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 *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

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

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc rehearing, 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."

Petitioners state several questions in their respective Petitions. *Amicus* writes separately regarding the following question:

Whether an agency decision to not exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued



STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

## INTEREST OF *AMICUS CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional takings. This aspect of its advocacy is reflected in regular representation of property owners challenging overreaching governmental actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs at both the state and federal level in support of property owners. *See Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Council*, 505 U.S. 1003 (1992); and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

This case is of particular interest to SLF because the Fifth Circuit's holding that the U.S. Fish and Wildlife Service's (Service) decision to not exclude Petitioners' land from critical habitat violates this Court's

[1] All parties have consented to the filing of this brief by blanket consent or individual letter, and the parties were notified of *amicus curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

precedent, disregards the presumption of reviewability, and as Judge Jones explained for the six-member dissent from the denial of rehearing en banc, represents an "abdication" of the judiciary's responsibility to oversee agency action in accordance with the Administrative Procedure Act. *Markle Interests L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 636 (5th Cir. 2017) (Jones, J., dissenting). The "ramifications" of the panel majority's decision for, among other things, "judicial review of agency action cannot be underestimated." *Id.* at 637.

SLF agrees with that assessment. Over the last decade, the administrative state has grown in two primary ways – through the launching of new agencies and through the growing deference the judiciary affords agency actions. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of prime concern because expansion of administrative deference raises serious constitutional concerns. SLF writes to explain how the panel majority's view that the Service's decision to not exclude Petitioners' property from critical habitat is unreviewable is simply wrong.

## SUMMARY OF ARGUMENT

"The availability of judicial review, is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally void." Louis L. Jaffe, *Judicial*

*Control of Administrative Action* 320 (Little, Brown 1965). The common law presumption of reviewability grew out of the constitutionally protected right to claim protection of the laws. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (citing *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)). Congress codified the presumption of reviewability when it enacted the Administrative Procedure Act (APA). 5 U.S.C. § 701 *et seq*. And this Court has "long applied . . . [a] strong presumption favoring judicial review of administrative action." *Mach Mining v. EEOC*, 135 S. Ct. 1645, 1653 (2015).

Two decades ago, this Court addressed that presumption in a case with striking similarity to the cases before the Court today, and held that the Service's determination to not exclude property from the critical habitat of two endangered fish was judicially reviewable. *Bennett v. Spear*, 520 U.S. 154, 172 (1997). More specifically, this Court held that the issue of whether the Service followed proper procedure and considered the economic impact of its decision to not exclude, or rather to include, property as critical habitat was judicially reviewable. *Id*.

Ignoring the presumption of reviewability, this Court's precedent, and basic separation of powers principles, the Fifth Circuit abdicated its responsibility to review the Service's consideration, or rather lack of consideration, of the economic impact of its decision to not exclude Petitioners' property from critical habitat. Reviewing executive branch actions is one of the most important roles the judiciary plays in our society. As

Justice Kagan recently explained in her opinion for a unanimous Court, this Court is reluctant to see an agency's compliance with the law rest in its hands alone because "[w]e need only know – and know that Congress knows – that legal lapses and violations occur, and especially so when they have no consequence." *Mach Mining*, 135 S. Ct. at 1652-53.

The implications of the Service's decisions to include or exclude property from critical habitats cannot be understated. Any argument by the Service that such decisions are judicially unreviewable indicates a belief that it is above the law and that the judiciary lacks the power to hold it accountable and review whether it followed legislatively (or even administratively) mandated procedures. And, in what can only be described as an abdication of responsibility, over a dissent and a six-member dissent from the denial of rehearing en banc, the Fifth Circuit deferred to the Service.

In addition to those opportunities discussed in the Petitions, this case provides this Court with the opportunity to hold not only the Service, but all agencies embarking on so-called discretionary activities, accountable to the People and the letter of the law.

## ARGUMENT

### I. Introduction.

#### A. The Service designates Unit 1 as critical habitat.

This case arises from the Service's determination to designate privately owned land in Louisiana as critical habitat for the endangered Mississippi dusky gopher frog. In 2001, the Service listed the gopher frog as endangered. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Nine years later, the Service proposed to designate 1,957 acres of largely public property in Mississippi as critical habitat. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31,389, 31,395-96 (June 3, 2010). Notably, at that time, the Service did not designate any property in Louisiana as critical habitat. Rather, it noted that "[a]t the time of listing in 2001, this species occurred at only one site, Glen's Pond, in the DeSoto National Forest in Harrison County, Mississippi." *Id*. at 31,388; *see also id*. at 31,389 ("Field surveys conducted in Alabama and Louisiana have been unsuccessful in documenting the continued existence of Mississippi gopher frogs in these States.").

