No. 14-31008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARKLE INTERESTS, L.L.C.; P&F LUMBER COMPANY 2000, L.L.C.; PF MONROE PROPERTIES, L.L.C.,

Plaintiffs – Appellants

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, Director of United States Fish & Wildlife Service, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Department of Interior,

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

Consolidated with No. 14-31021

WEYERHAEUSER COMPANY,

Plaintiff – Appellant

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, Director of United States Fish & Wildlife Service, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Department of Interior,

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NOS. 2:13-CV-234, 2:13-CV-362, 2:13-CV-413, SECTION "F," HONORABLE MARTIN L.C. FELDMAN, PRESIDING

JOINT PETITION OF THE APPELLANTS FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants, Markle Interests, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.; and Weyerhaeuser Company certify that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants
Markle Interests, L.L.C.;
P&F Lumber Company 2000, L.L.C.;
PF Monroe Properties, L.L.C.; and
Weyerhaeuser Company

Entities with an interest
St. Tammany Land Company, L.L.C. (owns a portion of the land designated as critical habitat)

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RULE 35(b)(1) STATEMENT

This petition seeks review of a decision by a split panel of this Court affirming a final rule by the U.S. Fish and Wildlife Service (the "Service") that designates 1,544 acres of privately owned land in Louisiana ("Unit 1") as "critical habitat" for an endangered species, the dusky gopher frog. Because Unit 1 is not currently occupied by the frog, by law it may be designated as critical habitat only if it is determined to be "essential for the conservation of the species." It is undisputed, however, that (1) Unit 1 is currently unsuitable for habitation by the frog; (2) major, costly land modifications and ongoing maintenance would be necessary in order for Unit 1 to contribute to the conservation of the frog; and (3) the Service has absolutely no power to effectuate such modifications and maintenance. Thus, notwithstanding the critical habitat designation, the Service has no reason to believe that Unit 1 will ever contribute to the conservation of the dusky gopher frog in any way.

Yet the panel majority affirmed the Service's designation notwithstanding these facts, explicitly holding that land can be deemed "essential for the conservation of the species" even though the land is currently unable to support the conservation of the species and the Service has no rational basis to believe that it will ever do so in the future. According to the panel majority, all that is needed is a "scientific" determination that an endangered species needs additional habitat, and that some piece of land is theoretically restorable into suitable habitat for the species. *See* Opinion at 42 (Owen, J., dissenting) ("If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United

States could be designated as 'critical habitat' because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.").

As Judge Owen noted in her dissent, "[t]he majority opinion's holding is unprecedented and sweeping," adopting an "expansive interpretation" of the Endangered Species Act (the "ESA") that has led to "consequent overreach by the Government." Opinion at 43 (Owen, J., dissenting). If the majority opinion is allowed to stand, the judicial imprimatur on the Service's actions will likely encourage further government overreach across the nation in the enforcement of the Endangered Species Act. Furthermore, accepting the Service's statutory interpretation would render the ESA's critical habitat provision unconstitutional because the entire justification for regulation under the Commerce Clause will have been lost. Because the rights of any property owner in the United States could potentially be affected by a critical habitat designation, this case involves "an error of exceptional public importance" calling for *en banc* review. *See* 5th Cir. Rule 35 Internal Operating Procedures.

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ISSUES WARRANTING EN BANC CONSIDERATION

1. Does the Endangered Species Act ("ESA") permit the U.S. Fish and Wildlife Service (the "Service") to designate private land as "critical habitat" for an endangered species when the land is currently unable to support the conservation of the species in any way, and the Service has no rational basis to believe that it will ever do so in the future?

2. If the ESA permits the Service to designate land as "critical habitat" even absent any reason to believe the land will ever contribute to the conservation of any species, does the Act exceed Congress's powers under the Commerce Clause?

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

This case arises from the Service's efforts to conserve the dusky gopher frog, which was listed as an endangered species in 2001. The Service's initial conservation efforts were promising: although there was only one known frog population at the time of listing, by 2010, two new naturally occurring populations had been discovered, and the frog had been successfully reintroduced to one additional site.[1] Nevertheless, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the Service in 2007 for failing to designate critical habitat for the frog. In response, the Service issued a proposed rule that would have designated 11 units of land in Mississippi (1,957 acres) as critical habitat. This proposed land included four units that were actually occupied by the frog at the time, as well

[1] All of these sites were in Mississippi.

as seven unoccupied units that were designated with the intention of establishing new frog populations so as to expand the range of its habitat. Crucially, all of the unoccupied units were being actively managed to maintain a suitable habitat for the frog, and each unit contained all three of the "primary constituent elements" ("PCEs") that have been deemed essential to the conservation of the frog.[2]

