No. 16-596

In the
Supreme Court of the United States

ALASKA OIL & GAS, ET AL.,
Petitioners,
v.
SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

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

BRIEF OF AMICI CURIAE ALABAMA, WYOMING, ARKANSAS, COLORADO, GEORGIA, IDAHO, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NEW MEXICO DEPARTMENT OF GAME AND FISH, NORTH DAKOTA, SOUTH CAROLINA, TEXAS, UTAH, WEST VIRGINIA, AND WISCONSIN IN SUPPORT OF PETITIONERS

LUTHER STRANGE
Alabama Attorney General
Andrew L. Brasher*
Solicitor General
Brett J. Talley
Deputy Solicitor General
OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us
*Counsel of Record

PETER MICHAEL
Wyoming Attorney General
James Kaste
Deputy Attorney General
Erik E. Peterson
Senior Assistant Attorney General
OFFICE OF WYO. ATT'Y GEN.
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6946
james.kaste@wyo.gov

Counsel for Amici Curiae

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QUESTION PRESENTED

Does the Ninth Circuit's exceedingly permissive standard improperly allow the U.S. Fish and Wildlife Service to designate huge geographic areas as "critical habitat" under the Endangered Species Act when much of the designated area fails to meet the applicable statutory criteria?

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INTEREST OF *AMICI CURIAE*[1]

Alabama, Wyoming, and sixteen other states are deeply concerned that the Ninth Circuit's expansive reading of the Endangered Species Act ("ESA") strips the statute of the express limitations that Congress imposed on the United States Fish and Wildlife Service ("Service") with regard to the designation of "critical habitat." The Ninth Circuit's expansive reading will impose significant costs on the States while doing little to nothing to conserve threatened and endangered species. Critical habitat determinations have serious consequences for the economic and ecological interests of the States. Designations of critical habitat that go beyond what the statute allows cost jobs and tax revenue, while the States' efforts to comply with these designations often require the expenditure of taxpayer funds.

The States have a profound interest in maintaining the delicate balance Congress struck in the ESA between ensuring the recovery of listed species and protecting the private property rights of citizens and the sovereign interests of the States. The opinion of the Ninth Circuit upsets that balance, and this Court should grant the petition as a result.

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys. Due to inadvertence, notice was provided nine days ahead of filing. However, the parties consented to filing and waived the ten-day notice requirement.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress, recognizing both the potential importance of critical habitat to species recovery and the profound costs that habitat designations impose on States, communities, and property owners, struck a balance in the ESA. This balance grants authority to the Service to designate certain suitable areas as critical habitat for threatened and endangered species. But the statute also includes commensurate restrictions on how those powers may be exercised.

The Service may only declare as critical habitat "specific areas within the geographical area occupied by the species, at the time it is listed . . . 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." 16 U.S.C. § 1532(5)(A)(i). Unoccupied areas trigger an additional requirement—the Service must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

In addition, the designation of critical habitat must be based on "the best scientific data available," and the Service must take "into consideration the economic impact, the impact on national security, and any other relevant impact" before making a designation. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(a).

But in the decision below, the Ninth Circuit upheld a critical habitat designation that: (1) is not specific; (2) does not differentiate between occupied

and unoccupied areas; and (3) includes areas that do not, and in some cases never could, possess the physical or biological features necessary to preserve the species. Moreover, the Service's critical habitat designation was not based on the best available science and did not properly account for economic impacts. If allowed to stand, this decision will strip the ESA of the limitations that Congress imposed on the power of the Service to declare critical habitat, upsetting the careful balance that Congress intended.

The Ninth Circuit's decision has far-reaching implications for the States and any party affected by critical habitat designations. Accordingly, the Court should grant the Petition.

ARGUMENT

The Ninth Circuit's opinion ignores clear statutory restrictions on the power of the Service to designate critical habitat. The ruling below leaves the Service untethered from the provisions imposed by Congress in the ESA and free to designate almost any area as critical habitat regardless of the relevant statutory requirements.

I. Congress carefully limited the Service's authority to designate critical habitat.

The lower court's decision gives the Service authority to designate any area as critical habitat, free of the very limitations imposed by Congress in the ESA. The ESA became law in 1973, but only five years later, Congress determined that reforms were needed to constrain the statute and provide limits to its reach.

These reforms included, for the first time, the adoption of a definition of critical habitat in the ESA.

In introducing these definitions, the House Merchant Marine and Fisheries Committee explained Congress's concern that the existing regulatory regime "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9475. The Committee warned that, in applying the new statutory definition, "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." *Id.* at 18, reprinted in 1978 U.S.C.C.A.N. 9468. The Senate Committee on Environment and Public Works explained that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. On Env't & Pub. Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 1220–21 (Comm. Print 1982).

With these concerns in mind, Congress created a statutory definition for critical habitat that governs this case. Areas may be designated as either occupied or unoccupied habitat. To designate an area as occupied habitat, the Service must first identify occupied areas on which are found the features essential to conserve the species. 16 U.S.C. § 1532(5)(A)(i–ii). The Service may then only declare "specific areas within [that] geographical area" as critical habitat. *Id.* Unoccupied areas trigger an additional requirement—the Secretary must

determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532 (5)(A)(ii). As even the Ninth Circuit previously recognized, the statute imposes "a more onerous procedure on the designation of unoccupied areas." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *see also Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential."). Congress further limited the possible reach of critical habitat by specifying that it "shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C).

