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.

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

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In 2012, following scientific review and public comment, the U.S. Fish and Wildlife Service (Service) issued a regulation designating critical habitat for the dusky gopher frog, an endangered species listed under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* The questions presented are as follows:

1. Whether the Service's designation of a portion of petitioners' land as critical habitat—land that the frog previously occupied, and that continues to contain rare ephemeral ponds associated with the frog's breeding habitat—was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Whether the court of appeals properly declined to review the Service's discretionary decision not to exclude petitioners' land from the designation of critical habitat on grounds of economic impact.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-77a[1]) is reported at 827 F.3d 452. The opinion of the district court (Pet. App. 78a-122a) is reported at 40 F. Supp. 3d 744.

[1] Citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 17-71. Citations to "Weyerhaeuser Pet." are to the petition in No. 17-71; citations to "Markle Pet." are to the petition in No. 17-74.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2016. A petition for rehearing was denied on February 13, 2017 (Pet. App. 123a-162a). On March 27, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 29, 2017. On June 9, 2017, Justice Thomas further extended the time to and including July 13, 2017. The petition in No. 17-71 was filed on July 11, 2017, and the petition in No. 17-74 was filed on July 12, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. 1531(b). Responsibility for administering the ESA is shared by the Secretary of the Interior and the Secretary of Commerce. 16 U.S.C. 1532(15). The U.S. Fish and Wildlife Service (Service) implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. 50 C.F.R. 17.11, 402.01(b).

The ESA directs the Service to identify endangered and threatened species and to include those species on lists published in the Federal Register. 16 U.S.C. 1533(a)(1)-(2) and (c). When it determines a species to be threatened or endangered, the Service is also required, "to the maximum extent prudent and determinable," to promulgate a regulation designating the "critical habitat" of that species. 16 U.S.C. 1533(a)(3)(A)(i).

A species' "critical habitat" comprises two categories. First, critical habitat includes "the specific areas *within* the geographical area occupied by the species, at the time it is listed * * * 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) (emphasis added). Second, "specific areas *outside* the geographical area occupied by the species at the time it is listed" may be designated as critical habitat "upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii) (emphasis added). At all times relevant here, the Service's regulations provided that areas in the second category could be designated as critical habitat only "when a designation limited to [a species'] present range would be inadequate to ensure the conservation of the species." 50 C.F.R. 424.12(e) (2012).

The term "conservation," as used in the critical-habitat provisions, means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"; those measures may include, *inter alia*, "habitat acquisition and maintenance, propagation, live trapping, and transplantation." 16 U.S.C. 1532(3). Because "the ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species," the term "'[c]onservation' is a much broader concept than mere survival." *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 441-442 (5th Cir. 2001).

In designating a species' critical habitat, the Service must rely on the "best scientific data available" and "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). 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," unless such an exclusion would result in the extinction of the species. *Ibid.*

"The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area"; "does not allow the government or public to access private lands"; and "does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners." 77 Fed. Reg. 35,118, 35,128 (June 12, 2012). Rather, the "only regulatory effect" of designating private lands as critical habitat, *id.* at 35,143, is that a federal agency, in consultation with the Service, must "insure that any action authorized, funded, or carried out by such agency * * * is not likely to * * * result in the destruction or adverse modification" of the designated critical habitat. 16 U.S.C. 1536(a)(2).[2] If this consultation process reveals that a proposed agency action is likely to destroy or adversely modify the designated critical habitat, the Service issues an opinion that "suggest[s] * * * reasonable and prudent alternatives" to the

[2] A federal agency must also separately ensure, in consultation with the Service, that "any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).

proposed action, if available. 16 U.S.C. 1536(b)(3)(A); see 50 C.F.R. 402.02 (specifying that such alternatives must be "economically and technologically feasible"). Where a federal agency does not authorize, fund, or carry out activities on the designated critical habitat, no consultation with the Service is required.

2. a. The Service listed the dusky gopher frog (*Rana sevosa*) as an endangered species in 2001. 66 Fed. Reg. 62,993 (Dec. 4, 2001); see 77 Fed. Reg. at 35,118-35,119 (describing history).[3] The dusky gopher frog is a "terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. Historical records showed that the frog previously inhabited several counties or parishes in Alabama, Louisiana, and Mississippi. 66 Fed. Reg. at 62,994. By the time of the listing in 2001, however, the Service identified only one population still in existence: approximately 100 adult frogs at a single pond in Mississippi. *Id.* at 62,995. The Service found that the frog's continued existence as a species was threatened by its small population size and by habitat destruction due to fragmentation and conversion of the frog's ecosystem. *Id.* at 62,997-63,000.

At the time it listed the species as endangered, the Service deferred its designation of critical habitat due to budget limitations. 66 Fed. Reg. at 62,300. Following a lawsuit, however, the Service entered into a court-approved settlement agreement in which it agreed to a rulemaking schedule for designating the frog's critical

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[3] At the time it was listed as endangered, the frog was known as the "Mississippi gopher frog" and was understood to be a "distinct population segment" of the "gopher frog" species. 66 Fed. Reg. at 62,993. The Service later determined that the frog "warrant[ed] acceptance as its own species," and it adopted a proposal to use the common name "dusky gopher frog." 77 Fed. Reg. at 35,118.

habitat. See 77 Fed. Reg. at 35,118-35,119 (describing history).

b. Pursuant to that agreement, the Service published a proposed critical-habitat rule in 2010. 75 Fed. Reg. 31,387 (June 3, 2010). In the proposed rule, the Service identified and detailed three categories of "physical and biological features" needed to "sustain the essential life history functions" of the frog: (1) "ephemeral" (*i.e.*, seasonally existing) ponds necessary for the frog's breeding; (2) "[u]pland forested nonbreeding habitat"; and (3) "upland connectivity habitat between breeding and nonbreeding habitats." *Id.* at 31,393, 31,404.