However, based on comments from peer reviewers and others, the Service decided that these 11 units were insufficient. Accordingly, the Service ultimately designated one additional unit in Louisiana ("Unit 1") as critical habitat.[3] The differences between Unit 1 and the other units are striking. First, no dusky gopher frogs are present in Unit 1 or anywhere near Unit 1,[4] and none have been seen there since 1965. Second, unlike the other units, which were being actively managed for the benefit of the frog, Unit 1 is privately owned and is currently being used as a timber plantation. In fact, although Unit 1 contains one of the essential habitat elements—ephemeral ponds—the Service openly recognized that it lacks the other two essential habitat elements (open-canopy long-leaf pine forests and appropriate site connectivity). As the Service explained, "the surrounding uplands

[2] The three PCEs identified by the Service as essential for the conservation of the frog are: (1) small, isolated, ephemeral ponds with certain characteristics; (2) adjacent open-canopy long-leaf pine forests with underground habitat such as burrows and holes; and (3) appropriate sheltered connectivity between breeding and non-breeding sites. *See* ROA.642.

[3] The Service also expanded the other 11 units, resulting in a total critical habitat designation of 6,477 acres. Of this total, 1,544 acres were in the late-designated Unit 1.

[4] Unit 1 is the only unit in Louisiana (all of the other units are in Mississippi), and it is more than 50 miles away from any other unit.

[in Unit 1] are poor-quality terrestrial habitat for dusky gopher frogs."[5] Thus, Unit 1 is the only one of the 12 units that does not contain all three habitat elements necessary for the frog's conservation.

The Service made clear that it viewed Unit 1 only as "potential" frog habitat that is "restorable with reasonable effort."[6] However, the "reasonable effort" envisioned by the Service would require a radical transformation of the current conditions of the land and a fundamental change in its use going forward. Unit 1's current use is incompatible with the frog habitat the Service would like to create on the land. Whereas the frog requires an open-canopy forest of long-leaf pine, Unit 1 is currently covered with commercially preferable loblolly pine and currently exhibits a closed-canopy forest. The existing trees would have to be cleared and replaced with an entirely different species, which would then have to be managed to support frog habitat rather than commercial timber growth, including measures such as burning the property with "frequent fires."[7]

The Service recognized that designating Unit 1 as critical habitat does not give it any powers to effectuate the changes that would be needed before Unit 1 possibly could be used for the conservation of the frogs: "Such designation does not allow the government or public to access private lands . . . [or] require the implementation of restoration, recovery, or enhancement measures by non-Federal

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[5] ROA.644.

[6] *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the "Revised Proposed Rule"), 76 Fed. Reg. 59,774, 59,783 (Sept. 27, 2011).

[7] ROA.640.

landowners."[8] The Service also admitted that its plans rest on nothing more than a "hope" that the owners of Unit 1 will voluntarily agree to convert it into a frog habitat:

> Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, ***we hope*** to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there.[9]

The Service performed an economic analysis pursuant to 16 U.S.C. § 1533(b)(2), which states that the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat" and "may exclude an area from designated critical habitat based on economic impacts." The Service estimated that the designation of Unit 1 could cause losses to its owners of up to $33.9 million over 20 years as a result of lost development value.[10] Remarkably, the total estimated economic impact on the remaining 11 units was only $102,000 over the same period.[11] Thus, the overwhelming majority of the economic burden (over 99%) fell upon the one unit that was entirely unsuitable for habitation by the frog and highly unlikely to ever be used for the frog's conservation. Nevertheless, the Service merely stated, without elaboration, that it "did not identi-

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[8] Revised Proposed Rule, 76 Fed. Reg. at 59,776.

[9] ROA.634 (emphasis added); *see also* ROA.634 ("[A]ctions such as habitat management through prescribed burning, or frog translocation to the site, cannot be implemented without the cooperation and permission of the landowner.").

[10] ROA.651.

[11] ROA.651.

fy any disproportionate costs that are likely to result from the designation," and chose not to exclude Unit 1 from the designation.[12]

The Landowners[13] challenged the Service's designation of Unit 1 in the district court. The district judge expressed his view that the Service's actions were "odd," "troubling," and "harsh," and stated that "what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property."[14] Nevertheless, considering himself to be "restrained" by the standard of review under the Administrative Procedure Act ("APA"), which he described as "confining" and "somewhat paralyzing," the district judge reluctantly affirmed the Service's designation.[15]

On appeal, the panel majority affirmed the district court, holding that "the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA." Opinion at 28. The panel majority held that the Service had reasonably determined "that Unit 1 is essential for the conservation of the frog," Opinion at 28, but failed to explain how Unit 1 would ever be used for such conservation. The panel majority explicitly held that the Service can designate land as critical habitat even if the land is not currently occupied

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[12] ROA.652.

