No. 17-___

IN THE

Supreme Court of the United States

STATE OF ALASKA, ET AL.,

Petitioners,

v.

WILBUR L. ROSS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Jahna Lindemuth
ATTORNEY GENERAL
P.O. Box 110300
Juneau, AK 99801
(907) 269-5602
jahna.lindemuth@alaska.gov

Brad Meyen
ALASKA DEP'T OF LAW
1031 W. 4th Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5232
brad.meyen@alaska.gov

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Charles H. Davis
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Matthew Waldron
Shelley D. Cordova
Sarah J. Shine
ARCTIC SLOPE REGIONAL CORP.
3900 C Street
Suite 701
Anchorage, AK 99503
(907) 339-7665
Shelley.Cordova@asrcenergy.com

Matthew A. Love
Tyson C. Kade
VAN NESS FELDMAN LLP
719 Second Av.
Suite 1150
Seattle, WA 98104
(206) 829-1809
mal@vnf.com

QUESTION PRESENTED

The Endangered Species Act (ESA) requires the government to list a species as "threatened" if it is "*likely* to become an endangered species within the *foreseeable* future." 16 U.S.C. §§1532(20), 1533 (emphasis added). These statutory terms make clear that the ESA concerns immediate threats to species that are struggling or declining in numbers, as opposed to very-long-term threats to currently thriving species based on planet-wide issues like climate change. In this case, the National Marine Fisheries Service (NMFS) determined that a now-healthy population of the bearded seal is "threatened" because climate change *may* endanger its Arctic sea-ice habitat *by the year 2095*. When it acted to list the bearded seal on that basis, however, it decided that it would nonetheless refrain from requiring any action to address the identified, climate-change-based threat to the bearded seal as a consequence of the listing. The Ninth Circuit recognized that this case presents an isolated legal issue of nationwide importance—that it "turns on one issue." Pet. App. 6a. The question presented is:

> "When [the government] determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may NMFS list that species as threatened under the Endangered Species Act?"

Id.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners: State of Alaska; Arctic Slope Regional Corporation; The North Slope Borough; NANA Regional Corporation, Inc.; The Iñupiat Community of the Arctic Slope; Northwest Arctic Borough. Petitioners Alaska Oil & Gas Association and American Petroleum Institute are filing a separate petition for writ of certiorari.

Respondents: Wilbur L. Ross, U.S. Secretary of Commerce; National Marine Fisheries Service; National Oceanic and Atmospheric Administration; Benjamin Friedman, Acting Under Secretary of Commerce for Oceans and Atmosphere and the Acting Administrator, National Oceanic and Atmospheric Administration; Chris Oliver, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

Intervenors: Center for Biological Diversity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Administrative Materials

Other Authorities

INTRODUCTION

The question presented here is whether a now-healthy species that may one day be threatened by the uncertain consequences of global climate change is in fact "threatened," *today*, within the meaning of the Endangered Species Act (ESA). Given the textual limits Congress imposed on "threatened" listings—namely, that it must be "likely" in the "foreseeable future" that the species will be on the brink of extinction—the answer is "no." That result is bolstered by the remedial tools Congress provided in the ESA, which are grossly ill-suited to addressing long-term, global threats like climate-change effects that may occur 100 years hence. In fact, listing a now-healthy species on that basis opens the door to almost unfettered future listings of myriad species, each of which will result in heavy burdens on a local human population and—as the government readily admits—no requirement that anyone do anything that might alleviate the identified threat to species survival. The alternative, meanwhile, makes all the sense in the world: The agencies can simply wait to list the species until the identified threat manifests (if ever), the species actually experiences a decline, and locally burdensome conservation efforts can actually make a difference.

Combining an exceedingly deferential standard of review with a toothless interpretation of the statutory limitations, the Ninth Circuit has given the opposite answer. On its view—which it purports to share with the D.C. Circuit—the agency's acknowledged uncertainty about the long-term effects of global climate change on an Arctic species is no barrier to listing that species as "threatened"—in

fact, it *supports* the listing. The consequences of any such listing for States and their local populations are exceptionally serious. This Court should not permit the only meaningful limits on listing decisions to be effectively dissolved, as they now have been, by the similarly erroneous answers given to the question presented by the two circuits with plausible jurisdiction over those species most readily affected by climate change.

Alaska and her citizens—particularly her Native groups—will suffer the painful consequences of this misreading of the statute alone. Alaska Native communities that have called this land home for millennia depend on the unencumbered use of their land—land they fought to retain in the settlement of their aboriginal land claims—for the survival of their traditional ways of life. Central to this tradition is a subsistence culture that depends intimately on the harvest of bearded seals, which provide not only food, but also hides used to cover the wooden frames of the umiaq, a vessel commonly used by the whaling community for the traditional spring whale hunt. Likewise, the unnecessary burdens this listing will cause on natural resource extraction in Alaska will have significant, unintended consequences on the State and Alaska Natives. Royalties and property taxes from resource extraction are crucial to the State's social-services budget, the Alaska Permanent Fund dividend that keeps many local families out of poverty, and raising the funds necessary to support the Alaska Native subsistence lifestyle—a unique cultural heritage that actually does face imminent threats to its survival. Meanwhile, impinging on these important interests because the bearded seal is now a "threatened" species is literal nonsense: The

agency admits that the species is currently abundant, and that no human activity occurring in its habitat is sufficient to justify a listing or address the long-term climatological threat the agency purported to identify.

This statutorily indefensible result should not persist; it causes harms Congress did not intend for no benefit whatsoever. Petitioners, however, have nowhere left to turn. Absent this Court's immediate intervention, the agencies will continue to stymie investment and development in Alaska through pointless ESA listings that both the Ninth and D.C. Circuits—the only available venues—will predictably affirm. The Court should grant certiorari, and reverse.

PETITION FOR A WRIT OF CERTIORARI

The State of Alaska and other listed parties respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is published at 840 F.3d 671 (Pet. App. 1a). The district court's decision is available at 2014 WL 3726121 (Pet. App. 34a).

JURISDICTION

The Ninth Circuit's judgment issued October 24, 2016. Pet. App. 3a. A timely rehearing petition was denied on February 22, 2017. Pet. App. 82a. Justice Kennedy extended this petition's due date to July 22, 2017, *see* No. 16A1105. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

16 U.S.C. §1532(20) provides:

> The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Other relevant provisions appear in the appendix.

