No. 17-74

In the
Supreme Court of the United States

MARKLE INTERESTS, L.L.C., 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

BRIEF *AMICUS CURIAE* OF CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, AND BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PAUL J. BEARD II
Counsel of Record
ALSTON & BIRD LLP
1115 11th Street
Sacramento, CA 95814
(916) 498-3354
paul.beard@alston.com

Counsel for Amici Curiae

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE STATUTES

RULES

REGULATIONS

CONSTITUTIONAL PROVISIONS

MISCELLANEOUS

IDENTITY AND INTERESTS OF AMICI CURIAE[1]

California Cattlemen's Association, California Building Industry Association, and Building Industry Legal Defense Foundation submit this brief *amicus curiae* in support of petitioners.

California Cattlemen's Association ("CCA") is the preeminent organization of cattle grazers in California, and acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interest of the livestock industry. Formed in 1917 as a non-profit trade association, the CCA promotes the interests of ranchers both large and small in California; beef cattle producers operate on over 38 million of California's 100 million acres. The CCA has 35 local cattlemen's association affiliates that serve as a strong link between the grassroots membership and the association. The CCA represents its members' interests before the California State Legislature, Congress, and federal and state regulatory agencies on a wide range of issues including federal lands grazing fees and regulation, wetlands, conservation programs, air quality, wildlife management, parcel fees, and other issues affecting the use and ownership of California's rangelands.

---

[1] Pursuant to Rule 37.6, Amici certify that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from Amici, made any monetary contribution toward the brief's preparation and submission. Counsel for Amici provided counsel for all parties timely notice of their intent to file this brief, and all the parties consented.

The California Building Industry Association ("CBIA") is a statewide, nonprofit trade association representing approximately 3,000 businesses and employing more than 100,000 people involved in all aspects of residential and commercial construction. Its members include homebuilders, architects, engineers, sales agents, title and escrow companies, general and specialty contractors, lenders, attorneys, land planners, material suppliers, insurers and land developers. Collectively, CBIA's members are responsible for producing approximately 70% of all new homes built in California annually.

The Building Industry Legal Defense Foundation ("BILD") is a non-profit mutual benefit corporation and a wholly-controlled affiliate of the Building Industry Association of Southern California, Inc. ("BIASC"). BIASC represents approximately 1,200 member companies across Southern California that are active in all aspects of the building industry, including land development; builders of housing, commercial, and infrastructure; and related entities including architects, engineers, planners, contractors, suppliers, and property owners. The purposes of BILD are, in part, to initiate or support litigation or agency action designed to improve the business climate for the building industry and to monitor and involve itself in government regulation critical to the industry.

All of Amici's members own, lease, use, and/or develop a significant portion of land in California. As a consequence, they are deeply concerned about the proper scope of the power of the United States Fish & Wildlife Service ("FWS") under the Endangered

Species Act to designate private property as "critical habitat" for protected species. If, as the Fifth Circuit Court of Appeals in this case held, the FWS has the authority to impose a "critical habitat" designation even on property that is not habitat for any protected species—and is not even suitable for that purpose—then Amici's members face increasing regulatory burdens on and uncertainty over their ability to use and develop their properties.

The Court's review is necessary to clarify the extent of the FWS's "critical habitat" authority, which has real-world impacts on property owners across the United States, including Amici's members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Endangered Species Act ("ESA") requires the United States Fish and Wildlife Service ("USFWS" or "Service")[2] to identify and list endangered and threatened animals and plants. 16 U.S.C. § 1533(a)(1). The listing of an animal species triggers the Service's statutory obligation to designate "critical habitat" for that species "to the maximum extent prudent and determinable." *Id.* §

[2] The United States Department of Interior's USFWS and the United States Commerce Department's National Marine Fisheries Service ("NMFS") both administer the ESA. The USFWS has primary responsibility for terrestrial and freshwater wildlife, like the dusky gopher frog here, while NMFS has jurisdiction over marine wildlife. For simplicity's sake, this brief refers only to USFWS given that the case involves a species within its jurisdiction, but the same principles discussed herein apply to NMFS.

