No. 16-___

IN THE

Supreme Court of the United States

ALASKA OIL AND GAS ASSOCIATION,
AMERICAN PETROLEUM INSTITUTE,

Petitioners,

v.

SALLY JEWELL, Secretary of the Interior,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 4 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(a) the U.S. Fish and Wildlife Service (the "Service") must designate "critical habitat" for any species it lists as threatened or endangered. Section 3 of the ESA, 16 U.S.C. § 1532(5), narrowly defines critical habitat to *specific*, carefully limited areas where the *particular* features essential to maintaining the species are actually *found*. The Service long applied the statute that way, carving out focused areas truly essential to species conservation.

More recently, however, the Service has begun making designations that encompass huge swaths of territory, shifting the burden to states, native communities, and regulated parties to prove that specific areas do not actually have those essential features in subsequent proceedings with the agency. This about-face has nothing to do with species conservation, as the Service concedes that these designations actually serve little or no conservation benefit.

This practice persists because the Ninth Circuit, which decides the vast bulk of cases under this statute, has adopted an exceptionally lax and inexact standard regarding the specificity with which the Service must determine that particular habitat is critical for a species. The result, as clearly framed by this case, is that the Service can now freely impose sweeping designations (in this case an area the size of California), that overlap with existing human development (including, even, industrial areas), thereby imposing significant impacts on state and tribal sovereignty and economic activity, with virtually no judicial review as to whether all areas within the designation are actually critical (or even

helpful) to the conservation of the species. The question presented is:

Whether the Ninth Circuit's exceedingly permissive standard improperly allows the Service to designate huge geographic areas as "critical habitat" under the ESA when much of the designated area fails to meet the statutory criteria?[1]

[1] A similar question is presented by the State of Alaska and Native groups in a separate petition for certiorari filed on November 4, 2016 in this Court in *State of Alaska, et al. v. Sally Jewell*.

RULES 14.1 AND 29.6 STATEMENT

Plaintiffs-Appellees below and petitioners here are the Alaska Oil and Gas Association and the American Petroleum Institute.

Additional Plaintiffs-Appellees below were the State of Alaska, Arctic Slope Regional Corporation, the North Slope Borough, NANA Regional Corporation, Inc., Bering Straits Native Corporation, Calista Corporation, Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeagvik Inupiat Corporation, Kuupik Corporation, Kaktovik Inupiat Corporation, and the Inupiat Community of the Arctic Slope. These entities have filed their own petition for certiorari with the Court.

Defendants-Appellants below were Sally Jewell, Secretary of the Interior, Daniel Ashe, Director of the U.S. Fish and Wildlife Service, and the U.S. Fish and Wildlife Service.

Intervenors-Defendants-Appellants below were the Center for Biological Diversity, Defenders of Wildlife, and Greenpeace, Inc.

Petitioner Alaska Oil and Gas Association is a nonprofit trade association representing the oil and gas industry in Alaska. No parent corporation or publicly held company has a 10 percent or greater ownership interest in the Alaska Oil and Gas Association.

Petitioner American Petroleum Institute is a nonprofit trade association representing the oil and gas industry in the United States. No parent corporation or publicly held company has a 10 percent or greater ownership interest in the American Petroleum Institute.

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INTRODUCTION

On December 7, 2010, the U.S. Fish and Wildlife Service (the "Service") designated a 187,000-square-mile contiguous block of the Arctic (an area larger than the State of California) as critical habitat for the polar bear pursuant to Section 4 of the Endangered Species Act ("ESA"). 75 Fed. Reg. 76,086 (Dec. 7, 2010). The ESA narrowly defines critical habitat as "the specific areas within the geographical area occupied by the species, . . on which are found those physical or biological features . . . essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). As the plain language makes clear, critical habitat for the polar bear (and every other species) is statutorily limited to the "specific areas" where features essential to polar bear conservation are "found." *Id*.

The Service's 187,000-square-mile designation is the antithesis of the congressional intent expressed in the statute. In promulgating the designation, the Service determined that the "physical or biological features" included things like "[s]teep, stable slopes" for denning, "unobstructed, undisturbed access between den sites and the coast," and "refuge from human disturbance." 75 Fed. Reg. at 76,133. The Service proceeded to identify some of those "essential features" in "specific areas" within the range of the polar bear. But the Service did not limit the designation to those specific areas. Instead, the Service drew broad lines around the various features (in some cases in 20-mile swaths, and in other cases just pushing out to the 200-mile jurisdictional limit), thereby encompassing a contiguous block larger than the State of California. Swept within that enormous block of land are the entire ancestral homelands for certain Native

communities, as well as the largest and most productive oil field in North America.

In this litigation, an uncommon coalition of Alaska Natives, the North Slope Borough, the State of Alaska, and Alaska's oil and gas industry (collectively, "Plaintiffs") challenged the Service's polar bear critical habitat designation. Plaintiffs represent the stakeholders who live, work, own property, and govern in the areas designated as critical habitat, alongside polar bears—the Arctic's top predator. This coalition of Plaintiffs has successfully managed the potentially lethal interactions with polar bears for many decades (and for some of the Plaintiffs, for millennia) without negatively impacting polar bear populations. Currently, those interactions are governed by the Marine Mammal Protection Act, 16 U.S.C. § 1361, et seq. ("MMPA"), which authorizes Plaintiffs to actively keep polar bears away from homes and businesses. *See* 50 C.F.R. § 18.34(b)(2) ("Guidelines for use in safely deterring polar bears.").

This coalition found common ground in opposition to the polar bear critical habitat designation, centered around two factors. *First*, the designation materially impacts state and tribal sovereignty, and the property rights of companies and Native Corporations, by improperly declaring the areas around where they live and work as essential to polar bear conservation. The sweeping designation overlaps almost all of the existing and proposed oil and gas operations on the North Slope, covers all of the home lands of some Native groups, and covers lands selected by the State of Alaska and Native groups pursuant to federal law to ensure the economic future of the people of Alaska.

The North Slope is the core of Alaska's economy, and the Service's designation of broad portions of the North Slope as critical habitat severely threatens the future of the State's economy moving forward.