STATEMENT OF THE CASE

I. Statutory Background

Concerned that "species of fish, wildlife, and plants have been *so depleted in numbers* that they are in danger of or threatened with extinction," 16 U.S.C. §1531(a)(2) (emphasis added), Congress responded with the ESA. Shortly thereafter, this Court recognized that Congress intended the Act to have a dramatic effect on the entire United States government. Once a species is deemed likely to become extinct, the ESA prioritizes its preservation over even the "primary missions" of almost every federal agency. *TVA v. Hill*, 437 U.S. 153, 185 (1978). The decision to list a species as threatened or endangered is thus enormously consequential.

1. 16 U.S.C. §1533(a)(1) imposes a mandatory duty on the "Secretary"[1] to determine, based on five enumerated factors, "whether any species is an endangered species or a threatened species," and to so designate any species that meets those statutory tests.[2] The criteria are focused on the species'

---

[1] Responsibility for ESA listings is shared between the Secretaries of Commerce and Interior, *see id.* §1533(a)(2), who act through the U.S. Fish and Wildlife Service (FWS) and NMFS respectively. For concision, we refer generically below to the "Secretary," "government," or "relevant agencies."

[2] These include: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; (E) other natural or manmade factors affecting its continued existence." *Id.* §1533(a)(1).

present status and immediate threats to its viability (both temporally and geographically). In general, the Secretary must base the listing decision "solely on … the best scientific and commercial data available to him after conducting a review of *the status of the species*." *Id.* §1533(b)(1)(A) (emphasis added). The Secretary is also directed to determine whether "any species *is* an endangered or threatened species" based on the "present or threatened destruction … of its habitat or range," along with other present-tense considerations like "the inadequacy of *existing* regulatory mechanisms," or "other natural and manmade factors *affecting* its continued existence." *See id.* §1533(a)(1)(A)-(E) (emphasis added); *id.* §1531(a)(1); 50 C.F.R. §402.01(b) (2017).

Before the listing at issue, the agencies had never listed a species as endangered or threatened without evidence of vulnerably low population numbers or some other specific, local, and immediate threat. That began to change with the "threatened" listing for the polar bear in 2008, *see infra* p.30-32; *In re Polar Bear ESA Listing*, 709 F.3d 1 (D.C. Cir. 2013). But even that decision, while partly based on how global climate change would impact the bears' Arctic environment, was rooted in data demonstrating the present effects on existing and vulnerable portions of polar bear populations. As the parties and courts have acknowledged throughout this case, there is simply no precedent for listing a presently robust species as threatened solely because long-term forces might harm it at a distant date. *See, e.g.*, Pet. App. 78a-79a.

The concepts of "endangered" and "threatened" species of course require the Secretary to make

certain future-looking judgments, but those statutory definitions impose important limits on their temporal and conceptual reach. An "endangered" species must *already* be "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. §1532(6); *see also In re Polar Bear ESA Listing*, 794 F. Supp. 2d 65, 89-90 (D.D.C. 2011) ("in danger of extinction" means "on the brink of extinction"). And a "threatened" species must be "*likely* to become an endangered species within the *foreseeable* future." 16 U.S.C. §1532(20) (emphasis added). In the recent past, the agencies regarded the "foreseeable future" as extending no more than 50 years from the listing decision. Pet. App. 77a-78a. But in 2009, around the time FWS and NMFS considered these listings, the Solicitor of the Interior directed the agencies to abandon such limits and determine the span of the "foreseeable future" on a case-by-case basis. See Pet. App. 24a (citing Office of the Solicitor of the U.S. Dep't of the Interior, *Memorandum on the Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act*, No. M-37021 (Jan. 16, 2009)).

2. The statutory consequences of listing confirm Congress's focus on present and immediate threats to particularly vulnerable populations. "Threatened" and "endangered" status are all-but indistinguishable in this regard; either listing triggers a host of regulatory burdens on the federal government and regulated parties, including the States, local citizens, and Native groups (particularly, in Alaska). In general, steps must be taken to "halt and reverse the trend towards species extinction, whatever the cost," *Hill*, 437 U.S. at 184, and agencies must treat this as a "first priority" before all other aspects of their

missions. *Id.* at 185. Beginning with the emphasis on "revers[ing] the trend towards species extinction," *id.*, however, these provisions are difficult to parse in the context of currently healthy populations facing distant, vague threats rather than immediate, local challenges to their survival.

Notably, the agency must develop and implement a "*recovery* plan." 16 U.S.C. §1533(f) (emphasis added). Recovery plans must include "such *site-specific* management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species," as well as "objective, measurable criteria which, when met, would result in … the species['] … remov[al] from the list." *Id.* §1533(f)(1)(A)(B)(i)-(ii) (emphasis added). This obligation has no workable application to presently healthy populations that do not face an immediate threat from local forces.

In addition, the agencies must designate "critical habitat" for listed species, *id.* §1533(a)(3)(A), and the preservation of the animal's "critical habitat" is treated as particularly sacrosanct under the Act. The statute prohibits federal agencies from authorizing, funding, or carrying out "any action" that is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.* §1536(a)(2). As a result, any project affecting a critical habitat or the species itself must involve a "section 7 consultation" if it requires federal approval or receives even a modicum of federal funding. The consultation will determine if the action *might* have any negative impact on the listed species or its critical habitat, and may require that

plans be modified to avoid such effects. The consultations themselves—not to mention their outcomes—create "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation," and can result in the scuttling of a project in its entirety. Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10,678, 10,680 (2013). These costs fall overwhelmingly on local citizens. *See id*.

The ESA also puts stringent restrictions on local interactions between humans and the listed species. For example, the statute makes it illegal, with some exceptions, to "take" a member of the listed species—a term defined quite broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §§1538(a)(1), 1532(19). The statute imposes both civil and criminal penalties for violations, *id.* §1540, both of which are treated as strict liability offenses. *See, e.g.*, *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990).