The Service noted that, although only one population of frogs had been known in 2001, two other small populations had since been discovered at nearby sites in Mississippi, and another nearby population was established through human intervention. 75 Fed. Reg. at 31,389, 31,397. But the habitat occupied by the frog remained highly localized and fragmented, and the Service cautioned that the frog still faced a high risk of extinction from a drought or other random event. See *id.* at 31,394-31,395. The Service therefore proposed to designate as critical habitat, in addition to the areas occupied by the frog, several areas that were unoccupied by the frog but were determined to be essential for its conservation. See *id.* at 31,395-31,399. All of the areas were located within four counties in southeastern Mississippi. *Ibid.*

In addition to soliciting public comment, the Service obtained peer review of the proposed designation by six specialists with scientific expertise concerning the species, the geographic region, and conservation-biology principles. See 77 Fed. Reg. at 35,119; Pet. App. 86a; cf.

59 Fed. Reg. 34,270 (July 1, 1994) (agency policy on soliciting peer review). The peer reviewers were "united in their assessment" that the Service's proposed critical-habitat designation was "inadequate for the conservation of the dusky gopher frog." 77 Fed. Reg. at 35,123-35,124; see also *id.* at 35,119. As one reviewer explained, "the low number of remaining populations and [the species'] very restricted range" meant that the frog was "at risk of extirpation from events such as drought or disease" or other random, localized occurrences. C.A. E.R. 1568 (Jan. 1, 2015); see also Pet. App. 16a-17a (noting the "consensus expert conclusion" that "the designated habitat in the [2010] proposal was inadequate to ensure the conservation of the frog"). The peer reviewers therefore recommended that the agency "look within the species' historic range outside the state of Mississippi for additional habitat for the designation." 77 Fed. Reg. at 35,124.

After considering those comments, the Service agreed that the dusky gopher frog was "at high risk of extirpation from stochastic events, such as disease or drought," which are "likely to occur at the same time at sites near each other." 77 Fed. Reg. at 35,121, 35,124. The Service concluded that, to guard against the consequences of "local catastrophic events," "recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125; see also *id.* at 35,135 (concluding that "population expansion outside of the core population areas in Mississippi" was "a necessary component of recovery efforts" and thus essential for the conservation of the species). The Service therefore undertook to identify other sites that might appropriately be designated as critical habitat for the frog.

In undertaking this process, the Service made "the primary focus of [its] reanalysis" the identification of suitable breeding habitat. 77 Fed. Reg. at 35,124. The Service focused on breeding habitat because of the "rarity" of "open-canopied, isolated, ephemeral ponds within the historic range of the dusky gopher frog" and because of such ponds' "importance to survival of the species." *Ibid.*

One of the peer reviewers drew the Service's attention to a site within St. Tammany Parish in Louisiana, later designated as "Unit 1." 77 Fed. Reg. at 35,135; Pet. App. 105a. Unit 1 hosted a population of dusky gopher frogs—the last known population outside Mississippi—as late as 1965, and still contained a unique collection of ephemeral ponds that would support breeding by the frog. 77 Fed. Reg. at 35,135.

The Service inspected Unit 1 and found that it "provide[s] breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." 77 Fed. Reg. at 35,124. The five ephemeral ponds located on Unit 1 are "intact and of remarkable quality." *Id.* at 35,133. Indeed, "no group of five ponds such as these was found in any of the areas of historical occurrence that [the Service] searched in Mississippi." *Ibid.* The Service determined that "[i]f dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation, which increases the chances of the long-term survival of the population." *Id.* at 35,135. The Service acknowledged that the uplands surrounding the ponds were "poor-quality terrestrial habitat" for the frog, but found that these areas would be "restorable

with reasonable effort." *Id.* at 35,133, 35,135. Accordingly, in 2011, the Service issued a revised proposed designation that included Unit 1. See 76 Fed. Reg. 59,774, 59,783 (Sept. 27, 2011).

c. Following additional rounds of public comment and a public hearing, the Service finalized its designation of critical habitat for the dusky gopher frog in June 2012. 77 Fed. Reg. at 35,118, 35,119. The Service included Unit 1 (comprising 1544 acres) within the final rule, finding it to be "essential for the conservation of the species." *Id.* at 35,135. The Service explained that "[m]aintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated" is "essential to decrease the risk of extinction of the species resulting from stochastic events and [to] provide for the species' eventual recovery." *Ibid.*

The Service addressed public comments disagreeing with its designation of Unit 1. The Service acknowledged that the dusky gopher frog does not currently inhabit the site; that the current landowners object to translocation of the frog; and that restoration of the surrounding uplands would be needed if translocation were to occur. See 77 Fed. Reg. at 35,123. The Service explained that Unit 1 nonetheless is "essential for the conservation of the species" because it contains breeding habitat of a quality not known to exist anywhere else within the frog's historical range, and includes at least "two historic breeding sites" for the frog. *Id.* at 35,123-35,124. The Service rejected the suggestion that "artificial ponding" at another location was an adequate substitute, explaining that "[e]phemeral, isolated ponds are very difficult to establish in the landscape due to their short and specific hydrology," and that efforts to establish an artificial pond in Mississippi had already taken a

decade and not yet proven successful. *Id.* at 35,123. The Service also indicated that, although it could not require the owners of Unit 1 to allow the frog's return, it "hope[d] to work with the landowners to develop a strategy that will allow them to achieve their objectives" while also "protect[ing] the isolated, ephemeral ponds that exist there," and noted that federal funds may be available for such efforts. *Ibid.*

As required by 16 U.S.C. 1533(b)(2), the Service also considered the economic impact of its critical-habitat designation. 77 Fed. Reg. at 35,140-35,141. The Service found that "considerable uncertainty exist[ed]" concerning the economic impact of including Unit 1 in the designation, inasmuch as that designation would not change the use of the property but would merely impose consultation requirements on any federal agencies acting with respect to Unit 1 under other statutes. *Ibid.*; cf. 16 U.S.C. 1536(a)(2). The Service found it unclear whether "a Federal nexus for development activities" would ever exist for the site, such as the need for a federal permit to discharge fill material into "jurisdictional wetlands" under the Clean Water Act, 33 U.S.C. 1251 *et seq*. 77 Fed. Reg. at 35,140.

