Nos. 17-71 and 17-74

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

MARKLE INTERESTS, L.L.C., ET AL.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Petitions for Writs of Certiorari To The United States Court Of Appeals For the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS and AMERICAN FOREST RESOURCE COUNCIL SUPPORTING PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

Amicus American Forest Resource Council ("AFRC") is an Oregon non-profit corporation with its principal place of business in Portland, Oregon. AFRC has no corporate parents, subsidiaries or affiliates and does not issue stock. No publicly-held company has a ten percent or greater ownership of AFRC.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and account for 80% of all homes constructed in the United States.

Many of NAHB's members, such as Petitioners, are private landowners with reasonable expectations regarding the lawful use of their property. Since a predominant number of the species protected under the Endangered Species Act ("ESA") have the major share of their habitat on private land, critical habitat decisions significantly impact NAHB's members.

The American Forest Resource Council ("AFRC") is a regional trade association whose purpose is to advocate for sustained-yield timber harvests on

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Oregon, and Washington. Many of AFRC's members have their operations in communities adjacent to federal and state forestlands, and the management of these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves.

AFRC's members, and the communities in which they work, have been affected by reductions in timber harvest resulting from critical habitat designations, on federal, state, and private land, for species such as northern spotted owl, marbled murrelet, and Canada lynx. AFRC members' timber contracts have been suspended, slowed or cancelled as a result of overbroad critical habitat designations. Overbroad designations also threaten AFRC member interests in forest health, federal timber supply, and private forest land because those designations impede forest management projects that promote forest health and provide timber supply.

SUMMARY OF ARGUMENT

The Fifth Circuit upheld the Fish and Wildlife Service's ("the Service") designation of Unit 1 as unoccupied critical habitat, even though the Service recognized that the area was not suitable habitat for the gopher frog. By deferring to the Service's designation, the court below failed to heed the strict statutory standards on the designation of critical habitat.

Consequently, by allowing the Service to employ such broad authority, the Fifth Circuit's decision will have enormous economic impacts on industries like home building and forestry that rely on the use of private and public lands.

Finally, the Fifth Circuit found that it could not review the Service's decision not to exclude the Petitioner's property from its critical habitat determination because, in its view, Congress failed to provide a standard by which to review the Service's decision. The Fifth Circuit's holding conflicts with this Court's decision in *Bennett v. Spear,* 520 U.S. 154 (1997), and raises serious constitutional questions under Article I.

For these reasons, *amici* respectfully request that the Court grant *certiorari*.

ARGUMENT

I. THE COURT OF APPEALS' APPROACH IMPROPERLY APPLIES SCIENTIFIC DEFERENCE TO A LEGAL QUESTION.

The Fifth Circuit's decision is at odds with the structure of the Endangered Species Act ("ESA"). As such, it represents a troubling expansion of the Service's narrow delegated authority, essentially authorizing the Service, though the vehicle of *Chevron* deference, to rewrite the statute. *Certiorari* is warranted to establish a uniform standard for critical habitat designation that is a permissible construction of the statute.

The ESA allows the Service to designate critical habitat that is either "occupied" or "unoccupied" by the listed species. 16 U.S.C. § 1532(5)(A). Occupied habitat must include "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection[.]" 16 U.S.C. § 1532(5)(A)(i)[2]. The features in clause (I) are called primary constituent elements or PCEs by the Service. *See Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior,* 344 F. Supp. 2d 108, 120-21 (D.D.C. 2004); 50 C.F.R. § 424.12(b)(5) (2012). On the other hand, unoccupied critical habitat may be designated only "upon a determination by the Secretary that such areas are essential for the

[2] *Cf.* 16 U.S.C. § 1532(5)(C)("Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.").

conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

Occupied critical habitat is a subset of the range of the species at the time of listing; it includes "specific areas within the geographical area occupied by the species…." 16 U.S.C. § 1532(5)(A)(i). Similarly, unoccupied critical habitat is a subset of the area outside the species' range; it includes "specific areas outside the geographical area occupied by the species…." 16 U.S.C. § 1532(5)(A)(ii). Despite this parallel structure, subsection (ii) does not recite the specific requirements that are listed for occupied critical habitat. Instead, the reference to "essential" is legislative shorthand. And the use of "specific areas" in both sections carries with it the "cluster of ideas" embodied in the definition of occupied habitat. *Cf.*, e.g., *Air Wisconsin Airlines Corp. v. Hoeper,* 134 S. Ct. 852, 861-62 (2014). That is, both types of critical habitat must contain PCEs, those biological or physical features essential to the conservation of the species.