II. Procedural Background

In May 2008, the Center for Biological Diversity petitioned NMFS to list three species of ice seals as threatened or endangered "primarily due to concerns about threats to their habitat from climate warming and loss of sea ice." 77 Fed. Reg. 76,740, 76,740 (Dec. 28, 2012); *see also id.* at 76,742 ("The main concern about the conservation status of bearded seals stems

from the likelihood that their sea ice habitat has been modified by the warming climate."); Pet. App. 6a-7a. This case concerns the bearded seal (*Erignathus barbatus*), and was eventually refined down to a determination regarding the Beringia "distinct population segment" (DPS). NMFS issued its proposed listing of the "Beringia DPS" as threatened in December 2010, 75 Fed. Reg. 77,496 (Dec. 10, 2010), but then extended the notice-and-comment period for six months "to address a substantial disagreement relating to the sufficiency or accuracy of the model projections" of habitat loss. 77 Fed. Reg. at 76,741.

In its final listing decision, NMFS found that the "principal threat to bearded seals is habitat alteration stemming from climate change," focusing on sea-ice decline over shallow waters where the seals—"a long-lived and abundant animal with a large range"—whelp, nurse, molt, and rutt. *Id.* at 76,741-43; Pet. App. 11a-14a. NMFS thus relied exclusively on the first statutory factor for a listing decision—"the present or threatened destruction, modification, or curtailment of [the species'] habitat or range," 16 U.S.C. §1533—while finding that the other four statutory factors did not support listing. *See supra* n.2; 77 Fed. Reg. 76,745-48. Largely ignoring that the current seal population is healthy at "about 155,000 individuals," *id.* at 76,748, NMFS ultimately chose to list the Beringia DPS as threatened based on predictions of sea-ice decline by 2100, which NMFS found to be "within the foreseeable future." *Id.* Although it lacked data demonstrating the effect this long-distant sea-ice decline would have on the seal population, NMFS speculated that it would force the seals to "shift their

nursing, rearing, and molting areas" to "suboptimal conditions," causing a decline in population by 2100. *Id.*

Notably, this listing depended on two different long-term predictive judgments on which NMFS acknowledged there was substantial uncertainty. The first was the climate modeling used in attempting to determine the extent of summer sea-ice decline at century's end.[3] NMFS extended the comment period on its listing decision because of "disagreement among peer reviewers" regarding "the timing and magnitude of climate change effects on the availability of sea ice in the Bering Sea." Pet. App. 12a. "Because modeling for the second half of the century involved unknown variables (technological improvement, changes in climate policy)," and those models showed substantial "volatility," the agency relied on as many as "twenty-four models" from the Intergovernmental Panel on Climate Change (IPCC). *Id*. 16a. Comparing these models with observational data suggested that only one performed reliably in the western Bering Sea. *Id.* NMFS also recognized that the "farther into the future the analysis extends, the greater the inherent uncertainty," 77 Fed. Reg. at 76,741, and that significant "uncertainties" exist when making such predictions based on "hemispheric projections or indirect means," *id.* at 76,742. Nonetheless, six of these concededly unreliable models formed the basis

[3] A climate model is a mathematical projection of future surface air and ocean temperatures for a geographical region based in part on past warming trends and predicted amounts of future greenhouse emissions. *Id.* at 76,753.

of the agency's admittedly uncertain projections regarding monthly sea-ice levels from 2050 to 2100. Pet. App. 16a-17a.

Even more vexingly, the agency made uncertain guesses as to the effect that any sea-ice decline would have on bearded seals. Although "data on bearded seal abundance and trends of most populations are unavailable or imprecise" and there were "no quantitative studies" on the "relationship[] between sea ice and bearded seal vital rates," 77 Fed. Reg. at 76,742-43, the agency nonetheless used the extent of sea-ice loss as a direct proxy for species survival. In response to comments, however, NMFS candidly noted that "[d]ata were not available to make statistically rigorous inferences about how these DPSs will respond to habitat loss over time," and that "the Beringia … DPSs are moderately large population units, are widely distributed and genetically diverse, and are not presently in danger of extinction." *Id.* at 76,758.

Ultimately, NMFS speculated that, while the ice cover would be sufficient for whelping and molting through most of the century, there would "commonly be years" by 2100 without summer sea ice in the Bering Sea (but not in the Beaufort, Chukchi, and East Siberian Seas). *Id.* at 76,742-44. NMFS surmised in turn that sea-ice loss "would likely have a *negative effect* on the Beringia DPS." Pet. App. 13a (citing 77 Fed. Reg. at 76,742) (emphasis added). But it was unable to define that "negative effect" with any precision: it could not say how sea-ice loss would affect the population figures, how the seals might adapt to the changes, and how likely this was to result in a material risk of extinction.

NMFS's implementation of the listing was also statutorily anomalous. It disavowed *any* effort to follow through on the requirements the statute ordinarily imposes after a listing. For example, while the ESA typically requires agencies to immediately subordinate their primary missions to species preservation, *see supra* p.4, NMFS disclaimed any attempt to regulate agency decisions about carbon emissions or other forces contributing to the very climatological threat NMFS purported to identify for the Beringia DPS. 77 Fed. Reg. at 76,749, 76,764. In response to commenters, NMFS acknowledged that, as a result, this "listing does not have a direct impact on the loss of sea ice or the reduction of [greenhouse gases]." *Id.* at 76,764. At best, NMFS said, it might help "conservation efforts" indirectly by "enhanc[ing] national and international cooperation." *Id.* This symbolic effect was the only benefit NMFS identified; although it proposed regulations prohibiting the taking of bearded seals, it withdrew them after finding that the population is "sufficiently abundant to withstand typical year-to-year variation." *Id.* at 76,749. Moreover, due to lack of data on the seal population, NMFS was not even able to designate a critical habitat at the time of the listing decision. *Id.* at 76,749-76,750.

In contrast to the lack of conservation benefits, the listing decision has imposed immediate and substantial regulatory burdens on Alaska and its local citizens. NMFS acknowledged that the section 7 consultation requirement would apply to federal actions such as "permits and authorizations relating to coastal development and habitat alteration, oil and gas development … and cooperative agreements for subsistence harvest" by local Native groups. *Id*. In

simple terms, the local population would have to act as though the species was presently threatened, even though it was not, and nothing they could do would have any perceptible impact on its short-term or long-term survival.