The Service posited three economic-impact scenarios. In the first scenario, future use or development of Unit 1 would not require any federal permits, and thus would not invoke any consultation under Section 7 of the ESA; in that scenario, the designation would have no incremental economic impact. 77 Fed. Reg. at 35,140. In the second scenario, the Service assumed that future development of Unit 1 would require a Clean Water Act permit, and that the ensuing consultation would yield an arrangement under which 40% of the site would be de-

veloped for private use and 60% set aside for conservation. The Service calculated the economic impact of the designation of Unit 1 in this scenario as $20.5 million. *Id.* at 35,140-35,141. Finally, in a third scenario, the Service posited that if future development of Unit 1 required consultation, and if the Service in turn "recommend[ed] that no development occur within the unit," the expected impact to landowners would be $33.9 million. *Id.* at 35,141.

The Service then considered whether to exercise its discretionary authority to exclude any areas from the designation of critical habitat, assuming it determined the benefits of exclusion to outweigh those of inclusion. Cf. 16 U.S.C. 1533(b)(2). The Service found substantial conservation benefits for the frog from designating Unit 1 as critical habitat, and noted that those benefits were "best expressed in biological terms." 77 Fed. Reg. at 35,141. Based on its consideration of both potential economic impacts and conservation benefits, the Service ultimately determined against "exercising [its] discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Ibid.*

3. Petitioner Weyerhaeuser Company in No. 17-71, and petitioners Markle Interests, LLC, et al. in No. 17-74, collectively own all of the land within Unit 1. See Weyerhaeuser Pet. 11; Markle Pet. 7-8. For the portions of Unit 1 that it does not own, Weyerhaeuser holds a long-term lease to "grow and harvest timber" on the site; that lease expires in 2043. Weyerhaeuser Pet. 11.

In 2013, petitioners filed three suits in the Eastern District of Louisiana challenging the Service's inclusion of Unit 1 within its designation of critical habitat. Petitioners asserted that the Service's actions violated the

ESA, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and exceeded constitutional authority under the Commerce Clause. Pet. App. 89a. The district court consolidated the suits and allowed two environmental groups (the Center for Biological Diversity and Gulf Restoration Network) to intervene in defense of the Service's actions. *Id.* at 88a-89a.

On cross-motions for summary judgment, the district court resolved all merits issues in favor of the Service. Pet. App. 78a-122a.[4] Considering the administrative record supporting the Service's designation, the court rejected petitioners' argument that the designation of Unit 1 as critical habitat was arbitrary and capricious, explaining that the Service's "finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record." *Id.* at 106a. The court observed that the Service included Unit 1 only after the Service's original designation "was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog." *Id.* at 104a. Observing that petitioners "d[id] not meaningfully dispute the scientific and factual bases" of the Service's determination, *id.* at 106a, the court credited the Service's scientific judgment that Unit 1 was essential to the conservation of the frog because it "provide[s] breeding habitat that in its totality is not known to be present elsewhere within [the frog's] historic range," *id.* at 108a.

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[4] The district court ruled in favor of petitioners on the threshold issue of standing. Pet. App. 95a-99a.

The district court also rejected petitioners' other arguments. As relevant here, the court held that the Service properly "considered [the] potential economic impacts" of its designation of critical habitat and "determined that the[] economic impacts to Unit 1 were not disproportionate." Pet. App. 117a-118a. The court also rejected petitioners' arguments under the Commerce Clause, explaining that their "constitutional claim is foreclosed by binding precedent." *Id.* at 99a-100a.

4. a. On consolidated appeals, a divided panel of the court of appeals affirmed. Pet. App. 1a-77a.

Like the district court, the panel concluded that the administrative record supported the Service's determination that Unit 1 is "essential for the conservation of the species" and thus was properly designated as unoccupied critical habitat under Section 1532(5)(A)(ii). Pet. App. 32a. The panel noted that petitioners had not challenged the Service's finding that a designation limited to the frog's present range would be inadequate, *id.* at 17a, nor had petitioners "dispute[d] the scientific or factual support for the Service's determination that Unit 1 is essential" for the frog's conservation, *id.* at 20a-21a. The panel acknowledged that future occupation of Unit 1 would likely occur only after translocation of the frog and modifications to the surrounding uplands, which petitioners opposed and the Service could not compel. But the panel concluded that nothing in the statute precluded a reasoned determination that the area remained essential for the frog's conservation. *Id.* at 23a-27a; see also *id.* at 15a, 22a (stating that "the Service's interpretation of the term 'essential' is entitled to * * * deference" under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The panel rejected suggestions that upholding the Service's action on this record would mean that there are no meaningful limits on the Service's authority to designate critical habitat. The panel specifically rejected the dissent's contention that, under its decision, "the Service [could] designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue." Pet. App. 30a n.20 (citation omitted). The panel explained that it "create[d] no such generalized rule," but instead held only that "*in this case*, substantial, consensus, scientific evidence in the record support[ed] the Service's conclusion" that Unit 1 was essential for the frog's conservation. *Ibid.* In particular, the panel reasoned that the Service's designation was sustained by a "scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 29a.