Moreover, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.,* 566 U.S. 560, 132 S. Ct. 1997, 2004–05 (2012) (citations and quotation marks omitted). Acts of Congress "should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co., Inc.,* 513 U.S. 561, 570 (1995). As such, the use of "essential" in paragraph (A)(ii) carries the standards listed in paragraph (A)(i) to guide the Secretary's determination. If Congress wanted the Secretary to

have a freer hand, it would have said something—anything—other than "essential." But it did not.

The Service concedes that Unit 1 does not contain all the PCEs of critical habitat, and no one contends otherwise. Instead, it determined this unit was "essential to the conservation of the species"

> because this species is at high risk of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression. The establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery.

77 Fed. Reg. 35,118, 35,121 (June 12, 2012); *see id.* at 35,132.

The Fifth Circuit gave the Service's definition controlling weight, combining *Chevron* deference with the deference owed to an agency making scientific determinations. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.,* 827 F.3d 452, 464-65 (5th Cir. 2016) (discussing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). It cited, with hearty approval, to *Medina County Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) for the proposition that "[w]here an agency's particular technical expertise is involved, we are at our *most deferential* in reviewing the agency's findings." *Markle,* 827 F.3d at 465 (emphasis added). In any further litigation regarding impacts on gopher frog critical habitat,

the Service will get a *third* layer of deference as it interprets its own critical habitat regulation. *See, e.g., Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 613-14 (2013); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 991 (9th Cir. 2010).

This "super-deference" led the court astray. Instead of evaluating whether the Service's interpretation of the statute was reasonable, as a *legal* matter, it in effect deferred to the Service's scientific determination in assessing whether the designation survived *Chevron* step two. *Markle,* 827 F.3d at 464-465. Applying scientific deference to statutory interpretation takes *Chevron* too far. The Service's disregard of the statutory standards for critical habitat designation and the Fifth Circuit's use of *Chevron* to authorize amendment by regulation, have national effects of significant importance.

As a policy matter, the Service's use of a relaxed threshold for unoccupied critical habitat, not requiring presence of all the PCEs when outside the species' range may have some logic to it. Because of the "jeopardy" protection for listed species, designation of occupied critical habitat is arguably redundant and therefore less important. Indeed, the Service has stated in the past that "the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources." Endangered and Threatened Wildlife and Plants; Final Rule to Designate Critical Habitat for the Santa Ana Sucker (Catostomus santaanae), 70 Fed. Reg. 426 (Jan. 4, 2005). But that is not the

way Congress wrote the statute. In keeping with its intent that the agency be "exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species,"[3] Congress imposed specific requirements that the Service must meet. The Fifth Circuit erred in allowing the Service to disregard those requirements.

II. THE SERVICE'S DESIGNATION OF UNINHABITABLE AREAS AS CRITICAL HABITAT WILL INFLICT SEVERE COSTS ON LANDOWNERS AND THE AVERAGE CITIZEN WITH NO CORRESPONDING BENEFITS TO SPECIES.

"Critical-habitat designation is consequential." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.,* 848 F.3d 635, 638 (5th Cir. 2017) (dissenting from denial of reh'g *en banc*) (*"Markle Interests").* The Fifth Circuit's deference to the Service's interpretation of "essential" is problematic because it allows designation of lands that "do not currently contain the essential physical or biological features of critical habitat." *See* 77 Fed. Reg. 35,118, 35,135 (June 12, 2012); *see also id.* at 35,129 (noting that Unit 1 is a "closed-canopy forest unsuitable as habitat for dusky gopher frogs" that do not contain the PCEs of critical habitat). As Judge Owen's dissenting opinion correctly observed, under this definition of "essential," then "vast" areas "could be designated as 'critical habitat' because it is

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[3] H.R. REP. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, at 9468, 1978 WL 8486.

theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species." *Markle,* 827 F.3d at 481 (Owen, J., dissenting).

For the Louisiana landowners, whose 1,544 acres ("Unit 1") have been designated unoccupied critical habitat for the dusky gopher frog, the Service has calculated a $33.9 million loss in residential and commercial development opportunities. 77 Fed. Reg. at 35,118, 35,141. This conservative figure does not account for the lost option on foreseeable oil and gas development, mineral development, timber harvest, recreational use or hunting leases.[4] It also understates the true costs of Section 7 consultation and wholly fails to consider the expensive and time-consuming pre-consultation process.[5] A complete

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[4] Landowners have offered the Service verifiable proof of on-site untapped oil and gas reserves of $17.1 million, mineral deposits of up to $247,350, timber resources of $6.93 million and annual hunting lease revenues of $9,844. Industrial Economics, Inc., *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, 4-1, 4-5, 4-8, 4-9 (April 6, 2012) *available at* https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157 (*last visited* Aug. 8, 2017).