Second, the polar bear critical habitat designation will do nothing to help conserve the polar bear. Polar bears are threatened by projected loss of sea ice habitat due to climate change, *not on-the-ground activities in the Arctic*. Polar bears and their habitat are already properly managed under the MMPA. *See In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 222 (D.D.C. 2011) (polar bears have been "effectively managed and protected . . . for thirty years"). Even the Service agreed on this point, conceding that the polar bear designation will have *no conservation benefit* and explaining that it is "unable to foresee a scenario in which the designation of critical habitat results in changes to polar bear conservation requirements." U.S. Fish & Wildlife Serv., *Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States: Final Report* at ES-5 – ES-6 (Oct. 14, 2010), https://www.fws.gov/alaska/fisheries/mmm/polarbear/pdf/fea_polar_bear_14%20october%202010.pdf.

Plaintiffs filed suit in federal district court in Alaska seeking invalidation of the designation on grounds that the designation far exceeded the narrow definition of critical habitat by including vast areas that contained no essential features. The district court agreed, and issued a detailed opinion finding that the record provided no evidence of essential features in "ninety-nine percent" of the areas designated as denning habitat. App. *infra* 86a. As the district court explained, "the Service cannot designate a large swath of land in northern Alaska as 'critical habitat' based

entirely on one essential feature that is located in approximately one percent of the entire area set aside." *Id*. The district court further explained that the lack of any evidence of essential features "is especially stark concerning the inclusion of the areas around Deadhorse, Alaska, as such area is rife with humans, human structures, and human activity." *Id*.

The Ninth Circuit reversed on appeal by excusing the Service from the burden of producing evidence in the record to support the existence of essential features found missing by the district court. Instead, the panel relied on the "unassailable fact that bears need room to roam," even though "room to roam" is not one of the physical or biological features essential to the conservation of the polar bear in the final rule, and even though the final rule makes no mention of the need for "room to roam." App. *infra* 28a.

The Ninth Circuit's decision leaves an untenable situation for the people of Alaska, and everyone within the broad jurisdictional reach or influence of the Ninth Circuit. In the United States, there are 700 listed animal species and 903 listed plant species. U.S. Fish & Wildlife Serv., Listed Species Summary, http://ecos.fws.gov/ecp0/reports/ box-score-report (last updated Oct. 27, 2016). This long list includes many less charismatic species like the Oahu tree snail and the salt creek tiger beetle, all of which *must* receive their own critical habitat designations. And these lists are growing, with at least 30 more species on the candidate list. The Ninth Circuit's improper and permissive standard leaves the Service free to make grossly inexact designations of critical habitat on state and private lands, regardless of the consequences, and with virtually no burden to demonstrate that the designation is useful or helpful to these species.

Review by this Court is the only mechanism to bring this arbitrarily lax practice back into line with the plain language and intent of Congress.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Alaska Oil and Gas Association ("AOGA") and American Petroleum Institute ("API") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra* 1a-41a) is reported at 815 F.3d 544. The opinion of the district court (App. *infra* 48a-95a) is reported at 916 F. Supp. 2d 974.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2016. After the court of appeals extended the time to file, petitioners filed a timely petition for rehearing en banc on May 6, 2016. By order dated June 8, 2016, the court denied the petition for rehearing en banc. App. *infra* 47a. On August 30, 2016, Justice Kennedy extended the time for filing petitions for certiorari to November 4, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

16 U.S.C. § 1533(a)(3)(A)(i) provides in relevant part:

> The Secretary, . . . shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of

such species which is then considered to be critical habitat[.]

16 U.S.C. § 1533(b)(2) provides in relevant part:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

16 U.S.C. § 1532(5) defines "critical habitat" as follows:

> (A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> . . . .
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area

which can be occupied by the threatened or endangered species.

STATEMENT OF THE CASE

A. Statutory Framework - Critical Habitat

1. The ESA Requires the Service to Designate Critical Habitat and Protect That Habitat from Destruction or Modification.

Congress originally enacted the ESA in 1973 in response to a rise in the number and severity of threats to the world's wildlife, with the intent of preserving threatened and endangered species and the habitat on which they depend. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 177 (1978). The protections of the ESA are triggered when a species is listed as "threatened" or "endangered" under Section 4 of the ESA. 16 U.S.C. § 1533(a).

Under Section 4 of the ESA, once a species is listed as threatened or endangered, the Service has a mandatory duty ("shall") to designate critical habitat for that species. 16 U.S.C. § 1533(a)(3)(A). The Service does have discretion to remove an area from the designation if the benefits of exclusion outweigh the benefits of inclusion, but the Ninth Circuit has elsewhere largely rendered this provision a nullity by exempting such decisions from judicial review. *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1035 (9th Cir. 2015) ("[A]n agency's decision not to exclude critical habitat is unreviewable."), *cert. denied* (U.S. Oct. 11, 2016).

Once critical habitat is designated under ESA Section 4, Section 7 of the ESA provides substantive protections to protect and conserve that habitat. Specifically, ESA Section 7 requires every federal agency to "insure that any action authorized, funded, or carried out by such agency" will not "result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2).

2. The ESA Was Amended in 1978 to Provide an Express Definition of Critical Habitat.

As originally enacted in 1973, the ESA did not define the term "critical habitat," provide procedures for designating critical habitat, or even expressly require such designation.

In the absence of express guidance from Congress, the Service proceeded to expansively designate critical habitat on an *ad hoc* basis. In one early designation for a small fish in Tennessee (the snail darter), the Service concluded that "habitat" would "consist of a special environment in which a species lives," and that "'[c]ritical habitat' . . . could be the entire habitat or any portion thereof." 41 Fed. Reg. 13,926, 13,927 (Apr. 1, 1976). The Service finalized more formal regulations in early January 1978, defining critical habitat broadly as "any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species." 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978). That regulation further allowed that "[c]ritical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion." *Id*. at 875. By the middle of 1978, the Service (along with the Secretary of Commerce) had already desig-

nated critical habitat for 32 species, with 56 designations pending and an additional 140 species waitlisted for proposed designations.[1]

The ESA's critical habitat provisions quickly became a matter of controversy when a concerned citizen filed suit against the Tennessee Valley Authority alleging that the construction of the Tellico Dam on the Little Tennessee River would result in the destruction of critical habitat for the snail darter, a small fish living in the vicinity of the dam. *See Tenn. Valley*, 437 U.S. at 156. Although construction was "virtually complete[]," with nearly $100 million already expended on the major infrastructure project, the Supreme Court enjoined work on the dam. *Id*. at 172. As the Court explained in its June 15, 1978 opinion, the original language of Section 7 and its legislative history appeared to indicate a "plain intent . . . to halt and reverse the trend toward species extinction, whatever the cost." *Id*. at 184.

