

No. 15-1350

IN THE
Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF THE
BAY AREA AND BAY PLANNING COALITION,

Petitioners,

v.

UNITED STATES DEPARTMENT OF COMMERCE; NA-
TIONAL OCEANIC AND ATMOSPHERIC ADMINISTRA-
TION; UNITED STATES NATIONAL MARINE FISHERIES
SERVICE; PENNY PRITZKER, in her official capacity as
Secretary for the United States Department of Commerce;
EILEEN SOBECK, in her official capacity as Assistant Ad-
ministrator for Fisheries, National Marine Fisheries Ser-
vice,

Respondents.

**On Petition for a Writ of Certiorari
to the U.S. Court of Appeals for the Ninth Circuit**

**BRIEF FOR THE CATO INSTITUTE,
REASON FOUNDATION, AND NATIONAL FEDERATION
OF INDEPENDENT BUSINESS SMALL BUSINESS LE-
GAL CENTER AS *AMICI CURIAE* IN SUPPORT OF THE
PETITION FOR CERTIORARI**

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QUESTION PRESENTED

Are decisions regarding the designation of certain property as “critical habitat” under the Endangered Species Act somehow immune from the Administrative Procedure Act’s strong presumption in favor of judicial review of final agency action?

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INTEREST OF THE *AMICI CURIAE*¹

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to the principles of individual liberty, free markets, and limited government. Its Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books and studies, and issues the annual *Cato Supreme Court Review*.

Reason Foundation is a nonprofit think tank founded in 1978. Its mission is to advance a free society by promoting libertarian principles—including free markets, individual liberty, and the rule of law. Reason supports dynamic policies that allow individuals and voluntary institutions to flourish. It publishes *Reason* magazine, online commentary, and research reports. To further a belief in “Free Minds and Free Markets,” Reason selectively files *amicus* briefs in cases raising significant constitutional issues.

National Federation of Independent Business Small Business (NFIB) Legal Center is a public interest law firm that is the voice for small businesses in the courts. Founded in 1943, NFIB is the nation’s leading small business association, with members in Washington and all 50 states. NFIB protects its members’ right to own, operate, and grow their businesses. NFIB represents 325,000 businesses nationwide, spanning the spectrum from sole-proprietor enterprises to firms with hundreds of employees.

¹ Rule 37 statement: All parties received timely notice of *amici*’s intent to file this brief, and have consented. No party’s counsel authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

This case concerns *amici* because it implicates the basic principles of property rights as a safeguard of individual liberty against government overreach.

SUMMARY OF ARGUMENT

The Endangered Species Act (ESA, 16 U.S.C §§ 1531-44 (2016)) has been called “the pit bull of environmental laws” because “it’s short, compact and has a hell of a set of teeth.” Timothy Egan, *Strongest U.S. Environmental Law May Become Endangered*, N.Y. Times, May 26, 1992, at A1 (quoting Donald Barry, vice president of World Wildlife Fund). Much of the ESA’s “bite” is due to its regulation of otherwise normal and legal forms of land and resource use, such as timber cutting, farming, and homebuilding, which are deemed harmful to species listed under the Act.

This regulatory power can impose very substantial costs through the designation of land and water as “critical habitat,” which confers a significantly heightened regulatory burden. The estimated costs associated with what is included and excluded from the designation of critical habitat can often be enormous, widespread, and encompass vast amounts of the nation’s lands and waters. Yet, the U.S. Fish and Wildlife Service (USFWS) and other agencies enforcing the ESA routinely underestimate the economic costs through less-than-reasonable assessments.

Furthermore, the ESA’s perverse incentives foist immense costs onto private landowners, alienating many of those whose cooperation is necessary for successful conservation. By waving the stick of criminal penalty rather than the carrot of cost-offsetting, the ESA harms the very species it is supposed to protect.

