

extinction.”¹¹ Section 4 of the ESA requires the Secretary of the Interior (Secretary) to list a species as “endangered” when it “is in danger of extinction throughout all or a significant portion of its range.”¹² Section 9 prohibits any person from harassing, harming, or capturing an endangered species, and it may prohibit habitat modification.¹³

Under Section 4 of the Endangered Species Act, when a species is listed as threatened or endangered, the Service must designate critical habitat for that species “to the maximum extent prudent and determinable.”¹⁴ The designation must be based on “the best scientific data available” and may only be made after the Secretary considers and weighs the cost of all relevant impacts, including economic impacts.¹⁵ In 1978, Congress amended the ESA to define “critical habitat”:

- (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; and
- (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.¹⁶

Subsection (i) defines critical habitat in terms of the physical and biological features the area must possess.¹⁷ Subsection (ii) provides for the designation of unoccupied critical habitat, but only where the Secretary determines that the area is “essential for the conservation of the species.”¹⁸ Since the Louisiana property is unoccupied by the frog, both of these subsections are at issue in the case.

II. CONSERVING THE DUSKY GOPHER FROG ON NON-HABITAT LAND WOULD BE EXPENSIVE

In designating critical habitat for the frog in Louisiana and Mississippi, the Service identified three “primary constituent elements” (PCEs), which are defined by regulation as “the principal biological or physical constituent elements [within a defined area] *that are essential to the conservation of the species.*”¹⁹ These three PCEs include: (1) “small, isolated, ephemeral, acidic breeding ponds having an open canopy,” (2) upland forests “historically dominated by longleaf pine, adjacent to

and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy,” and (3) “[a]ccessible upland habitat.”²⁰

The land in Mississippi designated critical habitat contains those three essential characteristics; the Louisiana land does not—it contains, at most, only the ephemeral pond characteristic described in the first PCE.²¹ Nevertheless, the Service defended its decision to designate the Louisiana property by asserting that, in the event of a catastrophic event in Mississippi, the Louisiana property *could* serve as habitat for the frog, with significant changes to create the other two PCEs.²²

Pursuant to the ESA, the Service must “tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat,” and it “may exclude any area from critical habitat” based on economic impacts.²³ Before the final rule designating the Louisiana land was published, the Service prepared a final Economic Analysis²⁴ analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog.²⁵ The Economic Analysis considered three possible scenarios and ultimately concluded that the designation of the Louisiana property alone could result in lost development value of \$33.9 million.²⁶ Meanwhile, the impact on the Mississippi critical habitat designations would amount to, at most, \$102,000.²⁷ This lopsided economic impact resulted from the fact that the Mississippi critical habitat is already actively managed for the recovery of the frog, while the Louisiana property is not.²⁸

Despite the drastic economic impact and the lack of biological benefit to a frog that could not survive on the Louisiana land, the Service designated it critical habitat. That designation prompted the Landowners’ lawsuits that led to the current Supreme Court case.

III. PROCEDURAL HISTORY OF THE CASE

The Landowners filed separate lawsuits and sought identical declaratory and injunctive relief.²⁹ They alleged the rule designating their Louisiana property (not the Mississippi property) violated the ESA and the Administrative Procedure Act (APA), the Commerce Clause of the federal Constitution,

11 16 U.S.C. § 1531(a)(4).

12 16 U.S.C. § 1533(a)(1); 16 U.S.C. § 1532(6).

13 See 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

14 16 U.S.C. § 1533(a)(3)(A).

15 16 U.S.C. § 1333(b)(2); 50 C.F.R. § 424.12(a).

16 16 U.S.C. § 1532(5)(A)(i)-(ii).

17 16 U.S.C. § 1532(5)(A)(i).

18 16 U.S.C. § 1532(5)(A)(ii).

19 *Id.* at 762 (citing 50 C.F.R. § 424.12(b) (emphasis added)).

20 77 Fed. Reg. at 35,131.

21 *Markle Interests, LLC*, 40 F. Supp. 3d at 761.

