No. 17-74

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 Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* COALITION FOR A SUSTAINABLE DELTA, SAN LUIS AND DELTA-MENDOTA WATER AUTHORITY, AND WESTERN GROWERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Coalition for a Sustainable Delta (Coalition) is a non-profit comprised of agricultural water users and individuals in the San Joaquin Valley in California. The Coalition and its members depend on reliable water supplies from California's Sacramento-San Joaquin Delta for their livelihoods and economic well-being. The purpose of the Coalition is to (1) promote the long-term, ecological health of the Sacramento-San Joaquin Delta and its native species and (2) ensure a sustainable, reliable water supply for persons and entities engaged in agricultural pursuits in the San Joaquin Valley.

Western Growers Association (WGA) is a trade association that represents local and regional family farmers growing fresh produce in Arizona, California, Colorado, and New Mexico. WGA members and their workers provide over half the nation's fresh fruits, vegetables, and tree nuts, including nearly half of America's fresh organic produce. WGA advocates in legislative, regulatory, and judicial forums to ensure that environmental policy is based on sound science and proven data.

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[1] Pursuant to Sup. Ct. R. 37.6, amici curiae and their counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. Amici curiae file this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of amici curiae's intention to file this brief.

The San Luis & Delta-Mendota Water Authority (SLDMWA) consists of 28 public water agencies representing approximately 2.1 million acres within the western San Joaquin Valley, San Benito, and Santa Clara counties in California. SLDMWA operates and maintains certain federal Central Valley Project facilities, delivering approximately three million acre feet of water per year within the Authority's service area for agricultural, municipal, industrial, and environmental protection uses. SLDMWA and its member agencies commit significant resources to achieve water security for communities, farms and wildlife refuges in their service areas.

All three amici curiae have an interest in the well-being of farms, businesses and communities in the western United States, which must operate within limitations imposed by the federal government under the Endangered Species Act (ESA). In California alone, the United States Fish and Wildlife Service and National Marine Fisheries Service (Services) have designated more than 20 million acres of public and private land as critical habitat. The actual area impacted by the existing designations is much larger and extends to at least 25 percent or more of the total land area of the State. The designations apply to rivers and streams as well as to land, and limit the operation of California's major water projects.

Consistent with the plain language of the ESA and Congressional intent, until recently the Services only designated areas as "critical habitat" that at least arguably could be characterized as actual habitat of a

species. Further, it has been widely understood that the modifier "critical" limits rather than expands upon the concept of habitat. The decision of the Fifth Circuit panel majority, if left standing, would decouple the term critical habitat from the concept of habitat, allowing the Services to designate any area as critical habitat irrespective of whether that area can actually support the species, provided that someday through anthropogenic or natural actions the area could be transformed into habitat. The panel majority deferred to an agency interpretation of the ESA that is at odds with the text and legislative history of the statute. The ramifications of this holding for amici and other entities subject to regulation under the ESA across the nation are significant. The foreseeable expansion of critical habitat and, as a consequence, of projects triggering Section 7 consultation, will impose heavy costs across all economic sectors in exchange for hypothetical benefits that may never materialize.

SUMMARY OF ARGUMENT

The growth of the Executive Branch of federal government within our Constitutional democracy is – to a degree – a predictable byproduct of our increasingly complex society. But the exercise of power by the Executive remains subject to the strictures imposed by the Constitution. The functions of Congress in enacting the laws and the Judiciary in interpreting them are well established. These functions take on greater,

rather than lesser, importance in the context of the growth of the Executive Branch.

In the case at hand, the Executive Branch treaded upon the functions of Congress when the Service effectively re-wrote the ESA. Furthermore, the Fifth Circuit panel majority absconded with its proper role in interpreting the law when it deferred to the Service, effectively eliminating *Chevron* step 1 and failing to properly apply *Chevron* step 2.