ARGUMENT

I. FEDERAL AGENCIES ROUTINELY UNDERESTIMATE THE ECONOMIC IMPACT OF CRITICAL HABITAT DESIGNATION

A. The Cost of Designation Can Greatly Exceed the Conservation Benefit

Petitioners here *understate* the economic significance of critical habitat designation. They claim that “[d]esignations of critical habitat can cover hundreds of thousands of acres and impose hundreds of millions of dollars in economic costs, as well as other substantial social costs. Yet often they provide little or no conservation benefit.” Pet. at 3. That is an underestimate; designation imposes more than *\$10 billion* in economic costs and affects *tens of millions* of acres for little or no conservation benefit. The actual cost-benefit ratio aligns more closely with *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (“[T]he decision also ultimately cost power plants, according to the Agency’s own estimate, nearly \$10 billion a year. EPA refused to consider whether the costs of its decision outweighed the benefits.”).

“Federal administrative agencies are required to engage in ‘reasoned decisionmaking,’” *Id.* at 2706 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (internal quotation marks omitted)), and “consideration of costs is a central aspect of reasoned decisionmaking.” Andrew M. Grossman, *Michigan v. EPA: A Mandate for Agencies to Consider Costs*, 2014-2015 Cato Sup. Ct. Rev. 281, 284-85 (2015). Here, the government has “strayed far beyond those bounds” when it essentially “ignore[s] cost when deciding whether to” designate critical habitat space, leading to “the imposition of costs far in

excess of benefits.” *Michigan*, 135 S. Ct. at 2707, 2711. Agencies implementing the ESA are required to “tak[e] into consideration the economic impact” of critical habitat designation. 16 U.S.C. § 1533(b)(2).

Examining the data associated with the designation of critical habitat for 159 species—out of the 793 so treated as of May 1, 2016—reveals the enormous costs and amount of land and water involved in habitat designation. Brian Seasholes, *The Critical Nature of Critical Habitat Decisions*, Reason Found. (June 1, 2016), <http://bit.ly/28e6NsW>. The effects are:

- Total economic impact of up to \$10.7 billion (usually over 20 years, following designation);
- Annual economic impacts of up to \$1.3 billion;
- Hundreds of lost jobs per species;²
- Regulatory burdens affecting 60,169,546 acres of land (11,261,054 privately owned), 83,372 miles of streams/creeks/rivers, and 68,846,720 acres of lakes/oceans/estuaries;³
- Regulatory burdens associated with designating privately owned land adjacent to 27,851 miles of critical habitat streams and rivers.⁴

² An 11-species sample yielded an estimated 2,674 jobs lost: California red-legged frog, 404 jobs; Mexican spotted owl, 429; Rio Grande silvery minnow, 362 jobs; desert tortoise, 425 jobs; and seven species of freshwater mussels, 1,054 jobs. These calculations came from either the final rule designating critical habitat or the economic analysis performed for the USFWS.

³ Some amount of critical habitat overlaps—and is thus double-counted—especially for freshwater mussels and certain fish. And these acreages do not include additional lands affected by state regulations that are triggered by the federal designations.

⁴ The affected riparian zone is often defined as 300 feet from the normal high water line of publicly owned streams or rivers;

- Designations in 37 states and two territories.

Id. (linking to spreadsheet with detailed analysis).

On the other side of the cost-benefit scale, a number of studies have found that critical habitat designation has no discernible influence on whether a species' status is declining, stable, or improving. *See, e.g.*, Joe Kerkvliet & Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 *Ecological Econ.* 499, 499-510 (2007); Timothy D. Male & Michael J. Bean, *Measuring Progress in U.S. Endangered Species Conservation*, 8 *Ecology Letters* 986, 986-92 (2005); J. Alan Clark et al., *Improving U.S. Endangered Species Act Recovery Plans: Key Findings and Recommendations*, 16 *Conserv. Biology* 1510, 1510-19 (2002). Although one study found that designation can have a positive effect on species status, *see* Martin F.J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 *Bioscience* 360, 362 (2005), that study has been discredited because it did not account for other factors that can improve status, particularly expenditures on recovering species and the fact that habitat is more likely to be designated for vertebrates than invertebrates or plants. *See, e.g.*, Kerkvliet & Langpap, *supra*; Make & Bean, *supra*.

Indeed, the USFWS has flatly stated more than once that critical habitat designation does not pass cost-benefit analysis: "Critical habitat designations have too little effect on the way land and water is managed for the conservation of species to justify the

much of this land is private. The previous footnote's caveats regarding habitat overlap and state regulations apply here too.

drain they represent on Federal resources.” 62 Fed. Reg. 39132 (July 22, 1997). More directly:

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service’s present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs.