1533(a)(3)(A)(i). The ESA's "critical habitat" provisions apply only to protected animals, and not to plants.

In this case, a panel of the Fifth Circuit upheld the Service's designation of private land in Louisiana as "critical habitat" for a listed species that (1) is not used or occupied by the species, (2) is not near areas inhabited by the species, (3) is not accessible to the species, and (4) cannot sustain the species without modification. Petitioner's Appendix C-4, C-5. Simply put, the so-called "critical habitat" does not support the existence or conservation of the species in question. For the reasons amply explained in the petition, neither the ESA nor the Commerce Clause of the United States Constitution countenances such a radical expansion of federal control over private property, and its use and development. Amici fully supports the petition's arguments for review and will not rehearse them here.

Rather, this brief underscores the dramatic consequences of the Service's new-found power to designate property that is not habitat for any protected species as "critical habitat"—consequences that the Service downplayed and that the Fifth Circuit all but ignored. The Service routinely assures private landowners that designations of their property as "critical habitat" do not affect their land ownership or establish a refuge, wilderness, reserve, preserve or other conservation area.[3] It emphasizes that such designations do not allow the federal

[3] *See, e.g.*, https://www.fws.gov/southeast/endangered-species-act/critical-habitat (last visited August 14, 2017).

government or the public access to their lands, and do not result (at least automatically) in closure of the designated area to all access or use.[4] At worst, the Service claims, a "critical habitat" designation affects only projects on private lands requiring federal action that may adversely modify the designated critical habitat (e.g., projects requiring a federal permit, a federal license, or federal funding).[5] In that case, the federal agency undertaking the action must consult with the Service to avoid jeopardizing the existence of listed species and their critical habitat.

The Service's narrative masks the harsh reality that developers, ranchers, farmers, and other property owners face with a "critical habitat" designation on their land. First, as federal permitting jurisdiction has expanded over the last several decades, so too have the circumstances under which federal agencies need to consult with the Service to ensure that use and development of the property are limited to avoid adverse modification to any critical habitat. With the discretion to designate even ***non-habitat*** land as "critical habitat," the Service's power and influence over private property in the United States will dramatically rise to an unprecedented level—and certainly far beyond what Congress (let alone the Founders) could have contemplated.

Second, the effect of a "critical habitat" designation is not limited to projects requiring federal action. A "critical habitat" designation often

---

[4] *Id.*

[5] *Id.*

influences the fate of projects that require only state or local approval. Many jurisdictions, like California, eagerly rely upon a federal designation of "critical habitat" as legal and political justification to severely limit and condition the use and development of private property—even if they are not legally compelled to do so by the ESA. Local jurisdictions, especially those with a penchant for extreme land-use control and regulation, are all too happy to exploit the Service's power to designate even non-habitat lands as "critical habitat."

Finally, allowing non-habitat "critical habitat" designations will open up the floodgates to costly citizen suits; landowners will be forced to participate in those suits to ward off efforts to drastically limit or altogether block use and development of their properties.[6] Already, there is a veritable cottage industry of litigation that environmental advocates bring to compel the Service to designate land as "critical habitat," or to challenge a "critical habitat" designation that does not, in their view, cover enough

---

[6] The vast majority of fish and wildlife habitat is in private ownership. "Almost ninety percent of the nearly 1000 species of federally protected plants and animals are found on private land, and private property contributes substantially to the wildlife habitat resource base." Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things That Go Bump in the Night*, 85 Iowa L. Rev. 849, 858-59 (2000). Further, "[m]ore than half of the species that are protected by the Endangered Species Act (ESA) have at least eighty-one percent of their habitat on private land." *Id.* at 859 n.30. Thus, the listing of species and the designation of their critical habitat have a grossly disproportionate effect on those who own, use, and develop, private property.

land. If the Service may lawfully designate as "critical habitat" even areas of land that are not habitat for any protected species, the courts can expect to see an explosion of citizen suits that will tax an already-overburdened judicial system, and impose great uncertainty and litigation costs on developers, ranchers, farmers and other property owners.