The panel declined to review petitioners' challenge to the Service's decision not to exclude Unit 1 from the designation of critical habitat on economic-impact grounds. The panel reasoned that, although Section 1533(b)(2) requires the Service to consider economic and other impacts, the ESA ultimately leaves to the Service's discretion whether to exclude any areas on that basis. The panel explained that the ESA sets forth "no manageable standards for reviewing the Service's decision not to exercise [that] discretionary authority," such that the decision was committed to agency discretion. Pet. App. 34a. The panel noted that this holding accorded with decisions by the Ninth Circuit and "every district court that has addressed this issue." *Ibid.*

The panel also rejected petitioners' contention that the designation of Unit 1 as critical habitat would exceed the permissible bounds of federal authority under the Commerce Clause. The panel reasoned that designating critical habitat is "an essential part of the ESA's economic regulatory scheme," which petitioners did not otherwise challenge. Pet. App. 41a, 43a. The panel rejected petitioners' suggestion that the particular application of the ESA to Unit 1 was unconstitutional, explaining that, under *Gonzales* v. *Raich*, 545 U.S. 1, 23 (2005), "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." Pet. App. 43a (quoting *id.* at 101a) (brackets in original).

Judge Owen dissented. In her view, the Service had not shown that Unit 1 was "essential for the conservation" of the frog because the area currently "plays no part in the conservation of that species," Pet. App. 48a, and because there was "no reasonable probability that it could actually be used for conservation," *id.* at 61a.

b. Petitioners sought rehearing en banc, which was denied. Pet. App. 123a-124a. Judge Jones, joined by five other judges, dissented from the denial of rehearing. *Id.* at 124a-162a. Judge Jones disagreed with the panel's ruling that the Service's designation of Unit 1 as critical habitat was a reasonable application of the ESA, *id.* at 124a-156a, as well as with the panel's conclusion that the Service's decision not to exclude Unit 1 on economic-impact grounds was committed to agency discretion, *id.* at 156a-162a.

ARGUMENT

Petitioners renew their contentions (Weyerhaeuser Pet. 15-31; Markle Pet. 18-29) that the Fish and Wildlife Service acted unlawfully by including a portion of their lands within its designation of critical habitat for the endangered dusky gopher frog. The court of appeals correctly upheld the Service's determination, based upon the administrative record, that Unit 1 is "essential for the conservation of the species," 16 U.S.C. 1532(5)(A)(ii), and also properly declined to disturb the Service's discretionary decision not to exclude Unit 1 on economic-impact grounds. Those rulings do not conflict with any decision of this Court or of any other court of appeals, and the Service's factbound determination of critical habitat does not warrant this Court's review.

1. a. The ESA directs the Service, when listing a species as endangered or threatened, also to designate the species' critical habitat. 16 U.S.C. 1533(a)(3)(A)(i). The ESA directs the Service to make that designation of critical habitat "on the basis of the best scientific data available," while also taking into consideration economic and other impacts. 16 U.S.C. 1533(b)(2).

The statutory standard for designating an area as critical habitat differs between occupied and unoccupied areas. For areas "*within* the geographical area occupied by the species" at the time of listing, an area may be designated as critical habitat so long as it contains "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) (emphasis added). For areas "*outside* the geographical area occupied by the species" at the time of listing, however, an area cannot qualify as critical habitat simply by containing those "physical or

biological features." 16 U.S.C. 1532(5)(A)(i)-(ii) (emphasis added). Instead, such areas may be designated as critical habitat only "upon a determination by the Secretary" that the areas themselves "are essential for the conservation of the species." *Ibid.* Moreover, under the regulations applicable here, a designation of unoccupied critical habitat could not be made unless the Service determined that "a designation limited to [a species'] present range would be inadequate to ensure the conservation of the species." 50 C.F.R. 424.12(e) (2012).

Based upon the extensive administrative record, the Service concluded that limiting the critical-habitat designation to occupied habitat would be "inadequate to ensure the conservation of" the dusky gopher frog, 77 Fed. Reg. at 35,128, and further determined that Unit 1 is "essential for the conservation of the species," *id.* at 35,123, 35,135. The Service's decision is reviewable under the APA, and thus may be set aside only if arbitrary or capricious or otherwise contrary to law. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 658 (2007). Courts review an agency's scientific judgments with particular deference. See, *e.g.*, *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."). And because "Congress has not defined the word

'essential' in the ESA," the Service in designating critical habitat by regulation has the "authority to interpret the term" within the bounds of *Chevron*. Pet. App. 21a.

The court of appeals properly upheld the Service's determination that Unit 1 is "essential for the conservation of the [dusky gopher frog]" within the meaning of 16 U.S.C. 1532(5)(A)(ii).[5] In concluding that "the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA" under *Chevron*, Pet. App. 32a; see *id.* at 15a, 22a, the court of appeals properly accounted for the full range of relevant considerations.

First, as the court of appeals explained, the Service properly determined—and petitioners do not dispute—that a designation of critical habitat limited to the areas occupied by the dusky gopher frog at the time it was listed as endangered would be "inadequate to ensure the conservation of the species." Pet. App. 16a-17a (emphasis omitted) (quoting 50 C.F.R. 424.12(e) (2012)).[6]

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[5] Petitioners in No. 17-74 mistakenly assert (Markle Pet. 4) that "under the Fifth Circuit decision[,] the government's designation of critical habitat is unreviewable in a court of law." To the contrary, the court of appeals reviewed the designation of Unit 1 and upheld that action on its merits.

