, the analysis shows no biological benefits to the species to balance the harm to the landowners. "The report ends—abruptly with no weighing or comparison of costs and benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog." *Id*. at C-40.

Notwithstanding these deficiencies, the Fifth Circuit held the Secretary's decision to not exclude Unit 1 is subject to the sole discretion of the Secretary and is not reviewable in a court of law. But that

decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, wherein this Court expressly held the Secretary's decision is judicially reviewable for abuse of discretion under the Administrative Procedure Act:

> It is true that . . . except where extinction of the species is at issue, "[t]he 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." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion [under the APA] does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. at 172.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141.

With a potential $34 million impact to the landowners on one side and no articulated benefit to the species on the other side, the Secretary's decision defies reason and is arbitrary and capricious. The decision "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). This decision calls out for judicial review which is required by this Court in *Bennett v. Spear*.

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the Fifth Circuit and this Court as to the reviewability of agency action to not exclude an area from critical habitat under the ESA.

IV

This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species

Strict federal regulation applies to critical habitat, often limiting or precluding ordinary land or water use. In this case, the government designated as critical habitat for the dusky gopher frog over 1,500 acres of private land that may cost the landowners up

to $34 million in lost value, although it is undisputed that the dusky gopher frog cannot inhabit the designated area. Pet. App. at C-4. The panel majority held Unit 1 may be designated critical habitat for the dusky gopher frog because it purportedly contains one of three features—ephemeral ponds—required for the frog's survival, even though Unit I will likely never provide sustainable habitat for the species. *Id*. at A-78. That decision, if allowed to stand, establishes a dangerous precedent authorizing the federal government to designate any area of land or water as critical habitat so long as it (1) contains a single feature characteristic of species habitat and (2) provides the potential, after modification, to sustain the introduction or reintroduction of a species. The decision effectively grants the federal government unlimited power to regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power.

In a thirty-two page dissent from the denial of en banc review, six judges on the Fifth Circuit argued the panel decision gave the government "virtually limitless" power to designate critical habitat. *Id*. at C-36. The dissent called for further review, remarking that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id*. at C-5.

Judge Owen's dissent in the panel opinion expressed similar concerns. According to Judge Owen, the majority opinion interprets the ESA to impose onerous restrictions on private land use even though the land is not occupied by the species "and

has not been for more than fifty years." *Id.* at A-51. Moreover, the land "is not near areas inhabited by the species;" the land "cannot sustain the species;" and the land "does not play any supporting role in the existence of current habitat for the species." *Id.* at A-51, 52. This will lead, Judge Owen warns, to the designation of "vast portions" of the Nation as critical habitat subject to strict federal control. *Id.* at A-52.

Judge Owen observed the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." *Id.* at A-58, 59. The majority opinion is, therefore, unreasonable.

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of [the Act].

Id. at A-57.

Using less charitable terms, the en banc dissent stated: "This kind of interpretation is, frankly,

execrable and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition." *Id.* at C-31.

To underscore the unprecedented scope of the power granted the federal government under the Fifth Circuit decision, the en banc dissent provided a sampling of physical and biological features the U.S. Fish and Wildlife Service identifies as essential to the conservation of protected species. These include, "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and a "natural light regime within the coastal dune ecosystem." *Id.* at C-37. According to the dissent: "These are just a few of the myriad of commonplace 'essential physical and biological features' the Service routinely lists in its critical habitat designations." *Id.* Thus the dissent cautioned: "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* Under the majority opinion, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id.* In the end, the majority opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id.*

This power is indeed "unprecedented and sweeping." The government recently codified the *Markle* single-feature standard in a new rule redefining critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat. 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016). Under this rule, the *Markle* decision, authorizing nonhabitat as critical habitat, is now a rule of general applicability establishing a nationwide precedent. This is troubling because it raises a constitutional conflict, in two ways. First, federal regulation of local land and water resources, like Unit 1, that have no connection to a protected species, exceeds the commerce power on which the Endangered Species Act is based. And, second, federal regulation of local land and water use unduly impinges on the power of the states in violation of the Tenth Amendment to the U.S. Constitution.

Enforcement of the ESA to protect species found on private, state, and local lands and waters creates a line-drawing problem that implicates the outer boundaries of constitutional power. Although many challenges have been brought to test the constitutionality of the ESA, as applied to particular species,[2] this Court has never addressed the issue. However, this Court did address a similar line-drawing problem with respect to federal regulation of land and water resources under the Clean Water Act wherein this Court acknowledged such regulation raised constitutional concerns and held the challenged

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[2] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

statutory provisions should be read to avoid a constitutional conflict.

In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Corps asserted jurisdiction over remote water bodies that had no connection to any navigable-in-fact waters subject to regulation under the Clean Water Act, as authorized by the Commerce Clause. This Court rejected the Corps' interpretation of the Act, explaining that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172 (citing *Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id.* at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id.* *See United States v. Morrison*, 529 U.S. 598, 613

(2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012).

This Court could have been talking about this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. The only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*, that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause, the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

This Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends

to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id.* at 174. That impingement created a constitutional conflict. It is no wonder that 15 states filed an amicus brief in support of Petitioners and en banc review in this case. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should grant the Petition for a Writ of Certiorari and hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

CONCLUSION

The essentially boundless authority granted the federal government by the Fifth Circuit, to control local land and water use under the guise of species protection, conflicts with a plain reading of the Endangered Species Act and the lower courts interpreting the Act. It also conflicts with this Court's decisions in *Bennett* and *SWANCC*, and long-held constitutional precedent. This Court should therefore grant the Petition for a Writ of Certiorari and resolve these conflicts.

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Respectfully submitted,

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