These transgressions are not academic. Many millions of acres are already designated as critical habitat for species listed as threatened or endangered under the ESA. If the panel majority's decision is left to stand, millions more will almost assuredly be designated in the future including areas that do not constitute habitat for the target species. This is the case because the panel majority affirmed the Service's determination that areas that are not habitat for the dusky gopher frog, because they cannot support the species, may nonetheless be designated as critical habitat for the dusky gopher frog. In light of the national importance of this case and the errors below, the petition for writ of certiorari should be granted.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE

The scope of the federal government's power to designate land as critical habitat under the ESA is of national importance because critical habitat designations impose economic and social burdens on private landowners, resource users, and state and local governments, often by impairing ordinary land and water use. The Fifth Circuit panel majority's holding greatly expands the areas subject to designation as critical habitat by allowing the government to designate any area a critical habitat as long as it bears a ***single*** physical or biological feature necessary for the survival of a protected species, and could potentially be modified to support the conservation of the species in the future. *See Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 481-82 (5th Cir. 2016) (Owen, J., dissenting). Critical habitat designations have direct and indirect impacts. The direct effects of designation of critical habitat stem from the fact it may require consultation with the Services for a wide range of activities. Critical habitat designations are intended to protect listed species by requiring a federal agency that authorizes, funds, or carries out an action to consult with the Fish and Wildlife Service to insure that such action does not "result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). "Action" is broadly defined as "actions directly or indirectly causing modifications to the land, water, or air."

50 C.F.R. § 402.01. Because the federal nexus for actions is broadly construed, a wide range of activities undertaken by public and private entities has the potential to trigger consultation. Data compiled for an article published in 2015 reveal that an average of over 10,000 consultations occur each year. Jacob Malcolm and Ya-Wei Lie, Data contradict common perceptions about a controversial provision of the U.S. Endangered Species Act, *Proceedings of the National Academy of Sciences* 122:15844-49 (2015).

In the western United States, the effects of critical habitat designation are compounded by a disproportionate presence of the nation's listed species and federally controlled land and water resources. In California alone, the Fish and Wildlife Service and National Marine Fisheries Service have already designated more than 20 million acres of public and private land as critical habitat. *See* Exhibit 1. And yet of the 320 listed species that are present in California, the Services have only designated critical habitat for 113 species. As a consequence, in coming years, the agencies can be expected to designate critical habitat for a substantial number of additional species in California alone. If they are empowered to include in such designations areas that do not actually constitute habitat for the species, there is no limit to the land and waters they can designate.

The direct effects of designation of critical habitat stem from the fact that it can trigger consultation as mentioned above. Consultation can lead to the imposition of substantial economic costs, cause delay, or make

an activity completely infeasible. For example, consultation between the Bureau of Reclamation and the Fish and Wildlife Service regarding continuing operations of two large water projects in California (the Central Valley Project and State Water Project) that serve the majority of the state's residents, farmers, and businesses, led the Service to conclude that those projects were likely to result in adverse modification of critical habitat for the threatened delta smelt. *See* U.S. Fish and Wildlife Service, Biological Opinion on Coordinated Operations of the Central Valley Project and State Water Project (2008). Therefore, the Service imposed a "reasonable and prudent" alternative to water project operations that includes components intended to improve habitat that (i) restrict water supplies resulting in reductions in the range of 700,000 acre feet each year implemented (a loss equivalent to the water needed to supply 1.4 million households) and (ii) mandate the creation or restoration of a minimum of 8,000 acres of intertidal and associated subtidal habitat. *Id.* at 282-84.

Designation of critical habitat has indirect effects as well, as other federal, state, and local agencies impose restrictions on activity in areas designated under their own, distinct, authorizing statutes. For example, the United States Forest Service excludes certain categories of projects from environmental review under the National Environmental Policy Act that are not expected to have significant effects, but Forest Service regulations establish resource conditions it must consider before invoking a categorical exclusion. 36 C.F.R. § 220.6(b)(1). One such resource condition is whether

the project area is proposed or designated critical habitat. *Id.* As a result, lower courts have held that designation of an area as critical habitat, by itself, can trigger more demanding environmental review of a proposed action. *E.g.*, *Conservation Cong. v. U.S. Forest Serv.*, 2013 U.S. Dist. LEXIS 80136 (E.D. Cal. 2013) (in which the court held that the presence of a single resource condition was grounds to overturn a Forest Service decision to invoke a categorical exclusion).