The stakes are high, particularly for private landowners across the country. The Court's review of the Fifth Circuit's decision is necessary to restore certainty—and sanity—to the Service's approach to designating critical habitat. The petition should be granted.

REASONS FOR GRANTING THE PETITION

A "critical habitat" designation carries enormous consequences for the subject property's use and development. In this case alone, the challenged "critical habitat" designation cost landowners "$34 million in future development." Pet. App. at C-4. As explained below, the legal and economic consequences of expanding the Service's designation power are real and significant, and highlight the national importance of the issue before the Court. *See*, *e.g.*, Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation: A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 Envtl. L. Rep. News & Analysis 10678, 10678 (2013) ("The designation of critical habitat under the Endangered Species Act (ESA) can result in significant and costly consequences for landowners, industry, government, and other

entities—often with little if any evidence of a commensurate benefit to the species involved.").

I. "Critical Habitat" Designations on Private Property Impose Substantial Risks and Costs on the Landowner, and Can Substantially Limit Use and Development

As alluded to above, the Service's designation of land as "critical habitat" is legally consequential. Section 7 of the ESA requires that federal agencies ensure that their "actions" are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). "Actions" are defined as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas," and includes "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." 50 C.F.R. § 402.02. Thus, the range of federal actions that can trigger consultation is extraordinarily broad.

Under Section 7, federal agencies must consult with the Service on any actions that may affect listed species and their habitats to ensure that reasonable and prudent measures will be undertaken to mitigate impacts on listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14; *see also Bennett v. Spear*, 520 U.S. 154, 158 (1997). Consultation with the Service can be either formal or informal depending on the likelihood of the action to adversely affect listed species or critical habitat. *Id.* §§ 402.13, 402.14. Once a formal consultation is initiated, the Service will issue a Biological Opinion (either a "no jeopardy" or a

"jeopardy" opinion) indicating whether the proposed agency action will jeopardize the continued existence of a listed species, or result in the destruction or modification of its critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g). Significantly, a permit will not be issued for a project with a "jeopardy" opinion unless it is redesigned to lessen impacts; needless to say, "biological opinions under Section 7 have the power to stop development projects in their tracks and have sometimes done so." Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 141 (2004); see, e.g., Tennessee Valley Auth'y v. Hill, 437 U.S. 153 (1978) (ruling that the almost-constructed Tellico Dam, the completion of which (it was thought[7]) would eradicate the endangered snail darter (a small freshwater fish), could not proceed).

If landowners hardly ever needed federal authorization or funding for projects proposed on their properties, critical habitat designations might be considered relatively inconsequential from a legal and economic standpoint. But that unfortunately is not the case. Increasingly, landowners have witnessed ever-greater involvement by federal agencies in land use and development. "As federal regulatory

---

[7] Subsequent to the Court's decision, "several small relict populations" of snail darter were discovered in other streams. *See* Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 Envtl. L. 1, 8 n.22 (2002). In 1984, the Service downlisted the fish to threatened status and rescinded its critical habitat. *See* 49 Fed. Reg. 27,510 (July 5, 1984).

programs have expanded, an increasing number of non-federal activities require some sort of federal permit or approval, or some other federal nexus that triggers Section 7(a)(2) and the duty to avoid the adverse modification of critical habitat." Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 34 UCLA J. Envtl. L. & Pol'y 1, 8 (2016).