70 Fed. Reg. 46924 (Aug. 11, 2005).

Yet even those “huge social and economic costs” of critical habitat designation for most of those 159 species are significant underestimates for several reasons discussed *infra*. With little-to-no conservation benefits and costs exceeding \$10 billion, judicial review as to the reasonableness of critical habitat designation is clearly appropriate in light of this Court’s decision in *Michigan v. EPA*. 135 S. Ct. at 2701 (“It is not rational, never mind “appropriate,” to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”).

B. Federal Agencies Employ Self-Serving and Highly Suspect Methods of Cost-Benefit Analysis

In order to pass cost-benefit scrutiny, the agencies typically charged with enforcing the ESA—the

USFWS and National Marine Fisheries Service (NMFS) routinely underestimate the immense economic impact of critical habitat designation.

For example, in 2015, when the USFWS designated 1,429,551 acres of critical habitat—of which 614,707 was private land—for the Gunnison sage grouse (a chicken-sized bird in Colorado and Utah), it estimated that doing so would have an impact of \$6.9 million over 20 years. 79 Fed. Reg. 69347 (Nov. 20, 2014). The agency’s commissioned analysis provides separate estimates of annual impacts of the designation to the oil and gas industry: \$160 million and 44 jobs in Colorado and \$210,000, 5 jobs, and \$62,000 in lost tax revenue in Utah. Industrial Economics, Inc., *Economic Analysis of Critical Habitat Designation for the Gunnison Sage-Grouse: Final Revisions*, at ES-3 (2014). Yet the USFWS did not include these data in its final rule designating critical habitat.

“Traditional measures of the cost of regulation, namely the out-of-pocket cost of Section 7 consultation, are far off the mark,” according to David Sunding, professor of agricultural and resource economics at the University of California, Berkeley, and author of several ESA-related economic studies. *To Review Federal Regulations with Respect to Critical Habitat Designations Under the Endangered Species Act: Hearing Before the S. Subcomm. on Fisheries, Wildlife, and Water*, 108th Cong. 66-68 (2003) (statement of David Sunding). “A common claim of the USFWS is that critical habitat designation only causes economic impacts in the presence of a federal nexus, that is if the activity in question is carried out with a federal permit or federal funding. While there is no definitive research on this topic, my work with developers, local government officials and others sug-

gests that critical habitat designation has more far-reaching implications.” *Id.*

A study examining the effects of designating critical habitat for 26 species in California on the issuance of permits for building single-family homes over a 13-year period found that the critical habitat designation resulted in a 23.5 percent decrease in permits over the short run and a 37 percent decrease over the long run. See Jeffrey E. Zabel & Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. of Reg. Science 67-95 (2006). Proposed critical habitat designation acts as a signal that development will be more expensive. “This is consistent with anecdotal evidence that cities where [critical habitat] has been designated tend to become more risk averse and hence more stringent in issuing new building permits regardless of whether or not they are for land in CH-designated areas.” *Id.* at 94.

Other studies have found that the USFWS significantly underestimates the effects designating critical habitat on the real-estate market. See generally, e.g., David Sunding & Jonathan Terhorst, *Conserving Endangered Species through Regulation of Urban Development: The Case of California Vernal Pools*, 90 Land Econ. 290 (2014); David Sunding et al., *The Economic Costs of Critical Habitat Designation: Framework and Application to the Case of California Vernal Pools* (2003). One study found the costs were 7–14 times more than the estimate used by the agency. Sunding, et al., *supra*, at 43. The USFWS underestimated because it ignored consumer costs and did not account for development delays. *Id.* “In fact, economic impacts of critical habitat designations are borne disproportionately by consumers, particularly those on the

lowest end of the housing affordability spectrum.” Calif. Res. Mgmt. Inst., *Report Identifies Serious Flaws in the Federal Government’s Process in Determining the Economic Costs of Critical Habitat Designations*, PRNewswire (Feb. 26, 2003), <http://prn.to/1sJvBsd>.