Congress immediately responded to this pronouncement by amending the ESA in November 1978. Pub. L. No. 95-632, 92 Stat. 3751 (1978). As one member of Congress explained, "[t]he Supreme Court decision may be good law, but it is very bad public policy." Legislative History at 822 (reprinting House Consideration and Passage of H.R. 14104, with Amendments). Instead, the Service needed to use "commonsense" in implementing the ESA and to better "balance environmental and developmental interest[s]

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[1] *See* Staff of S. Comm. on Environment and Public Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980* (Comm. Print 1982) at 823 (hereinafter "Legislative History").

. . . [and] take into consideration more accurately the development needs of this Nation." *Id*. at 801, 837.

The "heart of the problem," as explained by Representative Duncan in proposing changes to the ESA, was the absence of a statutory definition for critical habitat, and the broad regulatory definition adopted by the Service. *Id*. at 880. The Service's broad regulatory definition "failed miserably" to address the problems associated with critical habitat (*id*.), and as a result, the Service's designations were going "too far in just designating territory as far as the eyes can see and the mind can conceive." *Id*. at 817. What was needed, instead, was "a showing that [habitat] is essential to the conservation of the species." *Id*. at 880. Members of Congress also raised particular concerns about the implications of critical habitat designations "when extremely large land areas are involved" and expressed a need to ensure that a listed species' "true critical habitat" was protected. *Id*. at 948 (reprinting S. Rep. No. 95-874 (1978)) (referring to the Service's proposal to designate over 15,000 square miles as grizzly bear critical habitat).

Members of Congress proposed to address these concerns by defining "critical habitat" to "narrow[] the scope of the term." *Id*. at 749 (reprinting H.R. Rep. No. 95-1625 (1978)). As proposed by Representative Duncan, the definition of critical habitat would include only "the specific areas within the geographic area[s] occupied by the species on which are found those physical or biological features which are essential to the conservation of the species and which require special management." *Id*. at 880 (reprinting House Consideration and Passage of H.R. 14104, with

Amendments).[2] The result of Representative Duncan's amendments, as incorporated in the conference bill, was an "extremely narrow definition of critical habitat." *Id*. at 1221 (reprinting Conf. Rep. on S. 2899).

The historical concerns identified in the legislative history are reflected in the language adopted in 1978. The definition rejects the Service's prior position that "'[c]ritical habitat' . . . could be the entire habitat or any portion thereof" (41 Fed. Reg. at 13,927), explaining that critical habitat ordinarily "shall not include the entire geographical area which can be occupied by the . . . species." 16 U.S.C. § 1532(5)(C).

The definition also divides potential habitat into two categories: (i) geographical areas that are "occupied by the species" at the time of listing, and (ii) geographical areas that are not occupied at the time of listing. 16 U.S.C. § 1532(5)(A). For areas that are "occupied" at the time of listing, critical habitat is limited to "specific areas . . . on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). For unoccupied areas, the area must

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[2] Although H.R. 14104 was not enacted, the language from H.R. 14104 was inserted into the enacted bill (S. 2899). Legislative History at 904 (reprinting House Consideration and Passage of S.2899, With Amendment, In Lieu of H.R. 14104) (passing motion to amend S. 2899 to "insert . . . the provisions of HR. 14104"). The final statute (Pub. L. No. 95-632) included "virtually identical" language to the House bill. Legislative History at 1220-21 (reprinting Conf. Rep. on S. 2899) ("[T]he Senate and House bills were not really all that far apart . . . [and] with all frankness the guts of the House Bill have been retained in the conference report . . . [including] . . . [a]n *extremely narrow definition of critical habitat*, virtually identical to the definition passed by the House[.]") (emphasis added).

be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Only the conditions applicable to "occupied" habitat are at issue in this case.

B. The Service's Designation of Critical Habitat for the Polar Bear

The Service listed the polar bear as a threatened species on May 15, 2008. 73 Fed. Reg. 28,211 (May 15, 2008). Unlike most species that are listed because there have been significant population declines, the polar bear is "generally abundant throughout its range, . . . continue[s] to occupy the full extent of its historical range, and it ha[s] yet to experience precipitous population declines in any portion of its range." *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 76-77 (D.D.C. 2011), *aff'd*, 709 F.3d 1 (D.C. Cir. 2013).

"[T]he polar bear was the first species to be listed due to climate change." *Id*. at 87. Polar bears are "evolutionarily adapted to, and indeed completely reliant upon, sea ice for their survival," and the Service predicted that within 45 years "polar bear populations will be affected by substantial losses of sea ice" that are attributable to climate change. *Id*. at 72, 76. Thus, while polar bear populations are presently stable, climate change poses a threat to the bear in the foreseeable future.[3]

Following the listing decision, the Service proceeded, as required by the ESA, to designate critical

[3] The listing decision was challenged and upheld in *In re Polar Bear*, 794 F. Supp. 2d 65. Petitioner AOGA participated as an intervenor-defendant in support of the Service's listing decision against the ultimately unsuccessful claims that the polar bear should be listed as "endangered" instead of "threatened." *Id*. at 78.

habitat for the polar bear. The Service identified three habitat types: (1) sea ice habitat (Unit 1); (2) terrestrial denning habitat (Unit 2); and (3) barrier island habitat (Unit 3). 75 Fed. Reg. at 76,133. Polar bears spend the vast majority of their time in sea ice habitat (which is the largest area of designated habitat), and the bears maintain large ranges on the sea ice (as that ice fluctuates seasonally) in pursuit of the prey upon which they depend. *Id.* at 76,095; *id*. at 76,090 (polar bears "typically remain with the sea ice throughout the year"). Polar bears "do not wander aimlessly on the sea ice," but instead "show a strong fidelity to activity areas that are used over multiple years." *Id*. at 76,090, 76,095.