[5] Computation of only the time and level of effort spent following the "official" start of consultation underrepresent the true cost of the consultation process. A recent study out of the University of Texas found that pre-consultation lasts 8 months or more, depending on the scope of the project. Melinda Taylor, et. al., *Protecting Species or Endangering Development? How Consultation Under the Endangered Species Act Affects Energy Products on Public Lands*, Kay Bailey Hutchison Center for Energy, Law & Business, Research Paper No. 2016-03, p.8 (Aug. 2016) *available at* http://sites.utexas.edu/

picture would further have considered the costs of actions likely to be undertaken by the landowners outside of the consultation process, such as a reduction in the development's buildable envelope to avoid the difficulties and expense of formal consultation. *See* Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10678 (August 2013) (discussing efforts undertaken by landowners before and after consultation to avoid the even greater costs and burdens of formal consultation). Despite the Service's failure to quantify any direct monetary or "biological" benefits to the frog flowing from the designation, it found its "economic impact analysis did not identify any disproportionate costs." 77 Fed. Reg. at 35,141. In contrast, the six judges who dissented from denial of *en banc* review described the findings of the impact analysis as "shocking," particularly so in light of the fact that "there is virtually nothing on the [benefit] side of the economic ledger." *Markle Interests,* 848 F.3d at 653. The Service's flawed economic analysis clearly merits further review.

As detailed above, the project-level toll of a critical habitat designation can be immediate and significant, "resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath at 10681. However, the bigger story here is the regulatory trickle-down to the consumer. A recent study by NAHB reveals

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kbhenergycenter/files/2016/08/ESA-Report.pdf (*last visited* Aug. 7, 2017).

that, on average, compliance with regulation during lot development accounts for 14.6 percent of the final price of a new single-family home. Equally disturbing is the fact that the cost of regulation during development, which is ultimately added onto the lot price when a home is sold, is rising more than twice as fast as the average American's ability to pay for it. Paul Emrath, *Government Regulation in the Price of a New Home,* p. 5, 8, Special Studies (May 2, 2016), *available at* https://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311. The designation of backup critical habitat that is presently uninhabitable but that may "someday become useful to the [listed species]" will only fuel this alarming trend. *Alliance for the Wild Rockies v. Lyder,* 728 F.Supp.2d 1126, 1142-1143 (D. Mont. 2010). Absent an unoccupied critical habitat designation, the ESA and the avalanche of regulatory costs that follow would not apply to private land.

Consider that the most common type of federal permit requiring Section 7 consultation with wildlife agencies is a permit authorizing the discharge of dredge or fill material into waters of the United States.[6] These permits are issued by the Army

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[6] Under Section 7(a)(2) of the ESA (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 [. . .] result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Agency regulations define federal agency "action" to include the issuance of permits for projects carried

Corps of Engineers ("Corps") and are authorized under Section 404 of the Clean Water Act ("CWA"). 33 U.S.C. § 1344. They rank amongst the most common, if not the most common, permit that developers must obtain to provide housing for the nation's citizens. Annually, the Corps issues approximately 72,000 Section 404 permits (13-year average), and "over $220 billion of investment annually is conditioned on the issuance of these discharge permits." David Sunding, The Brattle Group, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal*, p. 1 (May 30, 2011);[7] Institute for Water Resources, *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources*. 2015-R-03, p. 25-26 (October 2015).[8]

As highlighted by the designation of Unit 1, the Service has become "increasingly aggressive in exploiting the Section 7 consultation process to control how land and water resources are used." Norman James and Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and its Improper Transformation into*

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out by private development interests. 50 C.F.R. § 402.02 (2016).

[7] *Available at* http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Mingo%20Logan%20Coal%20Co%20Inc%20v.%20EPA%20%28Sunding%20Economic%20Study%29.pdf (*last visited* Aug. 8, 2017).

[8] *Available at* http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-03.pdf (*last visited* Aug. 7, 2017).

"Recovery" Habitat, 34 UCLA J. ENVTL. L. & POL'Y 1, 6-7 (2016). The Endangered Species Act does not permit the Government to designate an area as 'critical habitat,' and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required. *Markle,* 827 F.3d at 481 (Owen, J., dissenting).