Nowhere has the expansion of federal regulatory programs been more pronounced than in the area of federal permitting of projects under the Clean Water Act. As one commentator has noted, "[t]he most likely source of a federal nexus for a private development project is Section 404 of the Clean Water Act, which requires private parties to obtain permits from the Army Corps of Engineers before conducting dredging or filling activities in the "waters of the United States," including wetlands, rivers, creeks, and streams. Sinden, *supra*, at 177 n. 216 (citing 33 U.S.C. § 1344; 33 C.F.R. § 328.3(a). But "[t]he reach of the Clean Water Act is notoriously unclear." *Sackett v. Environmental Protection Agency*, 566 U.S. 120, 132 (2012). Faced with that statutory ambiguity, the federal agencies charged with the Act's implementation and enforcement—the Army Corps of Engineers and the Environmental Protection Agency—have pushed their federal permit jurisdiction to the limit (and, arguably, beyond the limit of the Constitution). Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 Cato Sup. Ct. Rev. 139, 142-49 (2012) (tracing the expansion of

federal regulatory jurisdiction under the Clean Water Act over the last four decades).

The upshot is that landowners risk having the federal government control the extent to which they can use and develop their properties. Federal regulatory programs, like the Clean Water Act, are expanding. And, if the Fifth Circuit's decision stands and other courts follow suit, federal "critical habitat" designations will know no statutory or constitutional bounds.

II. "Critical Habitat" Designations on Private Property Affect Even Those Projects That Do Not Require Federal Action

A "critical habitat" designation can impose regulatory burdens on a landowner even when a project requires no federal action. Specifically, land that has been designated as "critical habitat" can be used by state and local governments to justify significantly limiting the use and development of the property. While it is true that ***federal*** law does not compel state and local governments to engage in Section 7 consultation with the Service, or mandate project modification based on the existence of federally designated critical habitat, ***state and local*** laws can and do render such critical habitat relevant to (and often decisive in) the decision whether or the extent to which to allow a particular use.

The Service is well aware of the significant influence that its critical habitat designations have on state and local permit decision-making, and that influence will only grow if the Service's designation

power is expanded, as sanctioned by the Fifth Circuit in this case. *See, e.g.*, Dashiell Farewell, *Revitalizing Critical Habitat: The Ninth Circuit's Pro-Efficiency Approach*, 46 Envtl. L. 653, 663 (2016) ("With more parties on notice the more likely it is that habitat will receive the consideration and protection it deserves. . . . [A]gencies involved in restoration and conservation efforts will be more aware of areas worth their attention.").

California is a good example of a jurisdiction where state and local agencies regularly rely upon federally designated critical habitat to limit land use and development, even where there is no federal nexus. For example, in 2011, the Service proposed a rule designating critical habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander. 76 Fed. Reg. 2863. In analyzing the proposed rule's effect on small businesses, the Service recognized that, "even in the absence of a Federal nexus, indirect incremental impacts [on small businesses] may result if, for example, a city requests project modifications via the city's review under the California Environmental Quality Act (CEQA), due to the designation of critical habitat."[8] *Id.* at 2869.

Another example comes from the California Coastal Commission, the state agency responsible for regulating and permitting land use and development along the coast. See Cal. Pub. Res. Code § 30001.5; *Ross v. Cal. Coastal Comm'n*, 199 Cal. App. 4th 900,

[8] CEQA is the California statute that requires state and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible.

923 (2011) (referring to the agency's governing statute, the Coastal Act, as "a comprehensive scheme to govern coastal land use planning for the entire state"). One of the Coastal Commission's strongest weapons against land use and development is the Coastal Act's concept of an "Environmentally Sensitive Habitat Area" ("ESHA"), which is defined as:

> any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Cal. Pub. Res. Code § 30107.5.

Designation of property as "ESHA" is the death knell of almost any land use or development. That is because only resource-dependent uses of property are allowed in an ESHA. *See id.* § 30240(a) ("Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.").