In 1999, the USFWS designated 731,712 acres in Arizona—of which 135,993 were privately owned—as critical habitat for the cactus ferruginous pygmy-owl, of which 135,993 were privately owned. 64 Fed. Reg. 37424 (July 12, 1999). A study found “undeveloped land fell in value by about 22 percent if it was within the critical habitat boundaries.” John A. List et al., *Is the Endangered Species Act Endangering Species?* 22, 25 (Nat’l Bureau of Econ. Research, Working Paper No. 12777, 2006). Another study estimated the proposed designation of habitat for the coastal California gnatcatcher would have economic impacts of between \$4.6 and \$5.1 billion over 20 years. David Sunding, *Economic Impacts of Critical Habitat Designation for the Coastal California Gnatcatcher*, at ii (2003). This was about four to five times as much as the USFWS’s estimate. 68 Fed. Reg. 20228 (Apr. 24, 2003).

By taking such a narrow view of the “costs” imposed, USFWS all but ensures that the burdens of designation will be under-represented by several degrees of magnitude. Cost-benefit analysis is not a *pro forma* requirement; it requires actual consideration of the costs imposed relative to regulatory benefit. An agency does not reasonably consider costs when it downplays economic impacts to pass cost-benefit muster. *See Michigan*, 135 S. Ct. at 2707, 2710-11.

A second reason that reported economic impacts are likely underestimated is that the Services’ cost-benefit rubric excludes many major impacts. This

“baseline” approach separates the impacts that would occur absent critical habitat (baseline impacts) from the impacts only attributable to critical habitat (incremental impacts). The Services then only consider the incremental impacts when evaluating the economic impacts of designating critical habitat. The baseline approach underestimates the economic impacts, as evidenced by the huge disparity between the baseline and the incremental and by the difference between cost-benefit calculations made under the baseline approach from those using the “co-extensive” approach (a method the Services used in the 2000s).

1. Disparity between the baseline and incremental estimates

There is often a massive disparity between the estimates of baseline and incremental impacts for a given species. The USFWS listed the Jemez Mountain salamander as endangered in September 2013 and designated 90,716 acres—of which 3,709 acres were private property—as critical habitat two months later. 78 Fed. Reg. 69569-91 (Nov. 20, 2013); 78 Fed. Reg. 55600-27 (Sept. 10, 2013). The Service estimated that the economic baseline and incremental impacts of the designation would be \$26,000,000 and \$260,000, respectively. 78 Fed. Reg. at 69585.

In September 1991, the USFWS and NMFS jointly listed the gulf sturgeon as threatened and, in 2003, designated habitat for it in four states, including 1,730 miles of rivers and 2,333 square miles of marine habitat. 68 Fed. Reg. 13370 (Mar. 19, 2003); 56 Fed. Reg. 49653 (Sept. 30, 1991). The estimated impacts over 10 years contained baseline costs of between \$23,245,000 and \$34,785,000. Yet the incremental costs were estimated between \$616,000 and

\$762,000. Industrial Economics, Inc., *Economic Analysis of Critical Habitat Designation for the Gulf Sturgeon*, at ES-6 (2003) (prepared for USFWS).

In 2008, the USFWS designated 18,293 acres of critical habitat for the bay checkerspot butterfly (14,650 of which was privately owned). 73 Fed. Reg. 50406 (Aug. 26, 2008). The Service estimated that over the preceding 20 years, following the butterfly's initial listing in 1987, the baseline impacts totaled \$9,000,000. *Id.* at 50429. The Service also estimated economic impacts over the 20 years following critical habitat designation: baseline impacts of \$270 million (\$24 million annualized) and incremental impacts of \$0–\$750,000 (\$0–\$44,000 annualized). *Id.*

As illustrated by these examples, enormous disparities between baseline and incremental costs—one order of magnitude, in some cases two—raise questions about the plausibility of incremental estimates. An incremental cost that is about one-hundredth of a baseline cost is akin to a rounding error.

2. Disparities between the baseline and the co-extensive approach

Moreover, the Services' former use of co-extensive approach to estimate regulatory cost implies that the baseline approach—which takes into account only incremental costs—grossly underestimates the actual cost of designation. The Services used the co-extensive approach, which takes a broader view of impacts than the baseline approach, for a few years following a 2001 decision by the Tenth Circuit that the baseline approach violated the ESA. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001). A few examples illustrate the

widely different estimates that result from using the baseline and co-extensive approaches.