Petitioners timely challenged the listing in the District of Alaska. The district court held that, "given the lack of evidence upon which the listing was based," NMFS's decision was "arbitrary, capricious, and an abuse of discretion." Pet. App. 42a. It concluded that the statutory criteria did not permit the agencies to list a species based on the admittedly uncertain effects global warming would have on that species a century in the future. It thus explained that, even based on its "[i]ndependent research," it could not find "any case in which a listing of threatened was based upon a time period that exceeded 50 years"—including the recent polar bear listing decision. *Id.* 78a (citing *Polar Bear*, 709 F.3d at 1). The district court further noted that "it does not appear from the Listing Rule that any serious threat of a reduction in the population … exists prior to the end of the 21st century," and that NMFS itself "concedes that, at least through mid-21st century, there will be sufficient sea-ice to sustain the Beringia DPS at or near its current population levels." *Id.* 78a-79a; *see also id.* 79a (NMFS found "no significant threat" to the seal population until 2090). Ultimately, because of the "lack of any articulated, discernable, quantified threat of extinction within the *reasonably* foreseeable future" and the "express finding" that no further "protective action" was necessary, the listing decision "had no effect" beyond imposing an unnecessary

consultation requirement. *Id.* 80a. The district court therefore vacated the listing decision.

The Ninth Circuit reversed. Pet. App. 33a. The court determined that there was only one key issue in the case—namely, if an agency "determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may [the agency] list that species as threatened?" *Id.* 6a. Purporting to align itself with the D.C. Circuit's approach to the polar bear listing decision, the Ninth Circuit held that, because the agency considered the available science and acknowledged its shortcomings, the substantial uncertainty in its determinations was not a reason to invalidate its listing decision—if anything, it was a reason to uphold it. *See, e.g.*, *id.* 19a-28a (treating as *favorable* the record evidence that "the *uncertainty* attaching to 80-year predictions of how changing climate will affect bearded seals and their habitat has been, is being, and will be greatly underestimated" (emphasis original)).

The Ninth Circuit explained that this result followed from its "highly deferential standard of review." *Id.* 30a. Indeed, the Court concluded that "candidly" disclosing the shortcomings of the projections and providing a "reasonable" methodology "for addressing volatility" in the models was "all the ESA requires" of NMFS—even if substantial uncertainty remained. *Id.* 20a-22a. Accordingly, the Ninth Circuit refused to force the agency to "calculate or otherwise demonstrate the magnitude of [the] threat" before determining that an otherwise healthy species was "likely" to become endangered within "the foreseeable future." *Id.* 29a.

4. Petitioners sought rehearing *en banc*, stressing that the Ninth Circuit's approach had rendered the statutory limitations on threatened-species listings essentially meaningless. Rehearing was denied. Pet. App. 82a.

REASONS FOR GRANTING THE WRIT

I. This Case Isolates An Issue of National Importance Regarding A Critical Federal Statute.

As the Ninth Circuit recognized, this case isolates a single legal issue of critical importance regarding the reach of the ESA—an Act that imposes severe restrictions on States, Native groups, and local inhabitants. Simply put, the question is whether a currently healthy species must be listed as "threatened"—that is, "*likely* to become an endangered species within the *foreseeable* future," 16 U.S.C. §1532(20) (emphasis added)—if the government concludes, subject to a "highly deferential" standard of review, Pet. App. 30a, that its existing habitats will be negatively impacted by global climate change a century hence. Whatever one thinks of the *answers* given in the two dominant Circuits, this *question* plainly deserves this Court's attention. Given how comprehensively the ESA projects federal oversight into the States under a broad conception of the relevant statutory terms, it is essential that this Court resolve whether that broad conception can be reconciled with the text and structure of the ESA.

This case provides an ideal vehicle for the Court to do so by precisely framing the legal question and vividly demonstrating both the stakes of the issue and the problems with the Ninth Circuit's approach.

In particular, the record in this case leaves no doubt that: (1) NMFS based its listing decision entirely on the speculative, long-term effects of climate change on a healthy species; (2) the listing decision will take a substantial, immediate toll on the State and its local population; and yet (3) the challenged action lacks positive conservation effects because the agency disclaimed any power to address the threat it purported to identify.

1. As an initial matter, the proper role of climate change in a listing determination is perfectly framed for review here. Indeed, the Center for Biological Diversity's petition to list the bearded seal requested action "primarily due to concerns about threats to [the seal's] habitat from climate warming and loss of sea ice." 77 Fed. Reg. at 76,740. In its Final Rule, NMFS found that the "principal threat" to the Beringia DPS is "habitat alteration stemming from climate change," *id.* at 76,741, and that the "main concern about the conservation status of bearded seals stems from the likelihood that their sea ice habitat has been modified by the warming climate," *id*. at 76,742. The agency justified its listing decision entirely on its analysis of the first statutory factor (*i.e.* habitat erosion), *see supra* n.2, and ultimately used its 100-year predictions of sea-ice loss as a direct proxy for the risk to species survival, *id.* at 76,743-44, even though NMFS lacked data on the effects any climate-change related habitat alteration might have on species survival.

Further, both courts below agreed that NMFS's listing decision rose and fell with the propriety of using those long-term climate-change models to designate a species as threatened. The district court

noted that NMFS failed to provide sufficient data on "the resilience of bearded seals to cope with climatic changes," and extensively quoted the agency's admitted uncertainty about climate effects on the species and its habitat—particularly in the longer term. Pet. App. 70a-77a. The Ninth Circuit thus bluntly acknowledged that the case "turned on *one* issue:" whether NMFS must list a presently healthy species as threatened if it determines that the "species[,] [which] is not presently endangered[,] will lose its habitat *due to climate change by the end of the century*." *Id.* 6a (emphasis added).

In future cases, this question will be present but confounded by other variables, making the underlying legal issue isolated by the Ninth Circuit harder for this Court to reach. In this case, however, the listing decision was solely focused on the effect of climate change on the seal's sea-ice habitat. Indeed, the agency found that *none* of the other statutory factors could justify a threatened listing, *see supra* p.9-10, while affirmatively recognizing that "the Beringia … DPSs are moderately large population units, are widely distributed and genetically diverse, and are not presently in danger of extinction." 77 Fed. Reg. at 76,758. Thus, the agency could only identify a threat to the species by adopting its 100-year climate-change model as a direct proxy for species survival. Pet. App. 76a-80a.