Further, the Los Angeles County Department of Regional Planning (LADRP) frequently uses federal critical habitat designations as the basis for establishment of Significant Ecological Areas within which development is subject to special permitting, design standards, and review processes. An area may be designated as a Significant Ecological Area because it is the habitat of core populations of endangered or threatened plant or animal species, and LADRP has found that a federal critical habitat designation satisfies that criterion. There are currently 28 Significant Ecological Areas in Los Angeles County, many of which are on private land and abut developed communities. *See* LADRP, *SEA Program*, http://planning.lacounty.gov/sea (last visited July 21, 2017); Los Angeles County General Plan Appendix E (LADRP Oct. 6, 2015), available at http://planning.lacounty.gov/assets/upl/project/final-general-plan-appendices.pdf (criteria analyses for Significant Ecological Areas in Los Angeles County). The stigma of critical habitat designations also impacts land values. Industrial Economics, Inc., *Economic Analysis of Critical Habitat Designation for the*

Dusky Gopher Frog, at 2-17 (Apr. 6, 2012), https://www.regulations.gov (last visited July 17, 2017) (describing how the designation of critical habitat for the frog decreases land value).

The Fifth Circuit panel majority's interpretation of "critical habitat" stretches the concept beyond the breaking point because it allows the government to designate an area as critical habitat as long as it bears a single physical or biological feature of a species' habitat. It is rudimentary that species rely on multiple features of their surrounding environment to survive and that the presence of one among these may be necessary but is not sufficient grounds to conclude an area is habitat. By way of example, in its final rule designating critical habitat for delta smelt, the Fish and Wildlife Service has identified both (i) water and (ii) river flow as physical features (or primary constituent elements) necessary for the survival of the species. 59 Fed. Reg. 65,256, 65,259 (Dec. 19, 1994). These features are present in rivers and streams across the United States that delta smelt do not and could not inhabit. In the case under consideration, the Service has designated as critical habitat for the dusky gopher frog an area that lacks the upland habitat conditions necessary for the survival of the species, with no reason to expect that the landowners will ever decide to expend resources to create that habitat. *Markle*, 827 F.3d at 486 (Owen, J., dissenting). Large sections of the United States would satisfy those conditions, despite being incapable of providing habitat for the frog.

The Fifth Circuit's fractured decisions reflect the complexity of this issue and its potential significance on land use regulation and property rights. A split panel decision found in favor of the Service. Judge Owen's dissent recognized that

> [t]he majority opinion upholds [a critical habitat designation] on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for . . . modifications . . . that might then support the species if, with the landowners' cooperation, it is reintroduced to the area.

Markle, 827 F.3d at 481 (emphasis in original) (Owen, J., dissenting). The landowners' petition for rehearing en banc was narrowly denied by an 8-6 vote. Writing for the six dissenting judges in favor of rehearing, Judge Jones opined that the panel majority's decision has significant ramifications for land use nationally. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 637 (5th Cir. 2017) (Jones, J., dissenting). Whether such expansive designations are permissible under the ESA is thus an urgent question of national importance.

II. THE FIFTH CIRCUIT'S DECISION IS INCORRECT

This Court's now seminal decision in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), sets forth a two-step approach for the Judiciary to apply when

reviewing challenges to agency interpretations of statutes they administer:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

A. CONGRESS' INTENT THAT "CRITICAL HABITAT" MUST ALSO BE "HABITAT" IS CLEAR

In *Markle*, 827 F.3d at 458, the panel majority hopped right over step one of *Chevron* ("If the intent of Congress is clear, that is the end of the matter."). *Chevron, U.S.A., Inc.*, 467 U.S. at 842-43.

The term "critical habitat" in the ESA includes the noun "habitat" and the modifier "critical." The modifier

"critical" denotes the intent to define the term more narrowly than the concept of habitat itself. While the term "critical habitat" is expressly defined by the ESA, its constituent parts are not. As a result, consistent with the plain meaning rule, "critical" and "habitat" should be accorded their ordinary meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (opining that in the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning."). The term habitat is "the natural home or environment of an animal, plant, or other organism." *The New Oxford Dictionary* 762 (E.J. Jewell & F. Abate, eds. 2001).[2] The habitat of a species can include areas that it uses frequently or sporadically, depending on its life history. For example, whereas individual specimens of many plant species may make continuous use of their immediate geographical areas, migratory birds and fish may make very infrequent use of certain geographical areas that are nonetheless home to them for a portion of their life history (for example, nesting grounds or migratory corridors).