1. In 2005 the USFWS designated 17,418 acres as critical habitat for the Sonoma County Distinct Population Segment of the California tiger salamander. 70 Fed. Reg. 74138 (Dec. 14, 2005). Using the co-extensive approach, the Service estimated the costs of designating all 17,418 acres would have been more than \$196 million over 20 years. *Id.* at 74161. In 2011, USFWS re-designated critical habitat, this time including a total of 47,383 acres (of which 45,387 acres were private). 76 Fed. Reg. 54359 (Aug. 31, 2011). Using the baseline approach, the USFWS estimated the costs over 20 years to be \$482,000. Industrial Economics, Inc., *Economic Analysis of Critical Habitat Designation for the Sonoma County Distinct Population Segment of California Tiger Salamander*, at ES-8 (2011) (prepared for USFWS). Those significantly lower estimates were given despite the fact that the amount of critical habitat increased by 172 percent from 2005 to 2011. When the USFWS switched from the co-extensive to the baseline approach, estimated costs decreased by 99.8 percent.

2. In 1999, the USFWS designated 163 miles of the Rio Grande River in New Mexico as critical habitat for the Rio Grande silvery minnow. 64 Fed. Reg. 36274 (July 6, 1999). Using the baseline approach, it asserted “that there are no incremental economic effects associated with the designation of critical habitat above and beyond the effects of listing the species as endangered.” *Id.* at 36280. The USFWS re-designated critical habitat for the silvery minnow in 2003 and included 157 miles of river and adjacent private lands. 68 Fed. Reg. 8088 (Feb. 19, 2003). Using the co-extensive approach, the Service estimated

that costs were \$32–75 million over 20 years. *Id.* at 8128; Industrial Economics, Inc., *The Impacts of Critical Habitat Designation for the Rio Grande Silvery Minnow* (2003) (prepared for USFWS).

The major reason for the gaping disparity between the 1999 and 2003 cost estimates is that the economic analysis performed in 2003 accounted for the impacts of acquiring private water rights to maintain sufficient water flows for the silvery minnow. Industrial Economics, Inc., *Silvery Minnow, supra*. Fish require water, which is something the USFWS should know. Nevertheless, by omitting the costs of providing water for the survival of the Rio Grande silvery minnow, the USFWS in 1999 arrived at an estimated cost of zero for designating critical habitat.

3. When the USFWS designated critical habitat for the Alameda whipsnake in 2000 (406,598 acres, of which 248,270 were private) and used the baseline approach, the agency estimated the cost of designation as zero. 65 Fed. Reg. 58937, 58945 (Oct. 3, 2000). In 2006, however, when the Service re-designated critical habitat (154,834 acres, of which 123,952 was private), the agency estimated, using the co-extensive approach, costs of more than \$532 million over 20 years. 71 Fed. Reg. 58193, 58203 (Oct. 2, 2006).

4. When USFWS designated critical habitat for the cactus ferruginous pygmy-owl and used the baseline approach to estimate impacts, it claimed that the designation “will not add any additional restrictions and will not affect property owners beyond those restrictions resulting from the listing of the pygmy-owl as endangered.” 64 Fed. Reg. 37433 (July 12, 1999); Industrial Economics, Inc., *Economic Analysis of*

Critical Habitat Designation for the Cactus Ferruginous Pygmy-Owl (1999), at ES-5 (1999).

But the assertion that designating critical habitat for the cactus ferruginous pygmy-owl imposed no costs paints a highly misleading picture. When the USFWS proposed to re-designate critical habitat for the owl in 2002 (1,208,001 acres in total, 145,124 private), the agency arrived at a very different estimate of economic impacts. 67 Fed. Reg. 71040 (Nov. 27, 2002). Using the co-extensive approach, the USFWS estimated the costs over 10 years would be \$23-36 million. *Critical Habitat Proposed for Cactus Ferruginous Pygmy-Owl*, U.S. Fish & Wildlife Serv. (Dec. 2, 2002), <http://1.usa.gov/1RUKo80>.

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These estimates indicate that the baseline approach can result in massive underestimates of the impacts of designating critical habitat—sometimes to the point of fancifully reducing costs to \$0.