As for terrestrial denning sites, polar bears use these areas much less frequently (and only by maternal polar bears). Of the two populations of polar bears living in the waters off Alaska, the "primary denning areas" for one population (the Chukchi-Bering population) is in Russia, and is not part of the designation. *Id*. at 76,090. Only the Southern Beaufort population uses terrestrial areas in Alaska in significant numbers, but the confirmed number of den sites is still only 20-40 dens per year. *Id*. at 76,099.

Denning habitat has specific physical and biological features. These include (1) "[s]teep, stable slopes . . . with water or relatively level ground below the slope and relatively flat terrain above the slope," (2) "[u]nobstructed, undisturbed access between den sites and the coast," (3) proximity to sea ice in the fall, and (4) the "absence of disturbance from humans and human activities that might attract other polar bears." *Id*. at 76,133. As the Service explains, "[d]enning females typically seek secluded areas away from human activity," *id*. at 76,096, and are sensitive to

human activity within one mile of the denning site, *id*. at 76,115.

The denning habitat designation does not limit itself to the specific areas where those features are found. Rather, the Service selected the critical habitat area for denning by designating *all lands* within 20 miles of the coast from the Canadian border to the Kavik River, and all lands five miles in from the coast from the Kavik River to Barrow, collectively encompassing hundreds of miles of coastline.

Within these broad swaths of denning habitat are almost all of the existing oil and gas production facilities on Alaska's North Slope, including Prudhoe Bay (the largest production oil field in North America), nine other oil fields, and the industrial staging area of Deadhorse, Alaska. The Service excluded the physical "manmade structures" from the definition of critical habitat, but otherwise left the areas immediately adjacent to these industrial operations (including areas where bears are actively hazed away as authorized by the MMPA) as critical denning habitat. *Id*. at 76,133. So while the significant network of roads, buildings, pipelines, well pads, industrial gas compression plants and facilities, waste treatments plants, and even the Oxbow landfill are not themselves designated as critical denning habitat, the areas immediately adjacent to, between, and surrounding this network of industrial operations (from which bears are actively and lawfully hazed away) are designated as critical denning habitat. *Id*. at 76,098.

As for barrier island critical habitat, the Service employed a similar all-encompassing approach. The Service noted that bears use some barrier islands as migration corridors and to "avoid human disturbance." *Id*. at 76,120. Without identifying specific corridors,

the Service proceeded to include *every barrier island* in the range of the polar bear (and every spit on those islands) and *everything within one mile of those islands and spits* as a "no disturbance zone." *Id*. Included within the barrier island critical habitat designation (and the no disturbance zone) are 13 Native villages, including Wainwright, Point Lay, Point Hope, Kivalina, Shishmaref, Diomede, Wales, King Island, Teller, Solomon, Shaktoolik, St. Michael, and Nunam Iqua.[4]

C. The District Court Vacated the Designation for Lack of Evidence in the Record Demonstrating the Presence of Essential Features

The district court below reviewed the Service's decision against the ESA's statutory criteria for critical habitat. As the district court explained, "in order for an area to be designated as critical habitat, an agency must determine that the area actually contains physical or biological features essential for the conservation of the species." App. *infra* 83a (citing 16 U.S.C. § 1532(5)(A)(i)). The district court recognized the deference owed to the Service, but explained that "agencies must still show substantial evidence in the record and clearly explain their actions." *Id*. (Service "cannot simply speculate as to the existence of such features").

After carefully reviewing the record, the district court concluded that the required evidence of essential features in specific areas was plainly lacking to support such a broad designation. As the district court

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[4] The Service excluded the villages of Barrow and Kaktovik, concluding (incorrectly) that "[o]nly the North Slope communities of Barrow and Kaktovik overlap with the proposed critical habitat designation." 75 Fed. Reg. at 76,097.

explained, "[b]ased *solely* on the location of the confirmed or probable den sites, the Service concluded that the whole of Unit 2 contained *all* of the physical or biological features" essential to polar bear denning. App. *infra* 85a. The record demonstrates that the known and probable den sites, as well as all other *potential* denning habitat ("[s]teep, stable slopes" for den building), are instead found *only* "in roughly one percent of the entire area designated." App. *infra* 86a. At the same time, the Service "fail[ed] to point to the location of any features in the remaining ninety-nine percent" of the designated denning habitat, thereby providing no evidentiary basis to conclude that 99 percent of the designated area met the statutory definition of critical habitat. *Id*. This failure is "especially stark concerning the inclusion of the areas around Deadhorse, Alaska, as such area is rife with humans, human structures, and human activity." *Id*.

Similarly, the district court found that the evidence of physical and biological features was lacking with respect to barrier island habitat. The district court found that the Service could not produce "even minimal evidence in the record showing *specifically* where all the physical or biological features are located within" the barrier island unit. App. *infra* 90a. Although the Service presented evidence that *some* of the islands were used for denning, the "explanation of the location of the other essential feature[s] is lacking." *Id*. As the district court explained, "each part of Unit 3 does not have to contain each of the three essential features," but "*every part* of the designation must have at least one." *Id*.

Because the Service failed to provide evidence or explanation in the record to show that "at least one" essential feature is "found" in all of the designated

areas, the district court vacated the designation. App. *infra* 90a.