The following year, the Service published a Revised Proposed Rule expanding the critical habitat designation to include over 1,500 acres of privately owned land in St. Tammany Parish, Louisiana (Unit 1). *See* Revised Proposed Rule for the Designation of Critical

Habitat for the Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,783 (Sept. 27, 2011). The Service did so despite its acknowledgement that not a single gopher frog could be found in Unit 1 and that to even get the frogs to Unit 1 in Louisiana, they would have to be "translocated" from Mississippi. *Id*. The Service also admitted that "[t]he uplands associated with the ponds [in Unit 1] do not currently contain the essential biological and physical features of critical habitat; however, we believe them to be restorable with reasonable effort." *Id*. Despite the lack of gopher frogs and the great effort it would take to make Unit 1 habitable for the gopher frogs, the Service declared Unit 1 "is proposed as critical habitat because it is essential for the conservation of the species." *Id*. 59,783.

In designating Unit 1 as critical habitat, the Service acknowledged that it could exclude an area from the designation if the benefits of exclusion outweigh the benefits of designation. *Id*. at 59,789. The Service pointed to a draft economic analysis, which addressed the economic impact of designation on several properties including Unit 1 and acknowledged that the land was privately owned, "managed for timber, [and] recently re-zoned for mixed-use and residential development." Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog (Economic Analysis) (2012), at 6.[2]

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[2] https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf.

In June 2012, the Service published its Final Rule, in which it acknowledged that it had "no existing agreements with the private landowners of [the Louisiana Property] to manage this site to improve habitat for the dusky gopher frog, or to move the frog there." Final Rule for the Designation of the Critical Habitat for the Dusky Gopher Frog (the Final Rule), 77 Fed. Reg. 35,118, 35,123 (June 12, 2012). Even so, it "hope[d] 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." *Id*. However, none of the tools available to make those ponds potential habitats for the gopher frog, such as "prescribed burning, or frog translocations to the site, c[ould] be implemented without the cooperation and permission of the landowner." *Id*.

In addition, the Service addressed the economic impact of its critical habitat designation. Consistent with the draft economic analysis the Service evaluated three potential scenarios. The first, which would "avoid[] impacts to jurisdictional wetlands" and, thereby, avoid the need for Section 7 consultations between federal agencies, would not cost the landowner anything; rather, the costs would be "the administrative costs of future section 7 consultations in all other units." *Id*. at 35,140. The second assumed that a Section 404 permit from the U.S. Army Corps of Engineers would be required, and that 60% of the property would have to be "managed" for the frog's benefit. *Id*. at 35,140-41. The present cost of such a reservation to the landowners was estimated to be $20.4 million. Under

the third scenario, the Service would recommend no development "due to the importance of the unit in the conservation and recovery of the species." *Id*. at 35,141. In that case, the present cost of the Service's action to the landowners was estimated to be $33.9 million. *Id*.

For the benefits of designating Unit 1, the Service observed that it "believes that the benefits of the proposed rule are best expressed in biological terms." *Id*. at 35,127. Those benefits could not be "quantif[ied]" or "monetize[d]," so they could only be viewed "qualitative[ly]." *Id*. at 35,141. It concluded that the economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id*. Accordingly, it declined to exclude the Louisiana property from the critical habitat. *Id*.

### B. The Fifth Circuit holds that the Service's decision to not exclude Unit 1 from critical habitat is judicially unreviewable.

Owners of property in Unit 1, Petitioners Markle Interests and Weyerhaeuser, filed suit challenging the Service's decision to not exclude Unit 1 from its designation of critical habitat on economic grounds as arbitrary and counter to the evidence before the Service. The district court ruled against Petitioners. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv*., 40 F. Supp. 3d 744 (E.D. La. 2014). Petitioners timely appealed the district court's ruling.