22 77 Fed. Reg. at 35,124.

23 16 U.S.C. § 1533(b)(2).

24 Industrial Economics, Inc., *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* (Apr. 6, 2012), <https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf> (last visited Sept. 10, 2018) (final economic analysis).

25 77 Fed. Reg. at 35,140-41.

26 77 Fed. Reg. at 35,126.

27 77 Fed. Reg. at 35,140.

28 See 75 Fed. Reg. 39,396-399 (July 8, 2010).

29 *Markle Interests, LLC*, 40 F. Supp. 3d at 748.

and the National Environmental Procedure Act (NEPA).³⁰ The Center for Biological Diversity and the Gulf Restoration Network were granted leave to intervene as defendants.³¹

Upon cross-motions for summary judgment, the district court held that the Service had acted within the law in designating the Louisiana property critical habitat.³² But Judge Martin L. C. Feldman did not mince words in describing his view of the Service's designation of the Louisiana property, calling the Service's actions "odd,"³³ "troubling,"³⁴ and "harsh,"³⁵ and remarking that "what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property."³⁶ Nevertheless, considering himself to be "restrained" by the "confining" and "somewhat paralyzing" standard of review under the APA, Judge Feldman reluctantly affirmed the critical habitat designation as within the delegated powers of the agency pursuant to the ESA.³⁷ The district court also rejected the Commerce Clause challenge and other arguments made by the Landowners.³⁸

The Fifth Circuit affirmed in a 2-1 split opinion.³⁹ The panel majority concluded that the Service's designation of the Louisiana property was entitled to *Chevron*⁴⁰ deference because Congress did not define "essential" habitat as it concerns unoccupied critical habitat and thus delegated the definition to the Service.⁴¹ The majority also rejected the argument that the Service should have excluded the Louisiana property because of the disproportionate economic impacts the Landowners would suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and unreviewable.⁴² The Court also rejected the other arguments made by the Landowners.⁴³ In her dissent, Judge Priscilla Owen observed that the designated area is not essential for the conservation of the species "because it plays

no part in the conservation" of the species.⁴⁴ As she put it, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species.⁴⁵

The full court rejected the Landowners' motion for en banc review with an 8-6 vote.⁴⁶ Writing for the six-member dissent, Judge Edith Jones argued that the Service's actions in this case fell far outside the authorization of the ESA: "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500-acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the [dusky gopher frog]."⁴⁷ The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners \$34 million in future development."⁴⁸ From the panel decision and the denial of en banc review, the Landowners sought review.

IV. THE QUESTIONS BEFORE THE SUPREME COURT

The Supreme Court granted review⁴⁹ to consider two questions: (1) whether the ESA prohibits designation of private land as unoccupied critical habitat if it is neither habitat nor essential to species conservation, and (2) whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.⁵⁰ These two questions are fundamentally about how far an agency like the Service can reach in filling in the gaps in statutes written by Congress, and whether this agency decision-making is insulated from judicial review.

A. What Does "Essential" Mean?

The Service and the Landowners disagree about the scope of the authority the ESA gives the Service to protect an endangered species. How much private property can the Service cordon off from private use in the name of meeting the goals of the ESA? The arguments on both sides demand careful consideration from anyone who takes both the ESA and government power seriously.

1. The Service's Argument: Congress Asks the Service to Protect Endangered Species, and This Critical Habitat Designation Protects the Endangered Dusky Gopher Frog

In order to accomplish the underlying goal of the ESA—the conservation of endangered species—the lower courts and the Service relied upon the wide latitude the APA and *Chevron* deference give the Service in carrying out its statutory mission. Their arguments flow from the general proposition that the Service

30 *Id.* at 752-53.

31 *Id.* at 753.

32 *Id.* at 769.

33 *Id.* at 759.

34 *Id.*

35 *Id.* at 765.

36 *Id.* at 759.

37 *Id.* at 759-60.

38 *Id.* at 760-69.

39 *Markle Interests, LLC*, 827 F.3d 452.