[6] Petitioner in No. 17-71 notes (Weyerhaeuser Pet. 30-31) that, in 2016, the Service rescinded the regulation requiring a threshold "inadequa[cy]" determination before unoccupied critical habitat may be considered for designation. See 81 Fed. Reg. 7414 (Feb. 11, 2016). That regulatory change has been challenged in litigation by 20 States and various private groups, and the suits have repeatedly been stayed to afford the parties an opportunity to evaluate the potential resolution of the claims. See *Alabama* v. *National Marine Fisheries Serv.*, 16-cv-593 Docket entry No. 52 (S.D. Ala. Nov. 13, 2017) (staying case through Feb. 8, 2018); *Utility Water Act Grp.* v. *National Marine Fisheries Serv.*, 17-cv-206 Docket entry No. 24 (S.D. Ala. Sept. 14, 2017) (staying case through Nov. 20, 2017).

When the frog was listed in 2001, "only about 100 adult frogs [were] known to exist in the wild," *id.* at 3a, all at a single pond in Mississippi. Even after the Service proposed a designation that included both occupied and unoccupied areas within Mississippi, the "consensus expert conclusion" was that the designation remained inadequate to ensure the frog's recovery, particularly given the risk that "local events, such as drought and other environmental disasters," could cause the species' extinction. *Id.* at 17a. Scientific reviewers specifically "urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range." *Ibid.* The court thus observed that "recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 18a-19a (citation omitted).

Second, in reviewing the Service's determination, the court of appeals appropriately recognized the frog's unusual breeding needs. The court observed that the Service "focused its resources on locating additional ephemeral ponds" because of "their rarity and great importance for breeding, and because they are very difficult to replicate artificially." Pet. App. 18a. The Service gave particular attention to Unit 1 because it still possessed the rare kind of "isolated, ephemeral ponds" required by the frog for breeding. *Id.* at 19a. Other historic breeding sites, such as "[t]he area in Alabama where the frog once lived," no longer possessed those characteristics. *Ibid.* In fact, as the court noted, "the

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These actions do not affect the Service's designation of critical habitat for the dusky gopher frog, and recent (or any future) regulatory changes demonstrate only that the legal regime applied in this case may be of reduced prospective importance.

five ponds in Unit 1 provide breeding habitat" for the frog "that in its totality is not known to be present" anywhere else "within [its] historic range." *Ibid.* (citation omitted). And although ensuring the long-term success of the frog, if translocated to Unit 1, would likely require modifications to the surrounding uplands, the court correctly noted the Service's finding (not disputed by petitioners) that such modifications to the terrestrial habitat were readily feasible. *Id.* at 26a n.17. The court thus found reasonable the Service's conclusion that "the unique ponds located on Unit 1 are essential for the frog's recovery." *Id.* at 20a (citation omitted).

Third, the court of appeals properly declined to give dispositive significance to petitioners' assertions of unwillingness to participate in conservation of the dusky gopher frog. See Pet. App. 24a. As the court explained, petitioners' suggestion that a landowner's opposition to designation of unoccupied critical habitat suffices to defeat the designation "lacks legal support and is undermined by the ESA's text." *Ibid.* Nor does the ESA "set[] a[ny] deadline for achieving th[e] ultimate conservation goal," *id.* at 25a, or require the exclusion of areas from critical habitat simply because the designation in itself would not guarantee the species' recovery.

At the same time, the court of appeals appropriately cautioned that its decision did not permit the arbitrary or indiscriminate designation of unoccupied private lands as critical habitat. The court specifically rejected a "generalized rule" that "the Service can designate any land as critical" so long as it "contains a single one of the 'physical or biological features' essential to the conservation of the species at issue." Pet. App. 30a n.20 (citation omitted). The court held only that "*in this*

case" there was "substantial, consensus, scientific evidence" to support the Service's reasonable determination that Unit 1 is "essential" for the conservation of the frog, particularly in light of the "scientific consensus that the rarity of isolated, ephemeral ponds 'is a limiting factor in dusky gopher frog recovery.'" *Ibid.* (citation omitted); see also, *e.g.*, *id.* at 22a-23a n.15, 29a (similar). The court thus rejected the dissent's effort to "decouple the Service's 'essentiality' finding" from the administrative record compiled in this case. *Id.* at 31a n.20; see also *ibid.* (emphasizing that "the ESA specifically requires that critical habitat determinations be based on 'scientific data'") (quoting 16 U.S.C. 1533(b)(2)).

b. Petitioners' arguments do not identify any error in the court of appeals' decision.

Petitioners principally contend (Weyerhaeuser Pet. 15-16; Markle Pet. 18-22) that Unit 1 does not constitute "habitat" for the dusky gopher frog. Adopting a statutory argument offered by the dissent from denial of rehearing, petitioners assert that because the ESA directs the Service to "designate *any habitat* of such species which is then considered to be critical habitat," 16 U.S.C. 1533(a)(3)(A)(i) (emphasis added), the Service cannot designate an area as "critical habitat" unless that area first qualifies as "habitat."

As an initial matter, although petitioners raised this argument in district court (Weyerhaeuser Pet. 15 n.5), they did not present it to the court of appeals. Petitioners contested the Service's determination that Unit 1 is "essential for the conservation of the species" under Section 1532(5)(A)(ii), not any finding that Unit 1 constituted "habitat" under Section 1533(a)(3)(A)(i). The panel decision accordingly did not address the latter argument, as petitioners acknowledge. See, *e.g.*, Markle

Pet. 22. The dissent from denial of rehearing similarly observed that "the parties, for differing tactical reasons, did not call" this argument to the panel's attention. Pet. App. 138a (Jones, J.). Petitioners thus ask this Court to resolve arguments that the court of appeals did not address and was given no occasion to consider. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is "[one] of review, not of first view").