D. The Ninth Circuit Reversed

The Ninth Circuit reversed the district court decision. The Ninth Circuit's decision starts from the erroneous premise that the "polar bear population has been declining for many years." App. *infra* 9a; *cf. In re Polar Bear,* 794 F. Supp. 2d at 76-77 (explaining Service findings that bear populations are currently stable and have not experienced significant declines). From there, the court decided "[a]t the outset" that the district court required too strict of a "standard of specificity." App. *infra* 21a. Although the ESA expressly requires critical habitat designations to be "based on the best scientific and commercial data available" (16 U.S.C. § 1533(b)(2)), the court held that the ESA instead "requires use of the best available technology, not perfection." App. *infra* 21a.[5] Based on that erroneous standard, the court concluded that the Service did the best that it could with telemetry studies (even though the Service disregarded detailed mapping of features available in the record), and therefore could designate 20-mile-wide and five-mile-wide swaths of land based on "administrative convenience." App. *infra* 27a.

As for the absence of evidence of essential features on 99 percent of the areas designated as denning

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[5] The Ninth Circuit twice refers to the "best available technology" standard. App. *infra* 11a, 21a. The best available technology standard is employed in setting effluent limitations under the Clean Water Act, and plainly has no application in the ESA. *See* 33 U.S.C. § 1311(b)(2)(A). Nonetheless, at least one district court has already started applying the Ninth Circuit's newly crafted "best available technology" standard for the ESA. *Defs. of Wildlife v. Jewell*, No. 14-247-M-DLC, 2016 WL 1363865, at *19 (D. Mont. Apr. 4, 2016).

habitat, the Ninth Circuit chastised the district court for looking too narrowly at the locations where actual and probable den sites are located. App. *infra* 21a. Instead, the Ninth Circuit concluded that "[u]nderlying [the Service's] rejection of Plaintiffs' challenges is the unassailable fact that bears need room to roam," App. *infra* 28a, even though there was no evidence in the record that bears need to "room to roam" in denning habitat (and even on sea ice, where the bears have a large range, the record is clear that they do not "wander aimlessly"). 75 Fed. Reg. at 76,090.

Likewise, the Ninth Circuit made no meaningful effort to reconcile the readily apparent conflict between the Service's identified essential features such as "[u]nobstructed, undisturbed access between den sites and the coast," the "absence of disturbance from humans," or "refuge from human disturbance" (75 Fed. Reg. at 76,133) with the Service's inclusion of areas with pervasive human activity and disturbance such as the industrial areas of Prudhoe Bay and Deadhorse, or around Native villages. Pursuant to federal regulations, the people living and working on the North Slope use numerous hazing methods (under strict protocols) to deter bears from these areas including rubber bullets, cracker shells, and bean bags fired from shotguns[6], as well as "[a]coustic deterrent devices" like "sirens" or "air horns" in order to "move" polar bears away from those areas, and vehicles and boats to "block[] their approach." 50 C.F.R. § 18.34(b)(2). These areas plainly do not provide "refuge from human

[6] *See, e.g.*, Polar Bear and Walrus Interaction Plan for BPXA Areas of Operation, https://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Plans/BP%20PolarBear%20and%20Walrus%20Interaction%20Plan.pdf

disturbance" or "unobstructed, undisturbed access." The Ninth Circuit's decision conveniently avoids this issue, noting only that "'polar bears . . . are allowed to exist in the areas between the widely dispersed network of road, pipelines, well pads, and buildings.'" App. *infra* 30a.

This decision is plainly wrong, and therefore Plaintiffs seek review by this Court.

REASONS FOR GRANTING THE PETITION

The State of Alaska, Native Corporations, and Native groups have independently filed a petition for certiorari seeking review of the Ninth Circuit's decision. Petitioners AOGA and API support, endorse, and incorporate the reasons for granting certiorari put forth by those Petitioners. AOGA and API agree that Supreme Court review is needed because the Ninth Circuit's decision below is plainly wrong and creates an untenable situation in Alaska and in the Ninth Circuit that can only be corrected by Supreme Court review, and they agree that the issue is hugely important for states, Native, and environmental interests alike.

AOGA and API further agree that this case is the perfect vehicle for addressing the Service's backward practice and the Ninth Circuit's arbitrarily permissive standard. The stakes of a critical habitat designation will never be in starker relief than a designation the size of California that includes all the historic homeland of certain Native communities as well as the area most essential to a State's economic future. Likewise, the arbitrary nature of the Service's practice and the failure of the Ninth Circuit's overly deferential review will never be in sharper focus than it is here, with areas designated because they are supposedly free of "human

disturbance" when, in fact, pursuant to well-established federal law and regulation, bears are intentionally deterred away from these areas using approved hazing techniques to avoid lethal bear-human interactions.

Without repeating those arguments, AOGA and API have filed this separate petition for certiorari to emphasize additional reasons for granting certiorari in this case.

First, as detailed below, this case presents issues of exceptional importance regarding the future viability of oil and gas reserves that are absolutely essential to Alaska's economy and that are recognized as strategically important for the nation. The State of Alaska and private companies have invested billions of dollars in developing these important resources. The Service's cavalier designation of all of these developed areas as critical habitat, knowing that designation will have essentially no benefit for the bear, and the Ninth Circuit's refusal to meaningfully review that decision, places arbitrary and unnecessary burdens on the continued development of those essential resources. Only Supreme Court review can undo this nonsensical result.

Second, the Ninth Circuit's decision is the latest in a line of cases from that circuit that progressively undermine the critical habitat process. In the Ninth Circuit, decisions on critical habitat are not subject to environmental review or meaningful economic review, and the Service has unreviewable discretion to deny requests to exclude portions of a designation based on environmental or economic concerns. Now, as a result of the present decision, the Service in the Ninth Circuit can impose the burdens of critical habitat on staggeringly large geographic areas, with virtually no evidence that the vast majority of that

designation contains essential features and despite undisputed evidence that the species is actively and lawfully chased out of the area.

As detailed below, this permissive attitude by the Ninth Circuit at virtually all levels of the critical habitat process is both wrong and has created a situation where aggrieved parties seek to avoid the Ninth Circuit—and with good reason. Forum shopping and venue disputes are (and now increasingly will be) largely determinative of the outcome. Supreme Court review would end the need for parties to file California critical habitat cases in the District of D.C. or Washington critical habitat cases in Wyoming, and provide needed guidance for all the circuits.