[13] The "Landowners" are the owners of most of Unit 1 and the Appellants in this case: Markle Interests, LLC; P&F Lumber Company 2000, LLC; PF Monroe Properties, LLC; and Weyerhaeuser Company. St. Tammany Land Company, LLC, the remaining owner of land in Unit 1, is not a party to this appeal.

[14] ROA.2017; ROA.2019; ROA.2030; ROA.2032.

[15] ROA.2013; ROA.2035.

by an endangered species or able to support the conservation of the species in any way, and the Service has no reason to believe that it will do so at any point in the foreseeable future. *See* Opinion at 21, 24. The Landowners are unaware of any other court that has approved a critical habitat designation under such tenuous and speculative circumstances.

The panel majority went on to reject the Landowners' challenge to the Service's failure to exclude Unit 1 from the designation due to disproportionate economic impact. The panel majority held that the Service's decision on that issue is entirely unreviewable by the courts because there are "no manageable standards" for reviewing such a decision. Opinion at 29.

The panel majority also rejected the Landowners' argument that, if the Service's interpretation of the ESA is correct, the statute exceeds Congress's powers under the Commerce Clause. The panel majority appeared to recognize that the designation of Unit 1 does not actually regulate any economic or interstate activity or any activity that has a substantial effect on interstate commerce. *See* Opinion at 32–34. However, the panel majority held that "the designation of Unit 1 may be aggregated with all other critical-habitat designations" because the critical habitat provision is "an essential part" of a larger economic regulatory scheme, the ESA. *See id.* at 35, 38.

In her dissent, Judge Owen forcefully explained why the designation of Unit 1 is arbitrary and capricious and why the panel majority's "unprecedented and sweeping" opinion is both "illogical" and "inconsistent." Opinion at 43, 55 (Owen, J., dissenting). Simply put, "[a]n area cannot be essential for use as habitat if it is

uninhabitable and there is no reasonable probability that it could actually be used for conservation." *Id.* at 53. Because the Service's conservation plans for Unit 1 are based on "nothing more than the Government's *hope* or speculation" that the Landowners would volunteer to pay for the transformation of their land into a frog habitat, Unit 1 cannot rationally be described as "essential" to the frog's conservation as the ESA explicitly requires.

REASONS FOR GRANTING THE PETITION

I. The Service cannot designate private land as critical habitat when the land is currently unable to support the conservation of an endangered species in any way, and the Service has no rational basis to believe that it will ever do so in the future.

The Landowners do not dispute the general importance of critical habitat designations in conserving endangered species or the Service's statutory power to designate lands that truly are essential to the conservation of a species. However, courts must enforce the statutory limits of the Endangered Species Act to prevent improper designations that impose severe burdens on private-property owners with no corresponding benefit to any endangered species. The panel majority and the Service both recognized that private property often suffers "real economic effects" upon being designated as critical habitat, including a "reduction in land value" occurring "immediately at the time of the designation." Opinion at 12. In this case, the Service estimated that the designation of Unit 1, in itself, would cause up to $33.9 million in losses to the Landowners over a twenty-year period.

The critical habitat provisions of the ESA distinguish lands that are "occupied" by an endangered species from lands that are unoccupied. *See* 16 U.S.C.

§ 1532(5)(A). Importantly, even lands that are actually occupied by an endangered species cannot be designated as critical habitat unless they contain "those physical or biological features . . . essential to the conservation of the species" that "may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). As to unoccupied lands, there is no reference to physical or biological features on the land—instead, the statute requires a determination that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

It makes sense that unoccupied lands—which do not actually contain the endangered species, and which would presumably consist of most of the land in the United States—should be more difficult to designate. Courts have agreed, describing designation of unoccupied lands as a "more onerous procedure," *Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), and "a more extraordinary event that [sic] designation of occupied lands," *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 125 (D.D.C. 2004). Yet the only check on the Service's power to burden nearly any unoccupied private land in the United States with a critical habitat designation is the requirement that the land be "essential for the conservation of the species." Even the panel majority acknowledges that the term "essential" was intended to set "meaningful limits . . . on the Service's authority to designate unoccupied areas as critical habitat." Opinion at 24. But without a robust definition of "essential" that is enforced by the courts, there is no meaningful limit at all.