The disparities within the baseline approach—comparing the baseline and incremental impacts—and between the baseline and co-extensive approaches raises significant questions that call for judicial review. Under USFWS’s self-serving analysis, designating critical habitats is an insignificant regulatory burden because it imposes such small costs—the costs of incremental impacts are one-tenth or one-hundredth that of baseline impacts, *or even potentially zero*, while the baseline costs are in the tens or hundreds of millions of dollars.

Under *Michigan v. EPA* an agency can choose any *reasonable* method of cost-benefit analysis. 135 S. Ct. at 2711 (“It will be up to the Agency to decide (as always, within the limits of reasonable interpretation)

how to account for cost.”). Before the *New Mexico Cattle Growers* decision, the USFWS used the baseline approach. But the Tenth Circuit, after extensive analysis, found that this method was “not in accord with the language or intent of the ESA.” 248 F.3d at 1283-85. That was a question of first impression that “ha[d] not been decided by any of our sister circuits.” *Id.* at 1283. It is only an errant Ninth Circuit case that tersely “reject[ed] the Tenth Circuit’s approach,” *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1172-73 (9th Cir. 2010), that has allowed the agencies to return to their Enron-esque baseline accounting.

A circuit split over the reasonableness of a particular cost-analysis method employed in critical habitat designation is reason enough for the Court to grant certiorari. *But this case asks whether that issue is even judicially reviewable.* The relevant agencies are currently taking advantage of the split to achieve the designation of large swaths of land and water through woefully inadequate economic analyses. Only this Court can resolve whether the Ninth and Tenth Circuits even have jurisdiction—as they should under *Michigan*—to consider the reasonableness of the cost-benefit evaluation performed by USFWS and NMFS.

This Court should grant the petition and find that judicial review is available for landowners to contest erroneous cost analyses in designation proceedings.

II. BY CREATING PERVERSE INCENTIVES, THE ENDANGERED SPECIES ACT HARMS THE VERY SPECIES IT AIMS TO PROTECT

In addition to the enormous costs imposed by critical habitat designations, “[m]ounting evidence suggests that some regulatory actions by the Federal government, while well-intentioned and required by

law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands.” 75 Fed. Reg. 78460 (Dec. 15, 2010). These negative consequences are caused by the ESA’s regulatory reach and severe penalties—up to \$50,000 and 1 year in jail for misdemeanor harm to an endangered fish, bird, or even its habitat, whether the habitat is occupied or not, 16 U.S.C. § 1540(b)(1)—coupled with the ability to regulate vast amounts of land, water and natural resources (as indicated by the acreage figures associated with the designation of critical habitat for the 159 species analyzed discussed *supra*). As a senior Interior Department put it, “From a private landowner’s point of view, the Endangered Species Act looks like a nuclear weapon.” William K. Stevens, *Future of Endangered Species Act in Doubt as Law is Debated*, N.Y. Times, May 16, 1995, at C4 (quoting George Frampton, Assistant Secretary for Fish, Wildlife, and Parks).

Or, as the federal government succinctly describes the issue:

Many private landowners are wary of possible consequences of encouraging endangered species to their property Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where endangered or threatened species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. . . . This perception results in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities. . . . We attempt to ease these concerns through communication and outreach with

landowners; however, we recognize that these efforts are not always successful.

75 Fed. Reg. 78460 (Dec. 15, 2010).

The unfortunate but predictable result of the ESA's punitive approach to conservation is that species protection is connected to economic liabilities, and landowners seek to lessen these liabilities by denying species habitat, as some of the foremost ESA experts acknowledge.⁵ Expert opinion is also substantiated by scholarly research on a number of species, including two with critical habitat designations.

In 1997, the USFWS listed the Arizona population of the cactus ferruginous pygmy-owl as endangered and designated critical habitat in 1999. 62 Fed. Reg. 10730 (Mar. 10, 1997). Due to "preemptive acceleration" of development of non-critical habitat land and the 22 percent diminution in value of land designated as critical habitat, one study concluded that there is

⁵ "There is . . . increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems. . . . [Not from malice but] rational decisions motivated by a desire to avoid potentially significant economic constraints. In short, they're really nothing more than a predictable response to the familiar perverse incentives that sometimes accompany regulatory programs." Michael J. Bean, Speech for the USFWS's Office of Training and Education Seminar Series, *Ecosystem Approaches to Fish and Wildlife Conservation: "Rediscovering the Land Ethic"* (Nov. 3, 1994); Martin B. Main et al., *Evaluating Costs of Conservation*, 13 *Conservation Biology* 1263, 1265 (1999) ("[T]he regulatory approach to conserving endangered species and diminishing habitats has created anti-conservation sentiment among many private landowners who view endangered species as economic liabilities. . . . Landowners fear a decline in value of their properties because the ESA restricts future land-use options where threatened or endangered species are found but makes no provisions for compensation.").