2. Likewise, this case demonstrates that the effects of such listing decisions on human populations are not academic. A listing determination triggers a plethora of regulatory burdens on both the federal government and regulated parties. *See supra* p.7-9. Most importantly, it requires the listing agency to

make a critical habitat designation, which determines the area that will fall under federal protection. 16 U.S.C. §1532(5). These critical habitat designations can be sizable. For instance, the designation for the polar bear encompassed an area equaling about 5% of the entire United States. 75 Fed. Reg. 76,086 (Dec. 7, 2010) (over 187,000 square miles in northern Alaska and the Outer Continental Shelf region); *see also* 79 Fed. Reg. 39,756, 39,856 (July 10, 2014) (designation of approximately 317,000 square miles as critical habitat for Loggerhead Sea Turtle). And NMFS has continued to expand the size of critical habitat designations, reaching nearly *350,000* square miles for the ringed seal. 79 Fed. Reg. 73,010 (Dec. 9, 2014).

Beyond the vast size of the critical habitat designation, and the federal superintendence that results, the section 7 consultation requirement falls heavily on regulated parties. 16 U.S.C. §1536 (a)(2); *see* Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act & Its Improper Transformation into 'Recovery' Habitat*, 34 UCLA J. ENVTL. L & POL'Y 1, 4 (2016) ("Critical habitat has significant legal and economic consequences for landowners and resource users."). The scope of the section 7 consultation is almost boundless—it applies to any "action" involving any aspect of federal regulation or spending authority that may affect the designated area regardless of the reasons the species was listed. 16 U.S.C. §1536(a)(2). NMFS and FWS have defined "action" to apply to "all activities or programs of any kind authorized, funded, or carried out, in whole or *in part*, by Federal agencies in the United States or upon the high seas." 50 C.F.R. §402.02 (2017) (emphasis added). Thus,

almost any activity within the critical habitat area with any connection to federal agency action will trigger the consultation requirement.

The listing determination additionally requires the agency to "develop and implement" a recovery plan for the species, 16 U.S.C. §1533(f), which will be a significant time and resource drain for the agency—even though, when the species is currently healthy, there is no recovery to achieve. The listing decision also gives the agency the authority to enact regulations regarding the taking of any bearded seals, imposing civil and criminal penalties for violations. 16 U.S.C. §§1538(a), 1540.

Importantly, these listing consequences have serious impacts on regulated communities. The State of Alaska will lose control over the use of her local land and waters for the benefit of local citizens. The State has a clear, sovereign interest in determining the best use of its resources—including, of course, maximizing their value through reasonable mineral exploration. The federal conservatorship imposed by this listing decision will hamper those sovereign interests, both directly (by requiring federal approval for any "action" that even tangentially involves federal funding or approval) and indirectly (by making private investment in the State less desirable, decreasing public revenues that fund vital services).

Alaska currently has neither an income nor sales tax, and State infrastructure and services are thus heavily dependent on oil and gas revenues. So too is the Alaska Permanent Fund dividend, which is crucial for many citizens to stay above the poverty line. Revenues from mineral extraction also

constitute the consideration that many Alaska Native corporations realize for their Native shareholders in exchange for the aboriginal land claims they surrendered under the Alaska Native Claims Settlement Act, 43 U.S.C. §§1601-29.

Indeed, Alaska Native groups have a considerable interest in this listing decision, having long co-existed with and depended upon the bearded seal for both subsistence and cultural purposes. These Alaska Native groups depend intimately on the hunting of bearded seals to support their subsistence lifestyle and cultural traditions. *See supra* p.2-3. Although the ESA allows some exemptions for taking of species by Alaska Native groups, *see* 77 Fed. Reg. at 76,756, NMFS has the authority (now that the bearded seal is listed as threatened) to find that the Alaska Native subsistence harvest is "materially and negatively affecting the species," *id.*, which would allow the agency to limit such harvests; NMFS's present choice not to regulate the relationship between Alaska Native groups and the bearded seal can be freely changed. *See id.* at 76,763. Federal oversight of the relationship between Alaska Natives and a species they have honored and respected for centuries, under a listing that does not require Americans outside Alaska to do anything to preserve this resource, is exactly the sort of "needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives" that this Court has condemned under the ESA. *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

Additionally, the section 7 designation process could palpably harm deep-rooted business interests in Alaska, including off-shore resource operations

that contribute to Alaska's largest industry and revenue source. The importance of these industries cannot be overstated: Royalties and property taxes derived from resource extraction fund most of the public services provided to Alaska Native communities, who depend upon these funds to survive the crushing poverty caused by their isolation in the harsh environment they call home. Indeed, these royalties are indispensable if Alaska Native communities are to retain their traditional, subsistence way of life despite the inflated cost of necessities that many Americans take for granted. In its rulemaking, NMFS recognized that "rising global demand" would make it "very likely that oil and gas development activity will increase" in this region. 77 Fed. Reg. at 76,746. NMFS concluded that the threats to the Beringia DPS from oil and gas exploration were only "moderately significant," and insufficient to justify a listing, *id.* at 76,746-47, but all such efforts remain subject to the section 7 consultation requirement that NMFS imposed based on a *different* threat. Especially because the harsh climates in Alaska reduce the possible windows for exploration, production, and development, the delays caused by such consultations could prove fatal to growth in this vital industry.

Finally, and most strikingly, this case is a unique vehicle because the agency has admitted that there is nothing on the other side of the ledger. NMFS itself recognized that there would be no conservation benefit from its decision to list the bearded seal as threatened. 77 Fed. Reg. at 76,764; Pet. App. 79a-80a. That concession was unavoidable: NMFS and FWS have now affirmatively disclaimed any effort to use a listing decision as a basis to impose any

consultation or other requirements on *any* action that contributes to global climate change *anywhere* in the United States. 73 Fed. Reg. 76,249, 76,265-66 (Dec. 16, 2008) (section 4(d) analysis for polar bear). The agencies have thus decided to place all the burdens of their decisions on the kinds of actions they themselves believe are *insufficient* to create a threat to species preservation, while doing nothing at all about the threat they've purported to identify.

Future cases will not isolate so vividly the irony of the agencies' approach to global climate change. Alaskans will be among those most affected by such forces. But rather than acting to stymie whatever contribution the Nation is making to those effects, the agencies instead have placed *another* burden exclusively on Alaska, its citizens, its Native groups, and its businesses. These entities have no ability to control the identified threat and can do nothing else to improve the long-term prospects of the bearded seal because *it is currently healthy*. This simply cannot be what Congress intended, and is most certainly arbitrary agency action.