The relevant sense of the word "essential" connotes something that is of extreme or even critical importance. *See, e.g.*, CONCISE OXFORD ENGLISH DICTIONARY (12th ed. 2011) ("1. absolutely necessary; extremely important"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) ("2a: of the utmost importance: BASIC, INDISPENSABLE, NECESSARY"). Thus, based on the plain meaning of the word, land that is "essential to the conservation of the species" at the least must be highly important to the goal of conserving the species. But how can land such as Unit 1 be considered highly important to the conservation of a species (here, the frog) if the condition of the land is such that it cannot be used for the conservation of the species in any way? At best, Unit 1 ***could potentially*** play a role in conserving the frog if it were to be transformed and actively managed, but there is no rational basis to predict that this will happen. ***At this time***, therefore, Unit 1 cannot rationally be called "essential."

The panel majority's finding of "essentiality" appears to rest entirely upon the existence of ephemeral ponds on Unit 1 (one of the three required habitat elements the Service says are needed for the frog's conservation), coupled with the finding that the other necessary habitat elements could theoretically be restored there. *See* Opinion at 26 n.20 & 23 n.17 ("[S]ubstantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog."). The panel majority goes on to explain: "The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog." *Id.*

The panel majority's observation that the ponds cannot be separated from the uninhabitable land that contains them is absolutely correct. That is exactly why the ponds are of no use to the frog. Until the surrounding lands in Unit 1 are transformed into suitable habitat, Unit 1 cannot be "essential" to the dusky gopher frog in any sense of the word because it is useless to the frog. It is arbitrary and capricious to designate land as "essential" based on a single feature of the land when it is undisputed that that feature by itself cannot support a frog population and the land as a whole is uninhabitable by the frog.[16]

Through its loose and infinitely flexible interpretation of the word "essential," the Service seeks to use the critical habitat provision for a new and improper purpose that would vastly expand the Service's power beyond the limits set by Congress. Rather than using these provisions to designate and preserve land that ***actually is*** essential critical habitat for an endangered species, the Service is hoping to ***create*** new habitat by transforming unsuitable lands to make them suitable for habitation by the species. *See* Opinion at 50 (Owen, J., dissenting) ("It may be a good idea to permit the Service to designate any land as 'critical habitat' if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did."). Such an expansion of the statute is not only illegitimate—it is also irrational, because the Service admittedly lacks the power to actually achieve its goal of creating new habitat.

[16] *See, e.g.*, ROA.644; Revised Proposed Rule, 76 Fed. Reg. at 59,783.

As the Service recognized, the critical habitat designation here could potentially result in the prohibition of all development of Unit 1 (at a cost of up to $33.9 million to the Landowners). Even in that scenario, however, Unit 1 will not contribute to the conservation of the frog in any way because required land modifications and management will not occur. As Judge Owen explained in her dissent:

> Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat.

Opinion at 68 (Owen, J., dissenting). However, the ESA does not give the Service the power to create or restore habitat for an endangered species by means of a critical habitat designation. At best, the Service can impose a costly stalemate in which the land will neither contribute to the conservation of the dusky gopher frog nor serve the intended uses of its owners. This is exactly the sort of arbitrary and capricious agency overreach that calls out for judicial correction.[17]

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[17] The harm resulting from the panel majority's erroneous standard for designating critical habitat is multiplied by the holding that the Service's decision not to exclude land from the designation based on disproportionate economic impact is completely unreviewable. *See* Opinion at 31. The Service is required to "tak[e] into consideration the economic impact" before designating critical habitat, and "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." 16 U.S.C. § 1533(b)(2). As the majority acknowledged, this weighing of benefits provides a judicially manageable standard for reviewing the Service's decision to ***exclude*** an area. *See* Opinion at 30. Yet the majority held that a decision ***not to exclude*** is unreviewable because "even [if] . . . the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1." *Id.* This astonishing interpretation would allow the government to proceed with an action causing direct harm to private property owners even after determining that the costs of the action grossly outweigh the benefits, defying the rule of reason. Congress could not possibly have intended to authorize such conduct.

II. To the extent the ESA permits the Service to designate land as critical habitat even absent any reason to believe the land will ever contribute to the conservation of any species, it exceeds the powers of Congress under the Commerce Clause.