“the distinct possibility the Endangered Species Act is actually endangering, rather than protecting, species.” List et al., *supra*, at 3. “Under the letter of the law, critical habitat designation on private land provides, in most cases, no statutory protection to the species beyond that enjoyed on other land. Thus, even a tiny preemptive response may indicate that this particular aspect of the law is quite harmful to the species it seeks to protect.” *Id.* at 27.

In 1998, the USFWS listed the Preble’s meadow jumping mouse as threatened. 63 Fed. Reg. 26517 (May 13, 1998). A 2003 survey of Colorado landowners in the mouse’s habitat found that 26 percent of the land-area surveyed was being managed to make it inhospitable, and most landowners would not let their land be surveyed for the mouse. Amara Brook et al., *Landowners’ Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation*, 17 *Conserv. Biology* 1638, 1638–49 (2003). “The efforts of landowners who acted to help the Preble’s mouse were canceled by those who sought to harm it.” *Id.* at 1644. “As more landowners become aware that their land contains Preble’s habitat, it is likely the impact on the species may be negative.” *Id.*

These perverse incentives, which cause landowners to destroy mouse habitat and deny researchers access to their property, likely got worse with the designation of critical habitat and landowners’ realization of the huge costs involved. The USFWS designated critical habitat for the jumping mouse in 2003, more than four years after the authors of the study surveyed landowners about their attitudes. *Id.* at 1640; 68 Fed. Reg. 37276 (June 23, 2003). The economic analysis, using the co-extensive approach, estimated the designation of 31,222 acres of critical

habitat along 359.2 miles of streams would impose costs of \$79–183 million over 10 years. 68 Fed. Reg. 37276 (June 23, 2003); Industrial Economics, Inc., *Addendum to Economic Analysis of Critical Habitat Designation for the Preble’s Meadow Jumping Mouse* (2003) (prepared for USFWS). These estimated costs increased when the Service re-designated critical habitat in 2010 to include 34,935 acres along 411 miles of streams, which entailed \$88–201 million in co-extensive impacts, of which \$28–\$63 million were incremental impacts. 75 Fed. Reg. 78430, 78458 (Dec. 15, 2010). “In the high-end [cost] scenario, potential impacts to residential and commercial development represent 92 percent of the baseline costs and 96 percent of the incremental impacts.” *Id.*

Before designation, a substantial number of landowners had negative attitudes toward the conservation of the mouse. Those attitudes assuredly became more negative and spread to more landowners after the critical habitat designation, as predicted by the aforementioned study’s authors. How could they not? Indeed, the Service admitted that the ESA’s regulations, which lower property values, result in “anti-conservation incentives” to harbor species, including the mouse. 75 Fed. Reg. 78460 (Dec. 15, 2010).

Critical habitat designation also harms the environment because “by reducing the density of development in areas deemed to be critical habitat, [it] can change the shape of urban areas and squeeze growth into more remote locations.” Sunding et al., *The Economic Costs of Critical Habitat Designation*, *supra*, at iii. “This effect of designation is costly for potential homebuyers and business owners as they are forced to locate to less desirable areas. . . . By encouraging sprawl, critical habitat designation can also lead to

regional problems of road congestion and air pollution, in addition to the problem of housing affordability already mentioned.” *Id.* Yet sprawl is identified as a major threat to wildlife, including endangered species. *See generally, e.g.,* Reid Ewing & John Kostyack. *Endangered by Sprawl: How Runaway Development Threatens America’s Wildlife* (2005).