In any event, petitioners' argument misunderstands the significance of the term "habitat." For an area to fall within a species' "habitat," the species need not currently inhabit the area. The text of the ESA demonstrates as much: an area may qualify not only as "habitat," but as "*critical* habitat," even if the area lies "*outside* the geographical area occupied by the species at the time it is listed." 16 U.S.C. 1632(5)(A)(ii) (emphasis added).

Petitioners' related assertions (Weyerhaeuser Pet. 14-16; Markle Pet. 18-20) that Unit 1 is not "habitat" because the dusky gopher frog could not "live and grow" there rest on similar misunderstandings of both the law and the factual record. As a legal matter, petitioners rely on the observation (Weyerhaeuser Pet. 2; Markle Pet. 25) that Unit 1 does not currently contain "[a]ll three" of the "'primary constituent elements' ('PCEs') of frog habitat" that the Service previously identified as essential to the frog's conservation. But the three "PCEs" identified by the Service for the dusky gopher frog relate to the "physical or biological features" referred to in 16 U.S.C. 1532(5)(A)(i). Those features are the requirements of *occupied critical habitat*, not requirements of "habitat" itself. Petitioners' arguments erroneously conflate the distinct concepts of "habitat" and "critical habitat," while further overlooking that

Unit 1 was designated as unoccupied rather than occupied critical habitat.

Moreover, as a factual matter, the Service never concluded that Unit 1 is not "habitat" or is "uninhabitable" by the frog. Cf. Weyerhaeuser Pet. 16 (mistakenly declaring it "undisputed" that Unit 1 is not "habitat"); Markle Pet. 33 (same). To the contrary, the Service declared that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere" in the frog's "historic range." 77 Fed. Reg. at 35,124. The Service also found that the "surrounding uplands" were "poor-quality terrestrial habitat." *Id.* at 35,133. But that statement reflects only that the "terrestrial habitat" would require improvements to ensure long-term success. Indeed, the Service elsewhere clarified that its finding was that "the uplands [of Unit 1] do not currently contain the essential physical or biological features of [occupied] critical habitat," *id.* at 35,135, not that the uplands failed to constitute "habitat" at all. Indeed, the Service's final rule elsewhere reflects the principle that an area may constitute "habitat" and nonetheless still require or benefit from "restor[ation]" as part of a species' conservation. See, *e.g.*, *id.* at 35,133 ("[W]e searched for *additional habitat* with the best potential of restoring the physical and biological features essential for the conservation of the dusky gopher frog.") (emphasis added).

Petitioners' renewal (Weyerhaeuser Pet. 17-18; Markle Pet. 22-23) of their argument presented below—that the Service's designation was unlawful because Unit 1, in its present form, cannot be "essential for the conservation of the species" under Section 1532(5)(A)(ii)—is similarly without merit. As explained (pp. 18-21, *supra*), the court of appeals carefully reviewed the record

and properly upheld the Service's determination that Unit 1 was essential for the frog's conservation. Petitioners nowhere identify any provision in the ESA specifying that an area cannot be deemed "essential to [a species'] conservation" just because it may require reasonable modifications to fully benefit the species. On the contrary, "conservation" itself includes "the use of all methods and procedures" necessary to achieve the recovery of the species, including human-assisted habitat management. 16 U.S.C. 1532(3). The Service may conclude in an appropriate case that an area is "essential" for "conservation" even if reasonable restorations would be undertaken as part of that conservation. And, as the courts below noted, petitioners at no time challenged the factual and scientific findings underpinning the Service's judgment that Unit 1 is "essential for the conservation of the frog." See Pet. App. 17a, 20a-21a, 106a.[7]

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[7] Petitioner's assertion (Weyerhaeuser Pet. 29) that the Service's designation of Unit 1 reflects an "expansionary zeal to reach unoccupied non-habitat" is belied by the cautious, measured, and scientific approach taken by the Service throughout the designation process. See, *e.g.*, 77 Fed. Reg. at 35,123-35,124 (noting that Unit 1 was designated only after "scientific peer reviewers" were "united in their assessment" that the original proposal was "inadequate"); *id.* at 35,124 (declining to designate critical habitat in Alabama, despite suggestions of commenters, because available sites in Alabama could not be deemed "essential for the [frog's] conservation"); *id.* at 35,120 (declining to increase the "radius" of critical habitat around breeding ponds and rejecting use of data that were "skewed toward larger values" and would produce "possible bias" in favor of larger designations). As noted, petitioners have declined to challenge any of the Service's scientific judgments. To the extent petitioners identify "substantial scientific information" demonstrating that "revision [of the critical-habitat designation]

Petitioners' protestation that Unit 1 is not suited in all respects for immediate occupation by the frog also overlooks the substantial practical challenges inherent in the identification of critical habitat for endangered species. Many species are endangered precisely because their ideal habitat has been severely diminished or eliminated altogether. The district court properly credited the Service's observation that "it does not make sense to hamstring [the Service's] efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species," for "[i]f such habitat was readily available, the frog would not be reduced to 100 individuals." Pet. App. 108a n.28. And where optimal habitat is unavailable, the Service acts appropriately in prioritizing areas with those features that are rarest or most difficult to reproduce through human intervention—here, the unique ephemeral ponds necessary for the frog's breeding—while ensuring that any deficiencies in those areas could be addressed with "reasonable effort." 77 Fed. Reg. at 35,135. And though petitioners assert (Markle Pet. 10) that Unit 1 is "curiously distant and isolated from" other units designated as critical habitat, the record reflects that Unit 1 was selected in part precisely because it could "provide[] a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events." *Id.* at 35,124.