The legislative history of the ESA confirms Congress intended "critical" and "habitat" to be accorded their ordinary meaning. When the ESA was enacted

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[2] A more precise definition may be found in the scientific literature. Linnea S. Hall, Paul R. Krausman, and Michael L. Morrison, *The habitat concept and a plea for standard terminology*, Wildlife Society Bulletin 25:173-82 (1997) (defining habitat as "the resources and conditions present in an area that produce occupancy – including survival and reproduction – by a given organism"). It is reasonable to infer that Congress intended to adopt such a definition.

in 1973, the term "critical habitat" was not defined. Thereafter, the Service promulgated regulations defining the term. In 1978, Congress amended the ESA to add its own definition, replacing the Service's regulatory definition. Legislators voiced concerns that "the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as critical habitat" and explained that their intent was to narrow the scope of critical habitat designations. H.R. Rep. No. 1625, 95th Cong. 25 (1978). In light of the text of the ESA, the plain meaning rule, and the Act's legislative history, the Fifth Circuit should have been deeply troubled that the Service designated areas as "critical habitat" for the dusky gopher frog that do not constitute "habitat" for the frog, that is, areas that cannot be the natural home or environment of the species because they lack characteristics necessary to support it. Instead, the panel majority muddled the separation of powers by delegating to the Executive Branch the ability to re-write statutory terms that are clear on their face.

B. THE SERVICE'S CONSTRUCTION OF "CRITICAL HABITAT" IS NOT A PERMISSIBLE CONSTRUCTION OF THE STATUTE

Assuming, *arguendo*, that the statute is ambiguous, *Chevron* deference teaches that "the question for the court is whether the agency's answer is ***based on a permissible construction of the statute***." *Chevron*, 467 U.S. at 843 (emphasis added). What is a

"permissible construction" is subject to limits, in particular the words of the statute the agency is applying. "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994); *Sw. Bell Corp. v. F.C.C.*, 43 F.3d 1515, 1521 (D.C. Cir. 1995).

The deference given the agency's construction of the ESA in *Markle*, 827 F.3d at 458 is symptomatic of a broader trend of Executive intrusion into the legislative function and the unwillingness of the Judiciary to fulfill its role in maintaining the balance between the branches. Application of the ESA often requires policy makers to assess scientific information, and typically involves species at risk of extinction, and hence some courts have tended to give broad latitude to agency determinations. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014). This latitude can come at the expense of the Judiciary's role when agency determinations subsume issues of law, as they often do. Under *Chevron*, courts must ensure the agency's interpretation of law is "based on a permissible construction of the statute." The agency interpretation of the ESA upheld by the Fifth Circuit in *Markle* is not. This case presents an opportunity to clarify and reaffirm the proper and necessary role of courts when reviewing agency actions taken under the ESA, and the limits on deference due agency interpretations of law.

The plain text of the ESA delineates the process for critical habitat designation as follows: (1) determine

whether the land in question is the species' habitat, (2) if so, determine whether the habitat in question is currently occupied or unoccupied by the species, (3) use the proper definition for occupied habitat or unoccupied habitat to determine whether any portion of that habitat may be designated as critical habitat, and (4) if so, designate that portion of the species' habitat as its critical habitat. The Service's inclusion of Unit 1 in the dusky gopher frog's critical habitat is not based on a permissible construction of the ESA because Unit 1 is not habitable by the frog, and does not satisfy the ESA's definition of critical habitat for unoccupied areas.

1. The ESA Dictates That a Species' Critical Habitat Must be a Subset of That Species' Habitat

The Service's inclusion of Unit 1 in the dusky gopher frog's critical habitat is contrary to the plain text of the ESA because Unit 1 is uninhabitable by the frog. The ESA states that the Service

> ***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 . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)-(ii) (emphases added). Pursuant to this provision of the ESA, "[w]hatever is

'critical habitat' . . . must first be 'any habitat of such species.'" *Markle*, 848 F.3d at 640 (Jones, J., dissenting). This requirement of the ESA – "that only 'habitat of such species' may be designated as critical habitat" – manifests itself throughout the ESA and the ESA's implementing regulations. *See id.* at 640-41 (citing *inter alia* 16 U.S.C. §§ 1536(a)(2), 1533(a)(1)(A), 1537(b)(3); 50 C.F.R. §§ 402.01, 402.02, 402.05).