The harm caused species by the ESA is especially damaging on private lands because they are the linchpin of species conservation; 78 percent of endangered and threatened species depended on private land for all or some of their habitat. U.S. General Accounting Office, GAO/RCED-95-16, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* 4, 5 (1994). Ninety-one percent of all endangered and threatened species have at least some habitat on nonfederal land. *Id.* And while 50 percent of endangered and threatened species do not exist on federal land, only 12 percent of them exist solely on federal land. Bruce A. Stein et al., “Significance of Federal Lands for Endangered Species,” *in* Dep’t of the Interior, *Our Living Resources* 398-401 (Edward T. LaRoe et al., eds. 1995). “Most federally listed species in the United States will not recover without cooperation of non-Federal landowners,” according to the USFWS. 75 Fed. Reg. 78460 (Dec. 15, 2010).

Yet cooperation from landowners is exactly what the ESA’s incentive structure makes very unlikely. This is not something which exists merely in the abstract, but concrete examples exist showing how designation harms conservation efforts.

Take for example the Poitevent family in Louisiana. The Poitevents have a long history of landownership and sound stewardship going back to before

the Civil War. Christine Harvey, *Mississippi Gopher Frog Could Hop into St. Tammany*, New Orleans Times-Picayune (Nov. 20, 2011), http://www.nola.com/politics/index.ssf/2011/11/mississippi_gopher_frog_could.html. In 2011, the Poitevents discovered that the federal government planned to punish them for their stewardship (keeping the land in a natural state) when the USFWS proposed to designate 6,477 acres as critical habitat for the dusky gopher frog, of which 1,544 acres was a forested parcel owned almost entirely by the Poitevents and other relatives. 76 Fed. Reg. 59782 (Sept. 27, 2011).

When the USFWS finalized the designation of critical habitat in 2012, the agency estimated that if it “recommends that no development occur within the unit” (i.e., the 1,544 acres), the economic impact to the owners would be about \$34 million. 77 Fed. Reg. 35141 (June 12, 2012). Alternately, if “the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit,” in which “approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery,” the impact to the owners would be just over \$20 million. *Id.*

The USFWS designated the Louisiana land parcel as critical habitat despite many countervailing considerations: (1) the 1,544 acres were unsuitable habitat—the land contained five ponds or ephemeral wetlands that were suitable, but the upland habitat adjacent to the ponds and necessary to sustain the frogs could only be rendered suitable by man-made improvements; (2) the land was not occupied by gopher frogs at the time of listing in 2001 or when critical habitat was proposed; (3) the frog was only extant in Mississippi, 50 miles away on a portion of the 4,933

acres designated as critical habitat in that state; (4) the frog could not populate the 1,544 acres absent human intervention (translocation and habitat restoration); and (5) the last time a dusky gopher frog was seen in Louisiana was 1965. 77 Fed. Reg. 35135 (June 12, 2012); Robert Rhoden, *Federal Judge Hears Arguments in St. Tammany's Dusky Gopher Frog Case*, New Orleans Times-Picayune (Aug. 20, 2014), http://www.nola.com/crime/index.ssf/2014/08/federal_judge_hears_arguments_1.html. The designation of the 1,544 acres is the first time the USFWS determined that land that is *unsuitable for the species in question* and will never be suitable without human intervention is in fact “critical habitat.”

The Service's actions in Louisiana are evidence of both the significant costs critical habitat can impose and the counterproductive, penalty-based approach to imperiled species conservation the ESA represents. The dusky gopher frog needs landowners willing to conserve it, not those who feel aggrieved, antagonized, and hostile. After all, “disgruntled landowners make poor conservationists.” David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations*, 19 Harv. Env'tl. L. Rev. 303, 397 (1995). The perverse incentives created by the ESA's penalties and land and resource-use regulations cause harm to the very species they are supposed to protect. As with the cactus ferruginous pygmy-owl, preble's meadow jumping mouse, and many other species, the designation of critical habitat for the dusky gopher frog is quite likely harming, rather than conserving, the species.

These concerns—the harm of the ESA to the species it is meant to protect and the fanciful-at-best accounting methodology—militate toward an interpre-

tation of the ESA that would require the USFWS to engage in meaningful cost-benefit analysis. The Service that has created these problems shows no sign of correcting the issue absent judicial intervention. Indeed, these issues persist while the government tires to get this Court to close off judicial review under a questionable-at-best interpretation of the APA.

CONCLUSION

For the foregoing reasons, this Court should take up the issue of whether there is any judicial review available for critical habitat designation. The ESA's counter-productive incentive structure demands it.

Respectfully submitted,

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