II. The Analysis Below Is Inconsistent With The Text And Structure Of The ESA, And Threatens Serious Effects On State and Local Sovereignty.

The paradoxical results of this listing decision follow inexorably from the agency's disregard of the statutory text and structure. Neither Congress nor any natural user of the English language would treat 100-year, generalized risks as "likely" threats to a given species' survival in the "foreseeable future." Accordingly, Congress created a remedial scheme for threatened species that cannot be meaningfully

applied to distant, global climate issues—a certain sign that the relevant terms do not allow what the Ninth Circuit permitted below.

1. As explained above, the ESA provides that the Secretaries of Interior and Commerce, through FWS and NMFS respectively, "shall" determine whether a species is threatened or endangered by considering five statutory factors. 16 U.S.C. §1533(a)(1). But the only factor NMFS could apply here was the first: "the present or threatened destruction, modification, or curtailment of [a species'] habitat or range." *Id*. NMFS concluded that this single factor required listing the bearded seal as threatened because: (1) climate change may cause an increase in global atmospheric temperatures; (2) some models show that this temperature increase may decrease the amount of polar sea ice in summer months in certain areas of the seals' habitat one hundred years hence; and (3) seals now rely on that polar sea ice for certain lifecycle activities. And the Ninth Circuit affirmed because it believed that the "best available science" confirms that temperatures are rising, sea ice is receding, and that plausible, very-long-term recession will have a "negative impact" on the bearded seal, even though the agency itself acknowledged its uncertainty about the scope of that "negative impact." Pet. App. 21a n.7.

This analysis is untethered from the statutory text. To begin, a "negative impact" on the species occurring 100 years in the future cannot amount to a "likely" threat that the species will be endangered in the "foreseeable future." *See* 16 U.S.C. §1532(20). That is not a natural use of those terms, and their ill fit is reinforced by NMFS's inability to detail the

likely effects that the identified "threat" would have on species population. Although the statutory language may not require a detailed quantitative prediction of exactly when the species will cross the threshold to endangered, it requires at least some specificity as to when that threat will manifest, and the reasonable magnitude of the impact forecasted. Even very substantial and immediate "negative impacts" rarely take a healthy species to the brink of extinction.

As the district court explained, "[i]f it were … otherwise, [it] could logically render every species in the arctic and sub-arctic areas potentially 'threatened.'" Pet. App. 79a n.69. And because the Ninth Circuit has now blessed this approach, and the statute imposes a *mandatory* listing duty on the Secretary, that is the likely result. After this decision, environmental groups will predictably force NMFS and FWS to reconsider even its recent decisions rejecting efforts to force listings based on long-term global warming threats. *See, e.g.*, *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 962-69 (N.D. Cal. 2010) (upholding NMFS decision not to list ribbon seal because evidence of effect of climate change on habitat beyond 2050 was too unreliable).

That is because the decision below removes any meaningful limits on the species subject to listing as "threatened." Under the Ninth Circuit's analysis, NMFS must take a global phenomenon and apply it as a localized threat to a particular species' habitat. To overcome this discrepancy in scope, certain assumptions about local effects and a species' ability to adapt to long-term changes must be baked into the

modeling, and as the Ninth Circuit itself recognized, models stretching so far into the future show "greater volatility, and thus less reliable predictive value." Pet. App. 16a. It is nearly impossible for the agency to accurately predict with such models whether (or when) population declines will begin, as NMFS admitted here. But by failing to require any such certainty—and in fact treating uncertainty as a factor that *favors* the listing, *see supra* p.14-15, Pet. App. 19a-28a—the Ninth Circuit deleted from the statute the requirement that the threat appear in the "foreseeable future" or that extinction will be "likely" to occur. AOGA Pet. 23-24. Instead, the answer should be: If the agency cannot *foresee* the effects of a global phenomenon on a presently healthy species, it is not "likely" to be endangered in the "*foreseeable* future."

NMFS's approach also warps the structure of the ESA by listing species with a healthy population level even though current reductions in sea-ice levels have resulted in no demonstrated harm to the species. As the district court correctly noted, under this logic, essentially any arctic or sub-arctic species could be listed as threatened *right now*, even though there is no local action that could affect that distant threat. Interpreting the ESA this way will permit immediate listing in every Arctic case, transforming Alaska into a federal reserve for cold-weather species at the discretion of the federal agencies or even private petitioners.

In fact, this approach is not even limited to Arctic species—the IPCC forecasts rising sea levels

caused by the melting of polar ice caps,[4] which could place any number of species found on the coasts or on snow-packed mountain ranges within FWS's or NMFS's current interpretation of "threatened."[5] All the agencies would have to do is show that climate change may, under some model and at some point in the future, affect that habitat—citing uncertainty as a reason to make the listing rather than a reason to withhold it.

Even more striking from a statutory perspective is the irresolvable mismatch between such global, long-term problems and the local remedial mechanisms of the ESA. Taken seriously, the conclusion that the bearded seal is threatened by climate change would require the federal government to subordinate all its programs to reducing greenhouse gas emissions—the sole cause of the identified threat. *See TVA*, 437 U.S. at 184. But that position is so patently untenable that the agencies rejected it, and elected to require *no steps by anyone* outside Alaska that would combat the *only* threat at issue. Meanwhile, the local effects imposed by the listing will harm Alaska and its people, while achieving nothing at all—the bearded seal requires no protection from Alaskan projects or under the ESA take provision because it is currently healthy; even hunting the seals requires no immediate proscription.

---

[4] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis*, at 1140-41 (2013), *available at* https://tinyurl.com/y7fcycnp.

[5] See, e.g., Dave Owen, Sea-Level Rise and the Endangered Species Act, 73 LA. L. REV. 119 (2012).

See supra p.12-13. The tools that Congress provided for addressing threatened and endangered species are a key indication of what those terms mean. Congress gave the agencies a scalpel, and they think they were asked to chop down trees.