40 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "*Chevron* deference" holds that "[w]hen Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead*, 533 U.S. 218, 227 (2001) (internal quotation omitted).

41 *Markle Interests, LLC*, 827 F.3d at 467-72.

42 *Id.* at 473-75.

43 *Id.* at 475-80.

44 *Id.* at 481 (Owens, J., dissenting).

45 *Id.*

46 *Markle Interests, LLC*, 848 F.3d 635 (denying petition for rehearing en banc).

47 *Id.* at 636-37 (Jones, J., dissenting).

48 *Id.* at 637.

49 *Weyerhaeuser*, 138 S. Ct. 924.

50 See <https://www.supremecourt.gov/qp/17-00071qp.pdf> (last visited Sept. 10, 2018).

should be given a wide berth in determining how to best protect endangered species.

a. The Designation Was Neither Arbitrary Nor Capricious

First, the Service argues that its designation of the Louisiana property as unoccupied critical habitat must be upheld unless it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, per the APA.⁵¹ The Service then argues that its designation was anything but. The Louisiana property was identified by the Service after peer reviewers criticized the initial proposed designation—which only included land in Mississippi—as inadequate.⁵² That led the Service to the Landowners’ property in Louisiana, which was said to be in the historical range of the frog.⁵³ Although not perfect, the fact that the frog was reported to have been seen on the property many years ago convinced the Service that the property could be modified to conserve the frog and thus met the statutory requirements to serve as unoccupied critical habitat for the frog.⁵⁴

b. The Service’s Designation of the Louisiana Property Deserves Deference

That the Louisiana property is not a perfect habitat for the frog because it does not contain all the PCEs for the frog should not disqualify it from the designation; other courts have previously accepted this point in a variety of circumstances.⁵⁵ The Service submits that to hold otherwise on these facts would be to reject the long-standing principle of deference to agency decision-making when it comes to areas within its expertise. And determining “habitat” for a species is a scientific question, not a legal one, as the Service sees it. To buttress that conclusion, the Service notes that its interpretation of “habitat” is consistent with the ESA’s purpose: to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”⁵⁶

At bottom, Congress trusts the Service to protect endangered species, and it delegated power to the Service to carry out that important mission.⁵⁷ The protection of endangered species “requires an expertise and attention to detail that exceeds the normal province of Congress.”⁵⁸ Where even the Supreme Court has recognized that it is “beyond doubt that Congress intended

endangered species to be afforded the highest of priorities,”⁵⁹ it is virtually beyond cavil—according to the Service—to think that protecting the dusky gopher frog by designation of the Louisiana property sits beyond the Service’s delegated authority per the ESA.

2. The Landowners’ Argument: The ESA Does Not Authorize the Service to Designate Private Land That Cannot Sustain the Frog

The Landowners argue that the Service cannot designate the Louisiana property critical habitat under the ESA for a variety of reasons, any one of which should lead to a reversal of the lower court’s decision.

a. The Ordinary Meaning of Habitat and the Text of the ESA Do Not Support Critical Habitat Designation of the Landowners’ Property

First, the Landowners argue that their property cannot be designated critical habitat because the land is not habitat *at all* for the frog within any reasonable interpretation of the statutory term, and the Service may designate *only* “habitat” as critical habitat.⁶⁰ While the ESA does not define “habitat,” the ordinary dictionary meaning of the term is “the place where a particular species of animal or plant is normally found.”⁶¹ Here, the Service asks the Court to read “habitat” to mean something quite different from its commonly-understood plain meaning, which should be a bridge too far even if the courts reach step 2 of *Chevron* and defer to the Service’s proffered interpretation.