Unit 1 includes five ephemeral ponds that could support the dusky gopher frog's reproduction, but otherwise lacks the features the frog requires to survive. *Markle*, 848 F.3d at 638-39 ("No one disputes that the dusky gopher frog cannot inhabit Unit 1."); *Markle*, 827 F.3d at 481-82. The Service's inclusion of Unit 1 in the dusky gopher frog's critical habitat is therefore contrary to the plain text of the ESA and an impermissible construction of the statute.

2. The ESA Dictates That Unoccupied Habitat Designated as Critical Habitat Must Consist of *Areas*, Not Just Contain Some *Features*, That Are Essential for the Species' Conservation

The frog does not occupy Unit 1. The Service's designation of Unit 1 as critical habitat is contrary to the plain text of the ESA because it is not an "area" that is "essential" to the frog's "conservation." That Unit 1 includes one necessary feature of the frog's habitat is not sufficient under the law.

The ESA defines occupied critical habitat as:

> (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.

16 U.S.C. § 1532(5)(A)(i). This contrasts with the ESA's definition of unoccupied critical habitat as:

> (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.

Id. § 1532(5)(A)(ii).

The ESA states that unoccupied critical habitats are "specific ***areas*** . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). This contrasts with the ESA's characterization of occupied critical habitats which are "specific areas . . . on which are found those physical or biological ***features*** . . . essential to the conservation of the species[.]" *Id.* at § 1532(5)(A)(i) (emphasis added).

Pursuant to this text, "[f]or occupied habitat, the relevant specific areas contain physical or biological ***features*** essential to the conservation of a species" while "[f]or unoccupied habitat, the specific ***areas***

themselves must be essential for the species' conservation." *Markle*, 848 F.3d at 646-47 (emphasis added) (Jones, J., dissenting). "Flowing from the difference in terminology between 'features' and 'areas,' the burdens underlying the two types of designation are also different" because it is "easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard)." *Id.* at 646.

That "an unoccupied critical habitat designation was intended to be different from and more demanding than an occupied critical habitat designation" is further confirmed by the ESA's legislative history and Ninth Circuit and district court precedent. *See Markle*, 848 F.3d at 647-48 (Jones, J., dissenting) (citing Interagency Cooperation, 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978); S. Rep. No. 874, 95th Cong. 9-10 (1978); *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010); *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217, 131 S.Ct. 1475, 179 L.Ed.2d 301 (2011); *Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013); *Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004)).

Contrary to the plain text and legislative history of the ESA, the Service included Unit 1 in the dusky gopher frog's unoccupied critical habitat "solely on the

presence of a single allegedly essential feature (the 'ephemeral ponds')." *Markle*, 848 F.3d at 646 (Jones, J., dissenting). The Service's focus on a single suitable feature, rather than a suitable area, failed to comport with the definition of habitat and with the ESA's standard for unoccupied areas. The Fifth Circuit should not have permitted the agency to so deviate from the law.

3. The ESA Dictates That to Designate Unoccupied Habitat as Critical Habitat, the Habitat Must be "Essential"

The ESA requires that in order for unoccupied habitat to be designated as critical habitat it must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service's conclusion that Unit 1 is "essential" to the conservation of the dusky gopher frog is contrary to the plain meaning of this term. Although the Service is entitled to some level of discretion in determining whether a species' habitat is "essential" to its conservation, "there are limits to a word's meaning and hence the Service's discretion." *Markle*, 827 F.3d at 484 (Owen, J., dissenting).

Here, Unit 1 includes an area that is unoccupied by the dusky gopher frog, cannot be occupied by this species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the frog. *Id.* The Service's determination that Unit 1 is "essential" for the conservation of the dusky gopher frog "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean" and, therefore,

"is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable." *Id.* at 484, 486.

CONCLUSION

The Service's designation of Unit 1 as critical habitat for the dusky gopher frog strayed far beyond the limits of the ESA. In deferring to the Service, the Fifth Circuit failed its role as a check on the excesses of the Executive Branch. If allowed to stand, the Fifth Circuit's decision opens up broad swaths of this country to designation as critical habitat, with significant attendant economic dislocation. The petition for writ of certiorari should be granted.