A split Fifth Circuit panel, with Judge Owen dissenting, refused to review the Service's decision to not

exclude Unit 1, holding the decision judicially unreviewable, even for an abuse of discretion. *Markle Interests*, 827 F.3d 452, 473 (5th Cir. 2016). The Fifth Circuit panel majority was notably quiet regarding the presumption of reviewability. Further, the panel majority sought to justify its abdication of responsibility by stating that it could not review the exclusion because there was "no meaningful standard against which to judge the agency's exercise of discretion."[3] *Id*. (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The panel majority explained that "even were [it] to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable." *Id*. at 474.

Subsequently, the Fifth Circuit denied rehearing en banc, with six members dissenting. *See generally*, *Markle Interests*, 848 F.3d 635 (5th Cir. 2017). The dissent disagreed with, among other things, the panel majority's conclusion of unreviewability. It pointed to the panel majority's failure to acknowledge this Court's decision in *Bennett v. Spear*, where it held that "the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary." *Id*. at 654 (Jones, J., dissenting). Indeed, while the panel majority "refer[red]" to *Bennett* at several points,

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[3] As Petitioners explain, abuse of discretion is a familiar standard of review and one which this Court has applied before. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 43 (1983).

it "never engaged *Bennett*'s clear signal that the Service's decision is reviewable." *Id*. Accordingly, "[r]egardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion." *Id*.

## II. This Court should grant the Petitions because the Fifth Circuit erroneously held that the Service's designation of Unit 1 as critical habitat is judicially unreviewable.

### A. Judicial review of administrative actions like the Service's decision to not exclude Unit 1 is presumed.

1. This Court's precedent antedating the APA supports judicial review of executive action. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall declared: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Id.* at 163. Inherent in the constitutionally protected right to claim protection of the laws is a strong presumption of judicial review. *See Bowen*, 476 U.S. at 670 (citing *Nourse*, 34 U.S. (9 Pet.) at 28-29).

Throughout history, the Court has emphasized the need for the judiciary to review executive actions. And, despite a period of judicial restraint that resulted only out of deference to Congress, by the early 20th Century, any perceived barriers to judicial review faded away.

*See Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (explaining that the acts of all administrative agency "officers must be justified by some law, and in the case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief"). The increased level of executive actions and the already growing administrative state underscored the need for judicial review. In 1915, the Court reaffirmed the common law presumption of reviewability when it reviewed the Acting Commissioner of Immigration's detention of a group of aliens for the purpose of deportation even though the statute at issue did not provide for judicial review. *Geigow v. Uhl*, 239 U.S. 3, 8 (1915). Writing for the Court, Justice Oliver Wendell Holmes explained that judicial review was appropriate because the statute did not forbid courts from considering whether the Commissioner's act violated the statute. *Id*. at 9. In doing so, Justice Holmes made clear that under the common law, unless a statute forbids judicial review, the courts have both the power and duty to review challenged executive actions.

Over the next few decades, the Court continued to stress the need for judicial review of administrative decisions. By way of example, in *Lane v. Hoglund*, 244 U.S. 174 (1917), the Court reviewed the actions of the Secretary of Interior taken under a homestead law. In doing so, the Court found judicial review of administrative acts both appropriate and necessary, explaining that to find otherwise would "limit[] the powers of the court" and "be most unfortunate, as it would relieve

from judicial supervision all executive officers in the performance of their duties." *Id*. at 182. And, in *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932), the Court reviewed the Secretary of Labor's imposition of fines against steamship companies for bringing aliens with illnesses into the United States. The Court explained that it had the power to review the administrative action because even though "Congress confer[red] on the Secretary great power, . . . it is not wholly uncontrolled." *Id*. at 339.

In 1944, the "powers of the court" to review executive actions that the Court so often spoke about received their greatest affirmation and explanation. In *Stark v. Wickard*, 321 U.S. 288 (1944), the Court explained that the presumption of reviewability arises from Article III of the United States Constitution because "[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id*. at 310. The Court continued: "Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id*. Starting with the presumption of reviewability inherent in the Constitution, the Court reviewed the statute governing the Secretary of Agriculture's actions and, finding it silent as to judicial review, explained that "the silence of Congress as to judicial

review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id*. at 309.