That the ESA allows for both occupied and unoccupied habitat does not save the Service’s misinterpretation of the statute, either. The ESA defines “critical habitat” and lists cumulative requirements for either occupied or unoccupied designation—land must contain features that are (1) “essential to [species] conservation” and (2) “require special management.”⁶² And if the land is unoccupied, like the Louisiana land here, the additional statutory criterion—that the area *be essential for species conservation*—applies and limits the Service’s discretion for that type of designation.⁶³ Property that cannot support the frog at all because it does not contain all the necessary PCEs for it cannot at the same time be *essential* for the frog’s conservation.

b. Previous Cases in Which the Service Designated Unoccupied Critical Habitat That Did Not Have All PCEs Markedly Differ from This Case

Second, the Landowners acknowledge that courts have approved the designation of critical habitat that did not include all PCEs for the endangered species, but those circumstances differed meaningfully from the instant case. In this case, the Louisiana designation is an unoccupied area unconnected from and unrelated to areas that provide the remaining essential features

⁵¹ 5 U.S.C. 706(2)(A).

⁵² *Markle Interests, LLC*, 858 F.3d at 465.

⁵³ *Id.*

⁵⁴ *Id.* at 467-68.

⁵⁵ *See, e.g., Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993-94 (9th Cir. 2015) (upholding designation of sub-unit of critical habitat for Santa Ana sucker that provides coarse sediment for spawning elsewhere in unit), cert. denied, 136 S. Ct. 799 (2016).

⁵⁶ 16 U.S.C. 1531(b).

⁵⁷ *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 708 (1995) (“When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary.”).

⁵⁸ *Id.*

⁵⁹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

⁶⁰ 16 U.S.C. § 1533(a)(3)(A)(i).

⁶¹ *Habitat*, Black’s Law Dictionary (10th ed. 2014).

⁶² 16 U.S.C. § 1532(5)(A)(i).

⁶³ 16 U.S.C. § 1532(5)(A)(ii).

for the balance of a species' life cycle. Cases that allowed for designation without all PCEs did not suffer from that deficiency.

For example, in *Home Builders Association of Northern California v. U.S. Fish and Wildlife Service*,⁶⁴ the Ninth Circuit addressed whether vernal pools and their immediate surrounding areas could be designated as occupied critical habitat for a species where the pools themselves contained *most* but not all of the primary constituent elements (PCEs) for the species. The Ninth Circuit held that since the two portions of the designation *together* provided all four PCEs necessary for the habitat, the ESA did not require that each portion of the designated area supply all of the PCEs independently of the other. In this case, on the other hand, the entirety of the Louisiana property, even when combined with immediately surrounding areas, does not include all three PCEs for the frog. The Service concedes this.

Simply put, an area cannot be “essential to a species conservation” if it is unlikely to contribute to that conservation at all. In *Home Builders*, it was likely that the habitat would contribute to the conservation of the species, especially in combination with an immediately adjacent area. That is not the case here. Notably, the Service recently recognized this logic in its proposal to amend its Regulations for Listing Species and Designating Critical Habitat, although it proposed that this change would only apply to future designations.⁶⁵

B. Can Courts Review the Service's Designation Decisions?

The second question presented by the case is whether the Service's decision not to exclude the Louisiana property from the critical habitat designation is insulated from judicial review. The Service submits that Congress did not intend such decisions to be judicially reviewable. The Landowners argue that they should be able to show in court that the Service abused its discretion when it designated the Louisiana property. This question was not the primary focus of the parties' briefing in the lower courts, so the Supreme Court's decision to grant certiorari on it is especially interesting.

1. The Service's Argument: The Text of the ESA and the Lack of Standards for Review Mean Designation Decisions Are Not Subject to Judicial Review

The ESA expressly authorizes judicial review of certain specified actions or failures to act by the Service and other federal agencies.⁶⁶ And although the ESA does not explicitly provide for judicial review of other actions pursuant to the statute, the Supreme Court has held the Service's application of the ESA's substantive requirements is generally subject to judicial review under the APA.⁶⁷ But the APA itself does not allow for judicial

⁶⁴ 616 F.3d 983, 988 (9th Cir. 2010).

⁶⁵ See 83 Fed. Reg. 35,193, 35,198 (July 25, 2018) (“In order for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species.”). It is a mystery why the Service refuses to apply this new revision to past designations—a mystery the Justices of the Court will likely probe during the oral argument.