However, the Service has done just that with Unit 1. Through a CWA 404 permit nexus it has triggered the ESA and federalized the entire property for purposes of Section 7. With this, it has "recommend[ed] that no development occur within the unit" or, perhaps, may allow 40 percent of the unit to be developed under the "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." 77 Fed. Reg. at 35,141; *id.* at 35,123.

Similarly, this "unprecedented and sweeping" interpretation of unoccupied habitat is economically disastrous for industries dependent on public lands—like forest product manufacturers. A quintessential example is the designation of critical habitat for the northern spotted owl, one of the most controversial wildlife species listed under the ESA. In 2012, the Service designated 9,577,969 acres (roughly twice the size of the State of New Jersey) of forest land in California, Oregon, and Washington to be set aside for the owl. Endangered and Threatened Wildlife and Plants: Designation of Revised Critical Habitat for the Northern Spotted

Owl, 77 Fed. Reg. 71,876 (Dec. 4, 2012); *Carpenters Indus. Council v. Zinke,* 854 F.3d 1, 2 (D.C. Cir. 2017) ("[I]magine driving all the way up and then all the way back down the New Jersey Turnpike, and you will get a rough sense of the scope of the [2012 northern spotted owl] critical habitat designation here. The critical habitat designation means that a huge swath of forest lands in the Pacific Northwest will be substantially off-limits for timber harvesting.").[9] Of the lands designated as critical habitat, more than 2.6 million acres are "matrix lands," which were set aside under the Northwest Forest Plan to provide a steady supply of federal timber to the local forest products-based economy. 77 Fed. Reg. at 71,876; *id.* at 71,880 (noting that "matrix areas [are] where timber harvest would be the goal.") The Service estimated that approximately 6.5 percent (roughly 622,000 acres) of northern spotted owl critical habitat is likely to be unoccupied. 77 Fed. Reg. at 72,028. The true number is likely far higher.

In identifying unoccupied areas, the Service concluded that the critical habitat should contain "essential physical and biological features *or* is otherwise essential because it has the highest likelihood of meeting recovery objectives in the most efficient manner . . . ." 77 Fed. Reg. at 71,916 (emphasis added). The Service acknowledged that even though some unoccupied areas "lack[ ] some

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[9] Carpenters Industrial Council, AFRC, Siskiyou County, and several individual timber companies challenged the Service's final critical habitat rule for the northern spotted owl, in part, because the designation was based on a flawed modeling framework. *Zinke,* 854 F.3d at 1.

element of the physical or biological features, such as large trees or dense canopies that are associated with nesting habitat," those lands "contain proportionally greater areas of younger forests that are essential for the conservation of the species, because *they can develop additional habitat necessary to support viable northern spotted owl populations in the future*." 77 Fed. Reg. 71,917 (emphasis added). Thus, like with the gopher frog, the Service designated habitat that does not currently contain the essential physical or biological features of critical habitat essential for the owl.

The economic impacts resulting from overbroad critical habitat designations – like the northern spotted owl – are significant. The Service concluded that "economic impacts to [Forest Service] timber harvest are relatively more likely in unoccupied matrix lands or approximately 1,158,314 acres of 2,629,031 total acres of all [Forest Service] matrix lands." 77 Fed. Reg. at 72,028. The resulting decrease in timber supply is substantial. *Id.*

Without a more demanding and narrow interpretation of unoccupied areas compared to occupied areas, the Service is free to designate any land that contains a trifling physical or biological feature essential to a species conservation, or no such feature – a boundless authority that is in conflict with the plain language of the ESA. As illustrated by the examples above, the potential economic consequences of "virtually limitless" authority to reach, and further encumber, "vast portions of the United States" through uninhabitable critical habitat designations will be

severe. *Markle Interests,* 848 F.3d at 651; *Markle,* 827 F.3d at 481.

Certiorari is warranted to avoid unnecessary and significant economic burdens on private landowners and industries that depend on public lands.

III. THESE PETITIONS RAISE IMPORTANT QUESTIONS UNDER THE NONDELEGATION DOCTRINE.

The Fifth Circuit determined that the Service's decision not to exclude Unit 1 from its critical habitat determination was unreviewable pursuant to the Administrative Procedure Act ("APA") because Congress provided no manageable standard to determine whether that decision was proper. When Congress delegates its authority without providing standards to which an agency must conform, it raises serious constitutional concerns under Article I. U.S. CONST. art. I. There is an unresolved tension between Article I and APA section 701(a)(2) when Congress fails to provide standards to which an agency must conform its action. This petition provides an excellent vehicle to rectify this tension.