Finally, petitioners' assertions (Weyerhaeuser Pet. 29-30; Markle Pet. 4, 16-17, 34) that the court of appeals' decision "bestows 'virtually limitless' authority" on the Service to designate "vast portions of the United States" as "critical habitat" are plainly incorrect. The

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may be warranted," however, petitioners may petition the Service at any time to revise its designation. See 16 U.S.C. 1533(b)(3)(D)(i).

court emphasized the "meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat," Pet. App. 31a, and as explained (see pp. 20-21, *supra*), the court expressly disclaimed the broad legal holding that the dissenting judges (and now petitioners) sought to attribute to its decision. Petitioners' arguments in the end amount to a challenge to the court's factbound conclusion that the record in this case was sufficient to support the Service's determination that Unit 1 meets the statutory standard for designation of unoccupied critical habitat.

c. The court of appeals' decision does not conflict with the decision of any other court of appeals. Petitioners note that the Ninth Circuit has characterized the standard for designating unoccupied critical habitat as "more demanding" (Weyerhaeuser Pet. 25) or "more onerous" (Markle Pet. 28) than the standard for occupied critical habitat. But the court of appeals in this case nowhere stated that it was "impos[ing] a *lower* standard on the designation of unoccupied critical habitat" (Weyerhaeuser Pet. 24), and petitioners cannot show that the Ninth Circuit's observation translates into any substantive difference in the interpretation of the ESA's provisions governing critical habitat.

The cited decisions did not involve the designation of unoccupied critical habitat, much less demonstrate that the Ninth Circuit would reach a different result on the facts of this case. *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160 (2010), cert. denied, 562 U.S. 1216 (2011), involved a challenge to the designation of critical habitat for a species of owl. The plaintiffs argued that the Service improperly treated unoccupied areas as oc-

cupied habitat in order to avoid making the findings required for unoccupied critical habitat. *Id.* at 1163. The Ninth Circuit acknowledged that designating unoccupied critical habitat would have involved a "more onerous procedure," inasmuch as it would have "requir[ed] the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ibid.* But the court found that the Service properly treated the habitat in question as occupied. See *ibid.* ("We conclude that the [Service] permissibly interpreted the word 'occupied' in the ESA to include areas where the owl was likely to be present and that, applying this definition, the FWS designated only 'occupied' areas.").

Similarly, in *Home Builders Ass'n of Northern California* v. *United States Fish & Wildlife Service*, 616 F.3d 983 (2010), cert. denied, 562 U.S. 1217 (2011), the Ninth Circuit upheld the Service's designation of occupied critical habitat for several listed species in California. In response to the plaintiffs' contention that the designation encompassed some unoccupied habitat, the court noted its prior statement in *Arizona Cattle Growers* that any designation of unoccupied critical habitat would be subject to a "more demanding standard." *Id.* at 990. But the court found that even if some unoccupied habitat had been included, the Service's findings satisfied the necessary standard. *Ibid.* And nothing in the court's decision suggested that the "more demanding standard" it applied—a particularized determination that the unoccupied area was "[e]ssential for conservation," *ibid.*—was any different from the standard applied by the Service and the court of appeals here.[8]

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[8] The district-court decisions cited by petitioner Weyerhaeuser (Pet. 25) similarly do not articulate any substantive legal standard that differs from the standard applied by the court below.

2. a. The court of appeals also properly declined to review the Service's discretionary decision not to exclude Unit 1 from its critical-habitat designation. Pet. App. 32a-35a. The ESA provides that, in designating "critical habitat," the Service is to "tak[e] into consideration the economic impact * * * of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The statute then provides 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." *Ibid.* (emphasis added). But, aside from withdrawing the Service's discretion to exclude an area where "failure to designate such area as critical habitat will result in the extinction of the species concerned," *ibid.*, the statute nowhere specifies that the Service must exercise its discretion in any particular manner.

By permitting, but not requiring, the Service to exclude areas from critical habitat based on its impact analysis, the statute affords "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). The court of appeals' conclusion that the Service's authority to exclude an area from a critical-habitat designation under Section 1533(b)(2) is committed to agency discretion by law, see 5 U.S.C. 701(a)(2), is consistent not only with the decisions of "[t]he only other circuit court that has confronted" the question, but also with "every district court that has addressed this issue." Pet. App. 34a; see *Bear Valley Mut. Water Co.* v. *Jewell*, 790 F.3d 977, 989-990 (9th Cir. 2015) (concluding that "an agency's decision not to exclude critical habitat is unreviewable" because the ESA "cannot be read to say that the FWS is ever obligated to exclude habitat that it has found to

be essential"), cert. denied, 136 S. Ct. 799 (2016); *Building Indus. Ass'n of the Bay Area* v. *United States Dep't of Commerce*, 792 F.3d 1027, 1035 (9th Cir. 2015) (reaffirming *Bear Valley*), cert. denied, 137 S. Ct. 328 (2016). This Court denied review on that question in *Building Industry Ass'n*, and the same course is warranted here.

b. Petitioner in No. 17-71 challenges the court of appeals' reviewability holding (Weyerhaeuser Pet. 31-33), but its arguments do not warrant this Court's consideration.[9] Petitioner urges that the court of appeals' holding "flies in the face of the 'strong presumption favoring judicial review of administrative action,'" *id.* at 32 (quoting *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015)), but it fails to identify any basis upon which a court could review the Service's discretionary decision not to exclude an area on grounds of economic impact. Indeed, the Ninth Circuit's decision in *Building Industry Ass'n*, cited by the court of appeals below, agreed with petitioner's suggestion that "the preclusion of judicial review 'is not to be lightly inferred,'" 792 F.3d at 1035 (quoting *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970)), but nonetheless concluded that "Congress intended [the Service's] action to be unreviewable" because it did not impose any "standards for when areas *must* be excluded from designation," *ibid.*