I. THE NINTH CIRCUIT'S DECISION WILL SIGNIFICANTLY IMPAIR THE DEVELOPMENT OF STRATEGICALLY IMPORTANT STATE AND NATIONAL RESOURCES

Alaska entered statehood in 1959 on the promise and expectation that the State's natural resources, including the State's vast oil reserves, would provide the basis for the State's economy. *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1065 (2016). To that end, Alaska's Statehood Act granted Alaska title to submerged lands and the resources therein, and over 100 million acres of land "to serve Alaska's overall economic and social well-being." *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968); Pub. L. No. 85-508, § 6(a)-(b), 72 Stat. 339, 340 (1958). Congress followed the Statehood Act with the Alaska Native Claims Settlement Act ("ANCSA") in 1971, setting aside 40 million acres to secure the economic well-being of Alaska Natives, and the Alaska National Interest Lands Conservation Act ("ANILCA") in 1980, in part, to halt the federalization of lands in Alaska and ensure

the "economic and social needs of the State of Alaska." *Sturgeon*, 136 S. Ct. at 1066 (internal quotation marks and citation omitted). Alaska was not to be the "'Polar Bear Garden,'" that some predicted, but a state whose economy was built on the development of the State's natural resources. *Id*. at 1064.

The development of Alaska's North Slope for oil and gas has been, and continues to be, a key component of the State's economic development. In reliance on the promises in the Statehood Act, ANCSA, and ANILCA, the State of Alaska and Native groups selected millions of acres of land for their economic development potential on the North Slope. The selection of those lands, and the 1968 discovery of oil in Prudhoe Bay, led to billions of dollars of investment in developing oil and gas on the North Slope and adjacent waters, including the construction of the 800-mile Trans-Alaska Pipeline. The Trans-Alaska Pipeline is one of the largest infrastructure projects in the world, and represents an investment of more than $8 billion. And the State and private companies contemplate investing another $45 billion to $65 billion in a new pipeline to transport natural gas from the North Slope.[7]

As expected, the North Slope has been a key driver of Alaska's economy. North Slope oil and gas operations currently produce 475,353 barrels of oil *per day* through the Trans-Alaska Pipeline, accounting for the largest single revenue stream for the State of Alaska and for 11,000 jobs on the North Slope alone. The importance of Prudhoe Bay cannot be overstated:

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[7] Alaska Resource Development Council, Alaska's Oil & Gas Industry, http://www.akrdc.org/oil-and-gas (last visited Oct. 27, 2016).

"'One Prudhoe Bay is worth more in real dollars than everything that has been dug out, cut down, caught, or killed in Alaska since the beginning of time.'" Neal Fried, *Alaska Economic Trends*, Alaska's Oil and Gas Industry, June 2013, http:// laborstats.alaska.gov/ trends/jun13art1.pdf (quoting Alaska historian).

In addition to Prudhoe Bay, 10 of the 50 largest discovered oil fields are located on the North Slope. *Id*. Moreover, the U.S. Geological Survey estimates that there are as many as 21 billion barrels of oil and 62 trillion cubic feet of natural gas yet to be discovered on the North Slope. *See* USGS, Economics of Undiscovered Oil and Gas in the North Slope of Alaska: Economic Update and Synthesis, Open-File Report No. 2009-1112 (2009), https://pubs.usgs.gov/of/2009/ 1112/pdf/ofr2009-1112.pdf. Likewise, there are billions of barrels of oil on the Outer Continental Shelf ("OCS") off the North Coast of Alaska that have yet to be proven and developed. *See Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 501 (9th Cir. 2014) (estimating between 12 billion and 29 billion barrels in the Chukchi Sea OCS alone).

These oil fields are not just important for the State of Alaska's economy, but they have strategic national importance. As Congress explained in providing legislation for the Trans-Alaska Pipeline:

> The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

43 U.S.C. § 1651(a). The pipeline continues to serve that expected function, transporting 17 billion barrels of oil since construction.

In addition, President Harding in 1923 established the National Petroleum Reserve - Alaska ("NPR-A") on the North Slope by executive order to serve as an oil reserve for national defense purposes, noting that the future supply of oil "is at all times a matter of national concern." *See N. Alaska Envtl. Ctr. v. Norton*, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005) (internal quotation marks and citation omitted). The NPR-A is "the largest single unit of public land in the United States" at 37,000 square miles (but dwarfed in comparison to the 187,000-square-mile polar bear critical habitat designation). *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006). The NPR-A was opened by Congress and President Ford for development as part of the national response to the 1970 oil embargos, and continues to serve as an important strategic reserve. *N. Alaska Envtl. Ctr.,* 361 F. Supp. 2d at 1072.

The Service's sweeping designation of 187,000 square miles of critical habitat overlaps with all of these essential natural resource areas. The designation encompasses *all* lease and potential lease sites on the U.S. OCS in the Chukchi and Beaufort Seas, large portions of the Prudhoe Bay oil field (including planned and potential development areas), large and essential portions of the NPR-A, and huge tracts of lands selected by the State and Native groups for economic development. 75 Fed. Reg. at 76,097-98.

The Service's massive designation will seriously impair continued development of these essential and strategic energy reserves. It is undisputed in the record that the federal government has *never offered a*

lease sale on the OCS off Alaska under the Outer Continental Shelf Lands Act in an area that has been designated as habitat for any species. 75 Fed. Reg. at 76,106. Instead, the federal government has, in practice, deleted areas from leasing in the Alaska OCS once designated as critical habitat. *Id*. Indeed, groups opposed to oil and gas development see the critical habitat designation as grounds for a "moratorium on oil and gas activities" in the Arctic. 75 Fed. Reg. at 76,100.[8]

The critical habitat designation also threatens the continued viability of oil and gas development on the North Slope by unnecessarily imposing delays and costs. The logistics of exploring for oil and gas in one of the harshest environments in the world are extreme. Much of the North Slope is not connected by road to the rest of the world, and many of the local roads that are present on the North Slope are ephemeral ice roads that exist only in the winter. The construction window is exceedingly short, and many materials must be shipped in by air or sea. And many of the people employed by oil and gas companies on the North Slope do not live on the North Slope, but are flown in for shifts, rotating on and off the Slope.