To be sure, the agencies could change their mind and conclude that, to rectify the actual threat to the Beringia DPS habitat, they must impose section 7 consultation requirements and other limitations on every federally funded or regulated project in the Nation that may contribute to global climate change. Perhaps this is the intention of the environmental organizations that are petitioning for threatened or endangered status for many of these species.[6] But that would only make it obvious that the agencies had far exceeded the authority Congress intended to provide. If the statutory consequences of listing must be disavowed to make the listing plausible, the proper conclusion is that there is something wrong with the listing, not the statute.

In fact, the agencies' attempts to justify their decision not to follow their own reading of the statute to its logical conclusion leads to inconsistencies of the kind that prototypically violate the APA. In its section 4(d) decision for the polar bear, FWS explained that a section 7 consultation would only be triggered if there was a "causal connection between

---

[6] *See, e.g.*, Ctr. for Biological Diversity, A Future For All: A Blueprint For Strengthening The Endangered Species Act (Oct. 2011), https://tinyurl.com/ybbl9h8z; Todd Woody, *Enlisting Endangered Species As A Tool To Combat Warming*, Yale Env't 360 (July 22, 2010), *available at* https://tinyurl.com/ya3swupv (last visited June 12, 2017).

the proposed action and a discernible effect to the species or critical habitat that is reasonably certain to occur," 73 Fed. Reg. at 76,265-66, and then found it could not prove a direct causal link between greenhouse gas emissions and a threat to the polar bear's critical habitat. *Id*. Thus, because there is "currently no way to determine how the emissions from a specific action both influence climate change and then subsequently affect specific listed species" under the "best scientific data currently available," the agency could not use a listing decision as a means of regulating the emission of greenhouse gases in the United States. *Id*. This is, of course, the *exact opposite* of what the agencies are saying when it comes to the threat that global climate change allegedly poses to the species in general.

The ESA was not written to combat global warming, and these agencies should not be permitted to manhandle the statute to fit the square peg of climate change into the round hole of ESA regulation. That is particularly so because there remains an easy solution: The agencies can list the species when (if ever) the immediate population effects of climate change begin to manifest. At *that* point, the agencies would be relying on the kind of "forecast[ed] population trends" Congress intended when it added the "threatened" listing to the statute, S. Rep. No. 93-307, at 3 (1975), and local conservation efforts could actually make a difference. Until then, the agencies have misread the ESA to reach an issue Congress did not intend to address and the statute cannot help to fix.

III. Immediate Review Is Necessary Given The Ninth And D.C. Circuit's Approaches to Review of Listing Decisions.

While this case uniquely isolates the consequences of treating long-range climate effects as a present threat to species survival, it is not an isolated problem. Prodded by activist petitions, NMFS and FWS have begun using climate change as the sole basis for acting under the ESA, despite the textual limitations that aim it at imminent and local threats to currently vulnerable species. These cases will tend to arise most frequently in the Ninth and D.C. Circuits: These are the only forums open to Alaska (where the overwhelming effect of these Arctic-related listings is felt); and environmental petitioners attempting to compel a listing can freely forum-shop their cases to their favored, Ninth Circuit venues. *See infra* p.32-34. Meanwhile, although the Ninth Circuit purported to align itself with the D.C. Circuit, it has in fact gone substantially further in validating a broad approach to "threatened" listings. Given the two similarly problematic decisions from these two critical circuits, this Court's immediate intervention is necessary to protect States like Alaska with nowhere else to turn. Other vehicles are unlikely to arise soon from any other circuit, and—as explained above—are particularly unlikely to isolate the legal issues involved more precisely than the decision below.

Although the Ninth Circuit acknowledged that this case raised a single, dispositive, and debatable legal issue, its opinion treated this question as resolved by both in-circuit and out-of-circuit precedent. Accordingly, it cited heavily to its own

decision approving a critical habitat designation for the polar bear, *Alaska Oil & Gas Association v. Jewell*, 815 F.3d 544, 558-59 (9th Cir. 2016), as well as the D.C. Circuit's earlier decision approving the polar bear's threatened listing, *Polar Bear*, 709 F.3d at 1. As the parallel petition of the Alaska Oil and Gas Association explains, *see* AOGA Pet. 20-21, the Ninth Circuit went well beyond the D.C. Circuit by permitting speculation about species-level effects to justify the bearded seal listing decision. But the operative point is that neither of the circuits controlling the vast majority of relevant cases is likely to impose any effective limit on the listing of cold-weather species based on reasoning the agencies have now applied to the ESA.

In *Polar Bear*, the D.C. Circuit upheld the listing of the polar bear as a threatened species based, in part, on climate-change-induced habitat loss. *See* 709 F.3d at 5 (noting "three principal considerations" in the listing decision: (1) "the polar bear depends on sea ice for its survival;" (2) "sea ice is declining;" and (3) "climatic changes have and will continue to reduce the extent and quality of Arctic sea ice"). The court found that the agency's reliance on climate change modeling in the listing decision was reasonable. *Id.* at 8-10, 14-16. It also upheld the agency's approach to measuring how "likely" or "foreseeable" a threat is to a species under the statutory definition of "threatened"—concluding that a flexible, threat-specific approach was appropriate, including reliance on long-term predictions looking up to 45 years in the future. *Id.* at 14-16. Thus, both the Ninth and D.C. Circuits agreed that: (1) FWS and NMFS can rely solely on speculative effects of global climate change to justify a threatened species listing; and (2) the

agency's reliance on predictive modeling of habitat loss up to 50 years (*Polar Bear*) or 100 years (below) in the future is permissible under the ESA. Notably, both courts combined an expansive view of threats that were "likely" in the "foreseeable future" with an exceptionally deferential standard for reviewing the evidence on which the agency based its decision. If the agencies candidly assessed the science and determined that there was likely to be a "negative impact" on the species from global climate change in the distant future, that was enough to require listing as a threatened species, without any need to quantify the threat that the species would ultimately end up endangered or extinct. *See* Pet. App. 28a-30a.

That said, the polar bear listing decision at least included "long-term studies showing that" the impact on the bears' sea-ice habitat "had already been observed in some of the southern-most polar bear populations." *Polar Bear*, 794 F. Supp. 2d at 74. Thus, the D.C. Circuit's approach was tempered by data uniquely demonstrating the *present* effect of climate change on a subpopulation of the species at issue. The Ninth Circuit, on the other hand, strayed even further from the statutory mandate, concluding that the agencies could list a species facing *no* present threat. To the extent there is a practical distinction between these circuits, it is a further reason for this Court to grant review. And to the extent there is not, it demonstrates that the seriously erroneous interpretation of the ESA permitted by these Courts will not be corrected absent this Court's immediate intervention.