How precisely does the Coastal Commission go about deciding whether an area of land is an ESHA? Over the years it has issued guidelines for assessing whether land contains ESHA.[9] What is abundantly

---

[9] *See, e.g.*, https://www.coastal.ca.gov/ventura/smm-esha-memo.pdf (Memo by California Coastal Commission staff

clear is that the Commission *assumes* property is "ESHA"—and is therefore undevelopable—if it is or ever has been federally designated as critical habitat.

For instance, when the Coastal Commission was reviewing a proposed development of a toll road in Southern California in what was then mostly undeveloped open space, it observed that some of that area was federally designated critical habitat. That was enough to declare the area an undevelopable "ESHA" and, partly on that basis, the Commission denied the project.

In discussing the area's designation as critical habitat, the Commission explained:

> [A]lthough the Commission is not limited to designated critical habitats when defining ESHA, the Commission can rely on critical habitat designations as one of the components supporting an ESHA determination. As detailed below, the Commission finds that those areas within the coastal zone portion of the proposed project area that are currently or have previously been specifically designated as critical habitat by the U.S. Fish and Wildlife Service (FWS) due to the recognized and established presence of federally listed threatened or endangered species and/or the importance of these areas to the

---

articulating standards for designating ESHA in the Santa Monica Mountains (Los Angeles)) (last visited August 13, 2017).

> conservation of threatened or endangered species also qualify as environmentally sensitive habitat areas, ESHA.[10]

In sum, the effect of a "critical habitat" designation is not limited to projects requiring federal action. The designation can also influence and, in some cases, determine the permit decisions of state and local agencies, to the detriment of developers, ranchers, farmers, and other property owners. The power to designate even non-habitat as "critical habitat" is the power to further threaten and erode their right to use and develop their lands.

III. The Service's New-Found Power to Designate Non-Habitat As "Critical Habitat" Will Be Met with an Increase in Litigation Demanding More Designations, to the Detriment of Already-Overburdened Landowners

A significant amount of ESA litigation has centered on the issue of critical habitat. In particular, the Service has been "inundated with citizen lawsuits" challenging its alleged failure to designate what environmental advocates view as critical habitat. 64 Fed. Reg. 31871, 31872; *see also* Amy Armstrong, *Critical Habitat Designations Under the Endangered Species Act: Giving Meaning to the Requirements for*

---

[10] *See* https://documents.coastal.ca.gov/reports/2008/2/W8b-2-2008.pdf (Revised Staff Report and Recommendation on Consistency Certification, for Consistency Certification No. CC-018-07; adopted by the California Coastal Commission on February 6, 2008).

Habitat Protection, 10 S.C. Envtl. L.J. 53, 60 (2002) (noting that "[b]ecause the FWS and the [National Marine Fisheries Service] have failed to designate critical habitat for over ninety percent of all listed species [as of 2002], environmental advocates have brought numerous suits against these agencies"). For its part, the Service has noted the significant expense involved in undertaking just the economic analysis for critical habitat designations. *See, e.g.*, 64 Fed. Reg. 31871, 31873 ("Economic analysis done for critical habitat designation can be expensive, in the past, total costs for such analyses for critical habitat designations have cost as much as $500,000, against a total listing budget of a few million dollars.").

Citizen suits to date have focused principally on forcing the Service to designate certain ***habitat*** as "critical habitat." But with the Fifth Circuit's decision and others that may follow, a new generation of citizen suits will focus on forcing the Service to designate even ***non-habitat*** as "critical habitat." Developers, ranchers, farmers and other property owners will bear the brunt of the uncertainty and costs that those suits engender, as they are forced to defend against threatened "critical habitat" designations that federal, state and local agencies will use to limit their right to use their lands.

CONCLUSION

For the reasons stated above, and those stated in the petition, Amici urge the Court to grant the petition.

DATED: August 2017

Respectfully submitted,

PAUL J. BEARD II
Counsel of Record
Alston & Bird LLP
1115 11th Street
Sacramento, CA 95814
(916) 498-3354
paul.beard@alston.com
Counsel for Amici Curiae