Respectfully submitted,

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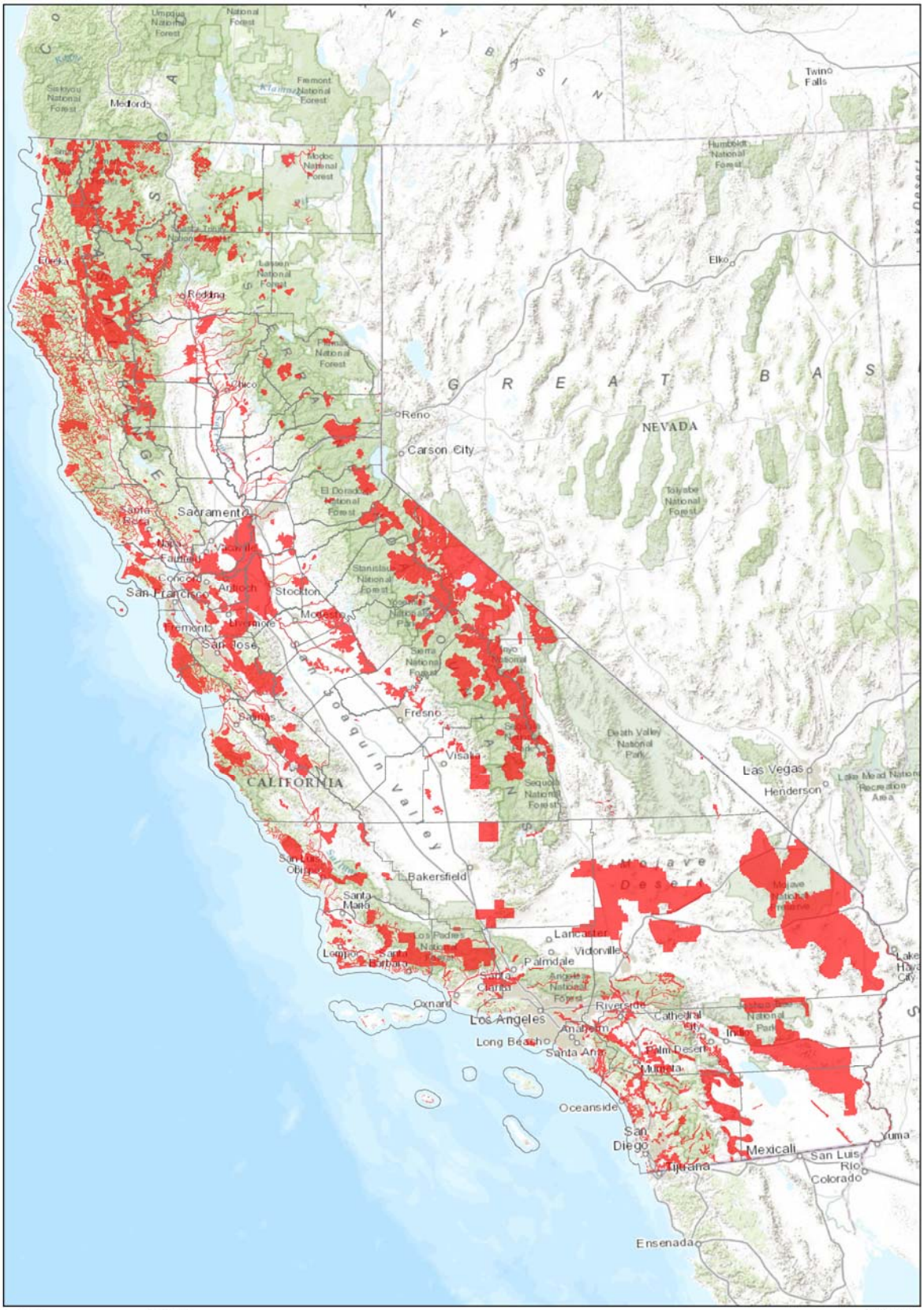

LSA

LEGEND

Critical Habitat

Total Acres of All Critical Habitat in California*: 18,159,192
Total Acres of the State of California: 104,764,524
Total Acres of All Critical Habitat in California (no-overlap): 16,006,207
Percentage of Land within Critical Habitat: 15.28%

*This includes areas of overlap.

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FEET

SOURCE: USFWS (2014); ESRI (2014)

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FIGURE 1

NGK1401

California Critical Habitat