Indeed, the Ninth Circuit's expansion of the D.C. Circuit's already deferential approach makes further

percolation both unnecessary and unwise, especially considering the geographical scope of the Ninth Circuit. The court covers a sizable portion of the American Southwest and Northwest (plus Alaska and Hawaii), which includes some of the nation's most diverse habitats.[7] Thus, listing decisions and critical habitat designations disproportionately occur within the geographic scope of the Ninth Circuit. And the relevant agencies' homes in the District of Columbia make it the next-most-frequent venue for ESA litigation.[8]

The State is thus caught in a futile feedback loop where it is forced to contest, and lose, every listing of an Arctic species for the same reasons over and over again in the same courts—each decision becoming yet more fodder for the next Arctic listing. There are already two cases pending in the Ninth Circuit regarding other "threatened" listings NMFS has made based on climate-change considerations.[9] And several additional cases are now pending in (carefully

---

[7] According to FWS, the Ninth Circuit's states contain over 1000 species (cumulative) that have been listed as threatened or endangered. *See Listed Species Believed To Or Known To Occur In Each State*, https://tinyurl.com/yaqhj2j2 (last accessed July 21, 2017).

[8] A recent search on Westlaw for opinions citing 16 U.S.C. §1533(a) shows that, of the 105 Court of Appeals cases, 49 were from the Ninth Circuit and 28 from the District of Columbia, meaning over 70% of decisions emanated from those two circuits. Similarly, of the 378 district court decisions, 172 were from district courts within the Ninth Circuit and 122 were from the District Court for the District of Columbia (approximately 78% of decisions).

[9] CA9 Case Nos. 16-35380, 16-35382, 16-35866, 14-17513.

chosen) federal courts in California where, based on the broad standard enunciated in the Ninth Circuit's recent cases, the Center for Biological Diversity has sued the agencies for failing to list species they view as equally threatened by climate change.[10]

Leaving the Ninth Circuit's overbroad approach to the statute in place is thus likely to quickly multiply the number of problematic listings, with disastrous effects for Alaska, and eventually other States as well. For example, the U.S. District Court for the District of Montana—a favored forum for environmental challengers, *see, e.g.*, *Wildearth Guardians v. U.S. Dep't of the Interior*, 205 F. Supp. 3d 1176 (D. Mont. 2016), *Ctr. for Biological Diversity v. Jewell*, 2016 WL 4592199 (D. Mont. Sept. 2, 2016)—recently held that FWS violated the APA by *not* listing a wolverine species as threatened. *See Defenders of Wildlife v. Jewell,* 176 F. Supp. 3d 975 (D. Mont. 2016). The wolverine requires snow for reproductive purposes, *id.* at 979, but the agency rejected the listing because the species could move to higher elevations with greater snowpack in future years, *id.* at 996. The court vacated that decision, however, requiring the agency to reconsider. *See id.* at 1001-10 (relying in part on *Alaska Oil*, which the Ninth Circuit in turn relied upon here).

The agencies themselves are now facing dozens of listing petitions that rely on climate-change

---

[10] See, e.g., *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Servs.*, No. 16-cv-06040 (N.D. Cal. filed Oct. 19, 2016); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Servs.*, No. 15-cv-05754 (N.D. Cal. filed Dec. 16, 2015).

justifications.[11] The approach adopted in the Ninth and D.C. Circuits will bind the courts in any case where the agencies decline to list the species—the petitioning environmental groups are certain to run to one of those courts to challenge the decision. And it will likewise be binding in many cases where the agencies list the species and the State or affected entities seeking to challenge that determination are within the Ninth Circuit's vast expanse. Even in the few cases where a State or regulated party might have access to another venue, these courts are frequently looked to on both ESA and administrative law issues, and are likely to be followed. Timely intervention by this Court is thus appropriate and essential.

* * *

This petition presents an opportunity for this Court to check an ever-expanding interpretation of the ESA that increases federal superintendence of local affairs in the States far beyond what Congress intended. By stretching the ESA's terms beyond their limits, the agencies have improperly placed the burden of rectifying global warming on Alaska, its constituents, its businesses, and its Alaska Native groups—who depend directly on the bearded seals and indirectly on continued resource extraction in the State to maintain their traditional subsistence way of

---

[11] *See, e.g.*, 81 Fed. Reg. 70,074 (Oct. 11, 2016) (Pacific bluefin tuna); 81 Fed. Reg. 68,379 (Oct. 4, 2016) (stonefly); 81 Fed. Reg. 64,414 (Sept. 20, 2016) (Iiwi); 81 Fed. Reg. 63,160 (Sept. 14, 2016) (Joshua tree); 81 Fed. Reg. 14,058 (Mar. 16, 2016) (bumblebee).

life—even though these parties can make, at best, an immeasurably small contribution to decreasing the identified threat. Congress has the power to address climate change and it has done so before. *See Massachusetts v. EPA*, 549 U.S. 497, 528-32 (2007) (EPA has authority to regulate greenhouse gases under Clean Air Act). Congress did not, however, provide the agencies with that power under the ESA. These agencies' willingness, with the blessings of the Ninth and D.C. Circuits, to expand the ESA beyond its limits requires this Court's intervention before it completely freezes Alaska's ability to develop its natural resources for the benefit of its inhabitants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Charles H. Davis
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Jahna Lindemuth
ATTORNEY GENERAL
P.O. Box 110300
Juneau, AK 99801

(907) 269-5602
jahna.lindemuth@alaska.gov

Brad Meyen
ALASKA DEP'T OF LAW
1031 W. 4th Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5232
brad.meyen@alaska.gov

Matthew Waldron
Shelley D. Cordova
Sarah J. Shine
ARCTIC SLOPE REGIONAL CORP.
3900 C Street
Suite 701
Anchorage, AK 99503
(907) 339-7665
Shelley.Cordova@asrcenergy.com

Matthew A. Love
Tyson C. Kade
VAN NESS FELDMAN LLP
719 Second Av.
Suite 1150
Seattle, WA 98104
(206) 829-1809
mal@vnf.com

July 21, 2017