Petitioner's assertion that the court of appeals' decision conflicts with *Bennett* v. *Spear*, 520 U.S. 154 (1997), is similarly unavailing. The relevant question in *Ben-*

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[9] Petitioners in No. 17-74 express disagreement with the court of appeals' holding (Markle Pet. 29-32), but fail to identify the issue as a question presented (cf. *id.* at i). Accordingly, this question is presented only in No. 17-71. See Sup. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

nett was whether the plaintiffs' claims could proceed under the citizen-suit provision of the ESA, which authorizes persons to commence a civil suit "where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary." 16 U.S.C. 1540(g)(1). The Court found a "duty * * * which is not discretionary" in the first sentence of Section 1533(b)(2), which directs that "[t]he Secretary *shall* designate critical habitat * * * 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." *Bennett*, 520 U.S. at 172 (quoting 16 U.S.C. 1533(b)(2)). It therefore allowed the plaintiffs to proceed on their claim that the Secretary had failed to meet that procedural requirement.

Petitioners note (Weyerhaeuser Pet. 32; Markle Pet. 31) that, in the course of that reasoning, *Bennett* stated that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion" did not "alter the categorical *requirement* that, in arriving at his decision," he must take economic impacts into consideration and use the best scientific data available. 520 U.S. at 172; see also *ibid.* ("[D]iscretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking."). But petitioners here do not allege that the Service failed to consider a mandatory factor or ignored "required procedures." *Ibid.* And *Bennett*'s assumption that the Secretary's ultimate decision whether to exclude an area would be "reviewable only for abuse of discretion" was a passing *dictum*; the Secretary made no decision concerning exclusion in that case, and no party contended or conceded that any such determination would be reviewable if made. Cf., *e.g.*, *Central Va. Cmty. Coll.* v.

Katz, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

3. Petitioners' constitutionally grounded arguments also do not warrant review. Petitioners in No. 17-74 claim to seek review of whether, if the Service's designation was authorized by statute, "the U.S. Constitution allow[s] such a designation" (Markle Pet. i).[10] But the body of their petition does not argue that the Service's application of the ESA was, in fact, unconstitutional. To the contrary, petitioners contend (*id.* at 39) that "[t]o *avoid needlessly reaching* these constitutional issues" (emphasis added), this Court should grant review on the statutory question and construe the text of the ESA to foreclose the Service's designation. The asserted constitutional question in No. 17-74 thus carries no independent content for this Court's review.

Petitioners' constitutional arguments below were not meaningfully more developed. In the court of appeals, petitioners "concede[d]" that the "critical-habitat provision of the ESA," properly interpreted, "is a constitutional exercise of Congress's Commerce Clause authority." Pet. App. 37a; see also *id.* at 38a (acknowledging petitioners' concession that "the critical-habitat provision of the ESA is 'within the legitimate powers of Congress'"). The court concluded that this "concession truncate[d] [the] analysis" of petitioners' constitutional arguments. *Id.* at 44a n.23. The court understood petitioners to argue only that "the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the

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[10] Petitioner in No. 17-71 does not seek this Court's review of any constitutional question (Weyerhaeuser Pet. i), although it urges this Court to interpret the ESA to "avoid constitutional doubts" under the Commerce Clause (*id.* at 21-23).

scope of an otherwise constitutional power," on the theory that the "designation of Unit 1" was an impermissible "*intra*state (not *inter*state) activity." *Id.* at 37a. The court rejected that argument, concluding that even assuming the Service's designation constituted intrastate activity, such "intrastate activity can be regulated if it is 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 39a-40a (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 36 (2005)). The court concluded (without any dissent) that that test was satisfied here, inasmuch as it reasoned that "the ESA is an economic regulatory scheme" and that "designating critical habitat is an essential part of the ESA's economic regulatory scheme." *Id.* at 40a-41a.

That decision would not warrant this Court's review even if petitioners had preserved their arguments, because there is no circuit split on the question. Rather, as the court of appeals noted, "[e]very other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power." Pet. App. 42a; see *People for Ethical Treatment of Prop. Owners* v. *United States Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017), petition for cert. pending, No. 17-465 (filed Sept. 26, 2017); *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 638 F.3d 1163, 1177 (9th Cir.), cert. denied, 565 U.S. 1009 (2011); *Alabama-Tombigbee Rivers Coal.* v. *Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007), cert. denied, 552 U.S. 1097 (2008); *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Gibbs* v. *Babbitt*, 214 F.3d 483, 497-498 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001).

This case would be a poor vehicle for considering the extent of Congress's Commerce Clause authority in any event because the exercise of authority at issue here is not the direct regulation of petitioners' conduct, but rather, the requirement that a federal agency "insure that any action authorized, funded, or carried out *by such agency* * * * is not likely to * * * result in the destruction or adverse modification" of a listed species' designated critical habitat. 16 U.S.C. 1536(a)(2) (emphasis added). Cf., *e.g.*, Markle Pet. 12-13 (recognizing that any economic impacts to petitioners would arise only "in the event of a Section 7 consultation"). Quite apart from the Commerce Clause, Congress has constitutional authority to direct Executive Branch agencies to conduct their own activities in ways that are protective of listed species. In all events, because it is not yet apparent that any Section 7 consultation will be triggered—or, if triggered, what the results of that consultation would be—it would be premature to consider here whether hypothetical future restrictions on the development of Unit 1, formulated through the consultation process, would exceed Congress's enumerated powers.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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