The APA "embodies the basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). However, section 701(a)(2) of the APA provides that it does not apply to "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Court has interpreted section 701(a)(2) to mean that

judicial "'review is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney,* 470 U.S. 821, 830 (1985)).

The ESA provides that the Service must take "into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Furthermore, Congress provided that the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . ." *Id.* Petitioners argued that the government acted arbitrarily in deciding not to exclude Unit 1 from the Service's critical habitat determination. The Fifth Circuit never reached this argument, instead holding that the APA precluded judicial review. *Markle,* 827 F.3d at 474.

The Fifth Circuit explained that there "are no manageable standards for reviewing the Service's decision not" to exclude Unit 1 from the critical habitat designation. *Id.* at 473. It further stated that 16 U.S.C. § 1533(b)(2) "establishes a discretionary process by which the Service may exclude areas from designation, but it does not articulate any standard governing when the Service must exclude an area from designation." *Id.* at 474. In other words, because the ESA provides no standard to determine if the Service correctly determined not to exclude Unit 1 from critical

habitat, that decision (according to the Fifth Circuit) is unreviewable under section 701(a)(2)'s "no meaningful standard" test.

Comparably, Article I of the Constitution vests all legislative powers in the Congress of the United States. "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Powell, J., concurring). This is known as the nondelegation doctrine. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (explaining that Article I permits no delegation of Congress's legislative powers). However, "[i]f Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *E.g.*, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added). "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving v. United States*, 517 U.S. 748, 771 (1996). Furthermore, the Court has explained that Congress has failed to state an intelligible principle if "there is an *absence of standards* for the guidance of [an agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of

Congress has been obeyed . . ." *Yakus v. United States*, 321 U.S. 414, 426 (1944) (emphasis added); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, C.J., concurring) (explaining that the intelligible principle rule requires "ascertainable standards" by which a court can test the exercise of delegated legislative discretion).

Therefore, APA section 701(a)(2) provides that judicial review is precluded if Congress fails to provide a "meaningful standard" by which a court can judge whether an agency properly exercised its discretion. However, the nondelegation doctrine provides that if Congress fails to provide a standard then it has failed to provide an "intelligible principle" and such a delegation is unconstitutional. As commentators have explained, "[i]f a statute is so broad that it lacks a guiding policy, the statute may lack an intelligible principle, in violation of the nondelegation doctrine." Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*? 73 U. CHI. L. REV. 1047, 1060 (2006); *see* Amee B. Bergin, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?* 28 B.C. ENVTL. AFF. L. REV. 363, 396 (2001) (arguing that "[i]f a court finds that a delegation lacks 'law to apply,' it follows analytically that not only *can* the court find that the delegation lacks an intelligible principle, but that it *must* do so"). Thus, there is a clear tension between the nondelegation doctrine and APA section 701(a)(2).

The Fifth Circuit found that 16 U.S.C. § 1533(b) provides no meaningful standard to review the Service's decision not to exclude Unit 1 and therefore precluded review under 5 U.S.C § 701(a)(2). Accordingly, under the nondelegation doctrine Congress also failed to provide an intelligible principle, leading to the conclusion that such a delegation is unconstitutional. The Fifth Circuit, however, did not explore the consequences of its reasoning on the constitutionality of Congress's delegation to the Service.

Had the Fifth Circuit explored those consequences, it would have found a ready answer in *Bennett*. In *Bennett*, this Court addressed whether a challenge to a critical habitat designation was properly reviewed under the ESA citizen suit provision, 16 U.S.C. § 1540(g)(1)(C), which allows a plaintiff to enforce a non-discretionary duty under section 1533 of the ESA. *Id.* at 171-72. The Court found the designation was reviewable under section 1540 to the extent it violated the "categorical requirement that, in arriving at his decision, [the Secretary] 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" *Id.* at 172 (quoting 16 U.S.C. § 1533(b)(2)). The Court qualified this by stating "the Secretary's ultimate decision," *i.e.* the ultimate decision whether to exclude, "is reviewable only for abuse of discretion," that is, under the APA. *Id.* at 172. This last statement immediately follows a quotation of the Secretary's authority to exclude. *Id.* Thus, this Court's precedent and the avoidance canon point in the same direction, which is to permit

review of the Service's decisions on whether to exclude habitat due to the impact of a designation.

These Petitions provide the Court with a valuable opportunity to realign administration of the ESA with the nondelegation doctrine and *certiorari* should therefore be granted.

CONCLUSION

For the reasons above, *amici* respectfully request that the Court grant the Petitions for *certiorari*.

August 14, 2017

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