The imposition of another regulatory hurdle in the form of a critical habitat designation (that by all accounts provides no benefit to the polar bear) can

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[8] These kinds of closures are unfounded as oil and gas activities within the range of the polar bear, as successfully regulated under the MMPA, do not currently or foreseeably threaten the polar bear species and have had no more than a "negligible impact." 73 Fed. Reg. 28,212, 28,289 (May 15, 2008) ("[T]he actual history of oil and gas activities in the Beaufort and Chukchi Seas demonstrate that operations have been done safely and with a negligible effect on wildlife and the environment.")

have severe consequences. Even small delays can result in losing entire construction seasons, which, given the scale of oil and gas development, can result in hundreds of millions of dollars in losses. 75 Fed. Reg. at 76,106 (detailing losses associated with potential delays). Given the decline in oil prices in recent years, and the high cost of development in the Arctic, these delays and costs (and even the risk of these delays and costs) will seriously hamper continued development on the North Slope.

The Service has long taken the cynical view that critical habitat designations are a waste of time: "The root of the problem lies in the [Service's] long held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary." *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001). Based on that view, the Service cavalierly designated 187,000 square miles of the Arctic and concluded that the *total* cost imposed by the designation over a period of *30 years* is between $677,000 and $1.21 million. 75 Fed. Reg. at 76,126-27

Reality, unsurprisingly, has disproven the Service's myopic view. The critical habitat designation was in place for a short time before being invalidated by the district court. In that short window actual costs *have already exceeded the Service's entire 30-year projection*. One example illustrates this problem. App. *infra* 98-101a. In 2009, ExxonMobil applied for permits for the construction of the Point Thomson project about 60 miles east of Prudhoe Bay in designated polar bear habitat. App. *infra* 99a. As part of that project, ExxonMobil needed to fill wetlands. Wetlands are virtually everywhere on the North Slope, but are a feature that is neither used nor needed by the polar bear. *Id*. But because the wetlands

are located in polar bear critical habitat, U.S. Army Corps policy required that ExxonMobil conduct *significantly greater amounts of mitigation*. App. *infra* 100a. As a result, "ExxonMobil's increased incremental mitigation costs alone for just this Project have already exceeded the Service's 30-year projection." App. *infra* 101a.

This example also fully discredits the Service's belief that the issues of over-designation can be resolved through subsequent Section 7 consultations. Over-designation "wrongfully shifts the burden of initiating designation decisions from the Service to future stakeholders." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 123 (D.D.C. 2004). The subsequent Section 7 consultation for Point Thomson did nothing to alleviate the imposition of unnecessary burdens associated with overly broad designation of critical habitat.

Absent Supreme Court review, this absurdity will repeat itself over and over again in consultations within the massive 187,000-square-mile designation. The sweeping designation includes all land and water within the contiguous block, including features that are not useful or needed by the bear like wetlands, and regulatory consequences automatically attach. This is plainly not what Congress intended when it carefully crafted an "extremely narrow definition of critical habitat." Legislative History at 1221.

These kinds of unnecessary costs ultimately threaten the continued viability of the Trans-Alaska Pipeline itself. The Trans-Alaska Pipeline has a capacity of 2 million barrels per day. At levels below 500,000 barrels per day (as is the case currently) the system is under increased stress from freezing and corrosion. Alyeska Pipeline Services Company, Low

Flow Impact Study, Final Report (June 15, 2011), http://www.alyeska-pipe.com/assets/uploads/pagestructure/TAPS_Operations_LowFlow/editor_uploads/LoFIS_Summary_Report_P6%2027_ExSum.pdf. Below 350,000 barrels per day, the system cannot operate safely. *Id*.

New projects must come online to keep the system viable. There is no shortage of recoverable oil on the North Slope. Just last month, one company announced the discovery of an oil field that could hold up to 6-billion barrels and that could provide 200,000 barrels per day to the pipeline.[9] But that field too is caught within the sweeping scope of the Service's polar bear critical habitat designation, and the expected $8 billion investment needed to develop that field will have to be made (or not) against the backdrop of the burdens and risks associated with constructing the project in polar bear critical habitat. And again, these regulatory burdens, according to the Service's own admission, *result in no conservation benefit to the polar bear species*.

Even a small designation of critical habitat "can impose significant costs on landowners." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011). The designation of 187,000 square miles of habitat, which overlaps the industrial areas at the core of Alaska's economy, will have significant and long-lasting economic impacts for the State's economy and the stability of the nation's energy supply. This is precisely the result Congress sought to avoid by amending the ESA in 1978 to provide an

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[9] Nick Cunningham, *New Mega Oil Discovery In Alaska Could Reverse 3 Decades Of Decline*, Oilprice.com (Oct. 6, 2016), http://oilprice.com/Energy/Crude-Oil/New-Mega-Oil-Discovery-In-Alaska-Could-Reverse-3-Decades-Of-Decline.html.

"extremely narrow" definition of critical habitat intended to focus on what is truly essential to the species. Supreme Court review is urgently needed to avoid unnecessarily risking the continued vitality of these State and national oil and natural gas reserves.

II. SUPREME COURT REVIEW IS NEEDED TO CONFORM NINTH CIRCUIT LAW TO THE PLAIN LANGUAGE OF THE ESA

The Ninth Circuit's decision in this case is just the latest in a series of critical habitat decisions that have largely rendered meaningless the limitations set forth in the 1978 Amendments to the ESA.

1. In *Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995), the Ninth Circuit held that the National Environmental Policy Act ("NEPA") "does not apply to the designation of a critical habitat." The Tenth Circuit expressly rejected that holding, explaining "Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure." *Catron Cty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996). Nonetheless, the Service refuses to comply with NEPA, when as here, the designation occurs only in the Ninth Circuit. 75 Fed. Reg. at 76,102.