This court has held previously that the ESA provision prohibiting "takes" of endangered species is within the Commerce Clause power of Congress, even as applied to commercially insignificant, purely intrastate species. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 624 (5th Cir. 2003). The Court's holding rested on two major premises: (1) extinction of all endangered species, in the aggregate, would have a substantial effect on interstate commerce; and (2) regulating even intrastate takes of commercially insignificant species is essential to the regulatory scheme, due to the "critical nature of the interrelationships of plants and animals between themselves and with their environment" and the "unknown" and "unforeseeable" effects that the extinction of one species could have on "the chain of life on this planet." *Id.* at 638–40. Accordingly, ***species extinction*** is the justification for regulation under the Commerce Clause; thus, when an ESA provision is interpreted to allow regulation that has no rational connection to preventing species extinction, it loses its constitutional footing.

To the extent the ESA allows the Service to designate land as critical habitat for an endangered species without any rational basis for predicting that the land will ever be used for the conservation of the species, it is unconstitutional—for the simple reason that designation of such land has no connection to species extinction, either individually or in the aggregate. Designating such land does not make it any less likely that the species will avoid extinction, and failing to designate the land

does not make it any more likely that the species will become extinct. This is not a question of statutory interpretation, but of constitutional law, as the lack of a rational connection removes the statute from the scope of the Commerce Clause power—no matter how limitless the statutory language or Congress's intent.

The panel majority held that because the critical habitat provision of the ESA is generally constitutional, "the application of [that] provision to Unit 1 is a constitutional exercise of the Commerce Clause power." Opinion at 38. The panel majority believed the Landowners to be arguing that the Court "should analyze the commercial impact of the Unit 1 designation independent of all other designations." Opinion at 32. This misconstrues the Landowners' actual argument. In fact, the Landowners argue that Congress has no power over the entire class of "activity on private land that is not occupied by any endangered species and will not support the conservation of any species in the foreseeable future," including Unit 1. Reply Brief at 20–21. The Supreme Court has made clear that even a generally constitutional statutory scheme may be unconstitutional as applied to certain specific classes of activity. Thus, the panel majority erred by failing to consider whether the critical habitat provision is constitutional as applied to ***the specific class of activity*** identified by the Landowners.

For example, in *Gonzalez v. Raich*, 545 U.S. 1 (2005), the plaintiffs did not dispute that the Controlled Substances Act, as a whole, was "well within Congress' commerce power." *Raich*, 545 U.S. at 15. Rather, their argument was "quite limited; they argue[d] that the CSA's categorical prohibition of the manufacture and possession of marijuana *as applied to the intrastate manufacture and possession of*

marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Id.* (emphasis added). The Court ultimately rejected their challenge after finding that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA"—in other words, "failure to regulate that class of activity [identified by the plaintiffs] would undercut" the overall regulatory scheme. *Id.* at 22, 18. However, the Court never suggested that the plaintiffs' as-applied challenge concerning a specific class of activity was improper or somehow barred.

As this Court explained in *GDF Realty*:

> "Where a general regulatory scheme bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." The *de minimis* instance, however, must be "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."

GDF Realty, 326 F.3d at 630 (quoting *United States v. Lopez*, 514 U.S. 549, 558, 561 (1995), in-line citation omitted, emphasis removed). The ESA would not be undercut if the Service were prohibited from designating land that cannot contribute to the conservation of an endangered species now or in the foreseeable future. The panel majority seeks to evade this difficulty with the statement that: "Allowing a particular critical habitat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat." Opinion at 37. But under the Service's standards (which have been approved by the panel ma-

jority), "essential" does not actually mean essential. Restricting a critical habitat designation to only those lands that are actually able to contribute to the conservation of an endangered species would have no impact at all on the Service's ability to carry out the conservation goals of the ESA.

Moreover, the Supreme Court recently emphasized that, although purely intrastate activities may be regulated if they substantially affect interstate commerce, "thus far in our Nation's history [the Supreme Court] ha[s] upheld Commerce Clause regulation of intrastate activity ***only where that activity is economic in nature***." *Taylor v. United States*, 136 S. Ct. 2074, 2079–80 (2016) (quoting *United States v. Morrison*, 529 U.S. 598, 613 (2000)) (emphasis added). The panel majority was unable to identify any economic activity that is regulated through the critical habitat designation of Unit 1, because there is none. *See* Opinion at 34. On that basis alone, the application of the ESA to Unit 1 and other similar land within the same class is beyond the legitimate scope of the Commerce Clause as recognized by the Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should rehear this case *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, an electronic copy of the foregoing Petition for Rehearing En Banc was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by either by the appellate CM/ECF system or by U.S. Mail to the following:

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CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that, in this Petition for Rehearing En Banc filed using the Fifth Circuit CM/ECF document filing system: (1) the privacy redactions required by Fifth Circuit Rule 25.2.13 have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of AVG Internet Security Business Edition and is free of viruses.

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