2. In 1946, Congress enacted the Administrative Procedure Act and codified "the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). When determining whether administrative action like the Jurisdictional Determination is subject to judicial review, the Court demands that the APA's "generous review provisions . . . be given a hospitable interpretation." *Id*. at 141 (internal quotations and citations omitted). Both the Court and Congress have emphasized that "'very rarely do statutes withhold judicial review[]'" because to do so would convert statutes into "blank checks drawn to the credit of some administrative officer or board." *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

### B. The Fifth Circuit's denial of judicial review conflicts with this Court's precedent.

In holding that the Service's decision to not exclude Unit 1 from designation as critical habitat is judicially unreviewable, the Fifth Circuit dismissed basic tenets of administrative law. As this Court explained

two decades ago when it found the Service's decision to not exclude land as critical habitat for fish listed as endangered in 1988 reviewable: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett*, 520 U.S. at 172 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)).

Like the Service does here, in *Bennett*, the Service sought to avoid judicial review of the critical habitat designation at issue. 520 U.S. at 172. More specifically the Service contended that the Secretary's duty under 16 U.S.C. § 1533(b)(2) to "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" was discretionary and hence, unreviewable. *Id*. at 172. This Court rejected that argument, explaining that while the Service's ultimate decision regarding critical habitat designation "is reviewable only for abuse of discretion" the "categorical *requirement*" that the Service consider the economic impact of such a designation remains and as such, is reviewable.[4] *Id*. As Judge Jones

[4] The Endangered Species Act (ESA) plainly requires the Secretary to consider the economic impact of the agency's actions. In pertinent part, 16 U.S.C. § 1533(b)(2) provides that, when designating critical habitat, the Secretary "shall" make any decision "on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." *Id*. In addition, it states that the Secretary "may exclude any area from critical habitat" when extinction of the species is not in issue by finding that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id*.

noted in writing for the dissent, *Bennett* is a "clear signal that the Service's decision is reviewable." *Markle Interests*, 848 F.3d at 654.

Further, the panel majority's reliance on *Heckler v. Chaney*, 470 U.S. 821, was misplaced. While this Court held that the claim before it was not reviewable because it raised a question "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the nature of the agency action involved there is entirely different from the agency action involved in this case. It explained that "an agency's decision not to take enforcement action should be presumed immune from judicial review" [because it] has traditionally been "committed to agency discretion. . . ." *Heckler*, 470 U.S. at 832.

Moreover, this Court observed that

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

*Id*. (emphasis in original). Here, as is plain, the Service exercised its powers over Petitioners' property. That affirmative exercise, whether denominated an inclusion or the refusal to exclude, is an affirmative action that is reviewable for an abuse of discretion.

This case provides the Court with an opportunity to affirm its rejection of the Service's request to exempt its discretionary acts from the "required procedures of decisionmaking."

### C. Denying judicial review of the Service's decision to not exclude Unit 1 violates separation of powers principles.

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities" *id*. at 1878, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . ." The Federalist No. 45 (James Madison), at 292 (Clinton Rossiter ed., 1961).

Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at

1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id*. at 1879 (citation and quotation omitted).

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Members of the Supreme Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id*. at 594 (Frankfurter, J., concurring). The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id*. at 629. As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution." *Id*. at 638 (Jackson, J., concurring).

Under these principles, any action by which one branch of the federal government presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to liberty. "In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of

May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966). *See* The Federalist Nos. 47-51 (J. Madison) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). *See id*. at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

Preclusion not only conflicts with the presumption of reviewability founded in common law and codified in the APA, but it runs afoul of the Constitution. As this Court has explained, "a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse" than a judiciary that reviewed agency action. *Free Enter. Fund*, 130 S. Ct. at 3157 (internal quotation marks, alterations, and citations omitted). "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) (majority opinion).

There are few actions by administrative agencies that exhibit the tyranny our Founding Fathers feared more than decisions by the Service not to exclude, or rather to include, land as critical habitat under the ESA. Congress could have never predicted the vast expansion of critical habitat and the egregious violations of the Fifth Amendment that the Service has pursued

since it enacted the ESA in 1973. The Service's latest attempt to expand critical habitat for the dusky gopher frog to include Unit 1 land owned by private parties which the Service itself admits is neither a current habitat or even a suitable habitat for the frog, underscores the need for judicial review.

## CONCLUSION

For the foregoing reasons, and those stated by Petitioners in the Petition for Writ of Certiorari, *amicus* respectfully requests that this Court grant the writ of certiorari, and, on review, reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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