2. In *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010), the Ninth Circuit held that the Service could limit its consideration of the economic impacts to only incremental costs (largely administrative) associated with the designation. The court rejected as "a matter of course" the concern that this methodology would allow the Service "to treat the economic analysis as a mere procedural formality." *Id*. at 1174. Yet procedural formality is

precisely what the Service continues to do, concluding that the designation of 187,000 square miles of critical habitat including the largest oil field in North America will have only "incremental administrative costs" of $677,000 and $1.21 million. 75 Fed. Reg. at 76,104. Here too, the Tenth Circuit has rejected such a constrained reading. *N.M. Cattle Growers Ass'n*, 248 F.3d at 1283-85 (rejecting incremental cost analysis).

3. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977, 989-90 (9th Cir. 2015), the Ninth Circuit held that the Secretary's refusal to exclude an area of critical habitat was *unreviewable*, even though the ESA expressly provides criteria for when the Service may exclude an area from designation. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"). Thus, even if a party presents an overwhelming and undisputed case that a designation will have no benefit and produce catastrophic economic or even environmental harms, the Ninth Circuit allows the Service to ignore the request for exclusion and makes the decision beyond judicial reproach. No other circuit is so permissive of arbitrary agency action. *See, e.g.*, *Wyo. State Snowmobile Ass'n v. U.S. Fish & Wildlife Serv.*, 741 F. Supp. 2d 1245, 1267 (D. Wyo. 2010) (rejecting exclusion decision for relying on a faulty cost-benefit analysis).

Taken collectively, the Ninth Circuit's case law on critical habitat turns the designation process into a farce. Although Congress expressly limited the designation process to "specific areas" on which essential features "are found" (16 U.S.C. § 1532(5)(A)(i)), and

expressly requires the Service to "tak[e] into consideration, the economic impact" of that designation (*id*. § 1533(b)(2)), the Service can now designate an area (within the Ninth Circuit's jurisdiction) the size of California without considering whether that designation will have any environmental consequences, can limit consideration of economic impacts to "incremental administrative costs," and has unreviewable discretion to ignore requests to exclude areas where the designation indisputably does more harm than good.

The Ninth Circuit's decision in the polar bear case drives this absurdity over the cliff, effectively excusing the Service of the need to produce evidence showing the essential features were even *found* (as required by the statute) in the areas designated as critical habitat. The result is, as the district court explained, that the Service can now "designate a large swath of land in northern Alaska as 'critical habitat' based entirely on one essential feature that is located in approximately one percent of the entire area set aside." App. *infra* 88a.

The Ninth Circuit's decision paves the way for even more egregious designations. Whereas the D.C. Circuit would require "substantial evidence" to support any critical habitat decision, for the Ninth Circuit it is enough that the species "roams" through an area or is "allowed to exist" in that area. *Compare Otay Mesa*, 646 F.3d at 916 *with* App. *infra* 30a. Indeed, the Service need only pick a zone that somewhere includes one habitat feature and that is "appropriate" for "administrative convenience." App. *infra* 27a. This is not substantial evidence; it is "abdication." *Otay Mesa*, 646 F.3d at 916. And it is certainly does not conform to the "extremely narrow

definition of critical habitat" envisioned by Congress. Legislative History at 1221.

Even more absurdly, the Ninth Circuit allows the Service to designate areas immediately next to homes, businesses, and industrial areas where bears are actively hazed away for the safety of bears and people. In these areas, people can (and do) use sirens and commercial air horns to "startle a bear and disrupt its approach to property or people," and use trucks and snowmobiles to "block[] their approach." 50 C.F.R. § 18.34(b)(2), as well as more aggressive approved hazing techniques. In these areas, the "essential features" of freedom from human disturbance or human activity cannot possibly be "found." This arbitrarily slipshod designation is precisely the opposite of what Congress intended.

The threat of additional over-designations is not hypothetical. The National Marine Fisheries Service has proposed an *even larger designation* for the ringed seal in Alaska encompassing some 350,000 square miles of icy marine territory in the Beaufort Sea off northern Alaska, the Chukchi Sea off northwestern Alaska, and the northern Bering Sea off the State's western coast—*i.e.*, essentially all U.S. jurisdictional waters in the Arctic. *See* 79 Fed. Reg. 73,010 (Dec. 9, 2014). Under the Ninth Circuit's holding here, all that is required to uphold this designation (which will be bigger than Texas), is the unassailable fact that seals, too, "need room to roam." This cannot possibly be what Congress intended when it amended the ESA in 1978 to provide an extremely narrow definition of critical habitat.

The Ninth Circuit is so far out of step with the plain language of the ESA that even before its decision on the polar bear, litigants affected by critical habitat

decisions were *already* trying to avoid the Ninth Circuit. Critical habitat challenges involving habitat in Washington State have been filed in Wyoming (in the Tenth Circuit), *see, e.g.*, *Wyo. State Snowmobile Ass'n*, 741 F. Supp. 2d at 1267 (Washington State Association filing in Wyoming regarding lands in Washington), and challenges to habitat designation in California have been filed in the District of D.C., *Otay Mesa*, 646 F.3d at 914 (San Diego fairy shrimp critical habitat).

The issue of venue (and transfer of venue) is largely dispositive of the outcome, given the Ninth Circuit's radically lax critical habitat jurisprudence compared against other circuits' efforts to adhere to statute mandates. Courts in the D.C. District require decisions supported by "substantial evidence," *Otay Mesa*, 646 F.3d at 916, refuse to let the Service "cast a net over tracts of land" on "mere hope," and require evidence that features are "'found' on occupied land before that land can be eligible for critical habitat designation," *Cape Hatteras Access Pres. All.*, 344 F. Supp. 2d at 122 (citation omitted). The Ninth Circuit, by contrast, will uphold a designation as long as it is on a scale that serves "administrative convenience" including the designations of areas where essential features (such as freedom from human disturbance) cannot possibly be found because, due to the proximity to humans and human activity and the associated risk to humans and animals, the listed species is actively monitored and lawfully hazed away. App. *infra* 27a.

Only Supreme Court review can bring the Ninth Circuit's case law back into conformity with the plain language and history of the ESA. The Service is now plainly casting its critical habitat net "as far as the eyes can see and the mind can conceive." Legislative

History at 817. This is exactly the opposite of what Congress intended for critical habitat.

CONCLUSION

For the above reasons, the Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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