⁶⁶ See 16 U.S.C. 1540(g)(1)(A)-(C).

⁶⁷ See *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

review “to the extent that . . . agency action is committed to agency discretion by law.”⁶⁸

Such is the case here, according to the Service and the lower court. Section 4(b)(2) of the ESA provides no instruction concerning how the Service should exercise its discretion to either exclude or not exclude land from critical habitat designation. The Act simply provides that, when the Service thinks exclusion would be more beneficial than inclusion, the Service *may* exclude the area, assuming the exclusion would not lead to extinction. Without guidance beyond that minor caveat, the ESA does not identify how the Service should decide whether to exclude, and that lack of guidance makes the discretion exercised when choosing not to exclude unreviewable. Without a standard to review the decision, the decision is unreviewable. Ultimately, the economic impact the Landowners suffer because of the designation does not give rise to a requirement that the Service's decision not to exclude the Louisiana property from designation be reviewable.

2. The Landowners' Argument: ESA Amendments and Standards of Review To Be Found at Law Justify Reviewability of Designation Decisions

a. Congress Was Concerned About the Economic Impact of Designations Under the ESA, and Courts Should Be Able To Ensure Congress's Concern Is Properly Addressed by the Service

The argument against judicial review of § 4(b)(2) decision-making under the ESA finds no support in the provision's statutory or legislative history. The original ESA of 1973 lacked a definition of or process for designating critical habitat.⁶⁹ To be sure, in 1978, the Court ruled in *Tennessee Valley Authority v. Hill*, that the ESA required the preservation of endangered species “whatever the cost.”⁷⁰ But, in response, Congress amended the ESA to require the Service to consider economic and other non-biological impacts when designating critical habitats, and Congress authorized the Service to exclude property from designation on account of excessive costs.⁷¹ Thus, construing the APA's “committed to agency discretion by law” bar to preclude review of decisions made under the Service's § 4(b)(2) authority would thwart the ESA's amended aim of “introducing some flexibility which will permit exemptions from the Act's stringent requirements.”⁷² The courts should be able to review the Service's decision not to exclude to see if it abused its discretion in failing to exempt the land from the ESA's stringent requirements.

b. Meaningful Standards Exist for the Court To Apply When Reviewing the Service's Designation Decisions

Moreover, there are standards that courts can apply in this and similar cases. As Justice Antonin Scalia put it when addressing a case involving § 701(a)(2) in his dissent in *Webster v. Doe*:

⁶⁸ 5 U.S.C. 701(a)(2).

⁶⁹ See Pub. L. No. 93-205, §§ 1-17, 87 Stat. 884, 884-903 (1973).

⁷⁰ 437 U.S. 153, 184 (1978).

⁷¹ Pub. L. No. 95-632, §11(7), 92 Stat. 3751, 3766 (1978).

⁷² H.R. Rep. No. 95-1625, at 14 (1978).

“[T]here is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest.”⁷³ Moreover, the Service itself identified a standard that courts could apply. In deciding not to exclude the Louisiana property, the Service explained it could not identify any “disproportionate costs” attendant to the designation. A court could review the facts of the case to determine whether the \$34 million economic impact was a disproportionate cost where the critical habitat designation did not benefit the frog.⁷⁴

The Service may have wide discretion in assessing economic impact as compared to biological benefit, but there is scant evidence that Congress expected that discretion to be unfettered. Yet that is what the lower courts held, and it is what the Service seeks. The Supreme Court in recent years has repeatedly reversed lower court decisions that insulate agency decision-making from judicial review,⁷⁵ and this case presents another opportunity for the Court to place limits on what agencies can do unchecked.

V. CONCLUSION

In the first case of its new term, the Supreme Court will consider the scope of the Service’s delegated powers under the ESA, and whether the Service’s exercise of those powers in the critical habitat designation for the dusky gopher frog is beyond judicial review. Given that there was no obvious circuit split supporting the grant of review, several of the Justices may think the Service went too far.

73 *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).

74 *Compare Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“One would not say that it is . . . rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”).

75 *See, e.g., U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012).