By creating this structure, Congress designed a system whereby the Service would have the tools needed to preserve endangered and threatened species while ensuring that the Service would not "zealously but unintelligently pursu[e] [its] environmental objectives." *See Bennett v. Spear*, 520 U.S. 154, 177 (1997).

Generally, habitat must be inhabited and contain the characteristics that make that habitation possible, and even then only specific areas within that area may be included in a definition. And if the Service wishes to designate uninhabited areas, it must show that, without doing so, it cannot conserve the species. Thus, the ESA sets a high bar for

designation. The lower court's opinion ignores and undermines this structure.

II. The Ninth Circuit's decision gives the Service unfettered power to declare areas critical habitat.

The ESA proscribes the boundaries of the Service's power, and in this case the agency ignored the limitations of the Act. In taking these actions, the Service violated the ESA in multiple ways. Rather than declaring specific locations within the larger area as critical habitat, the Service simply designated a vast swath of land. Rather than limiting the designation to areas that contain the necessary features to support the species, the Service ignored the fact that the overwhelming majority of the designation did not contain those features. Rather than attempting to meet the more stringent requirement for designating unoccupied areas as critical habitat, the Service simply declared the entire designation occupied, without the evidence necessary to support that finding. And the Service did so while recognizing that the designation would not result in any appreciable benefit.

The designation itself demonstrates these errors in a number of ways.

1. The Service designated 187,000 square miles of Alaska and the adjacent Outer Continental Shelf as critical habitat. *Designation of Critical Habitat for the Polar Bear*, 75 Fed. Reg. 76,086, 76,120 (Dec. 7, 2010) (to be codified at 50 C.F.R. pt. 17). That is an area larger than the entire state of California. The Service

claimed all 187,000 square miles were "occupied at time of listing." *Id.*

2. The Service designated "all barrier islands along the Alaska coast and their associated spits, within the range of the polar bear in the United States, and the water, ice, and terrestrial habitat within 1.6 km (1 mi) of these islands (no-disturbance zone)," primarily under the theory that these areas are used for polar bear denning. 75 Fed. Reg. at 76,133. But the Service candidly acknowledged that "not all barrier islands have suitable denning habitat," speculating that these islands could be used for movement or as refuge from human disturbance—with no evidence to support this assertion in general or as to specific barrier islands. *Id.* at 76,099.

3. The Service included more than 14,000 miles of terrestrial denning habitat covering the northern coast of Alaska in Unit 2 of the designation. Of this 14,000 miles, "the Service has identified physical or biological features in approximately one percent of Unit 2, but fails to point to the location of any features in the remaining ninety-nine percent." *Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 1000–01 (D. Alaska 2013), *rev'd and remanded sub nom. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544 (9th Cir. 2016).

4. The Service did all this while finding that it did not expect "this critical habitat designation to result in significant additional polar bear conservation requirements above and beyond those currently in place under [the Marine Mammal Protection Act] and through the species being listed under the Act." 75

Fed. Reg. at 76,103. The Service went on to admit that the habitat designation was superfluous because "conservation measures being implemented for the polar bear and its habitat under the MMPA, along with the conservation resulting from the species' listing status under the Act, are expected to sufficiently avoid potential destruction or adverse modification of critical habitat." *Id.* In other words, the Service declared vast stretches of land, water, and ice to be critical habitat, subject to all the limitations of the ESA, with no expectation of any appreciable benefit.

The district court recognized that the Service violated the law in taking these actions and vacated the rule. *Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974 (D. Alaska 2013). By reversing that decision, the Ninth Circuit set the Service free of the confines of the ESA. Under the Ninth Circuit's reasoning, it is unclear if any limitations apply to the Service's critical habitat designations.

Congress did not intend and the ESA does not allow the Service to exercise plenary power over the lands and waters of the United States. The Ninth Circuit ignored this principle, despite the fact that an agency may not regulate outside the jurisdictional boundaries established by Congress. *See, e.g., City of Arlington, Tex. v. Fed. Commc'ns Comm'n*, 133 S. Ct. 1863, 1874 (2013) ("Where Congress has established a clear line, the agency cannot go beyond it[.]").

III. ESA designations have significant financial effects on States and other property owners.

Even when critical habitat designations benefit a species, they also come with a cost. "Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015). In the ESA context, it is beyond dispute that "[c]onsiderable regulatory burdens and corresponding economic costs are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10678, 10680 (2013). For example, the first major Supreme Court decision examining the ESA, *Tennessee Valley Authority v. Hill*, resulted in the suspension of a dam-building project that was 80 percent complete and for which Congress had spent more than $100 million of taxpayer money. 437 U.S. 153, 172 (1978).

It was a harbinger of things to come. Critical habitat designations, by their very nature, limit human activity. That limitation almost always results in a lost economic opportunity. The impact ripples through the economy; in an average industry, every billion dollars in regulatory costs results in a loss of over 8,000 jobs. Sam Batkins & Ben Gitis, *The Cumulative Impact of Regulatory Cost Burdens on Employment*, AM. ACTION FORUM (May 8, 2014),

http://www.americanactionforum.org/research/the-cumulative-impact-of-regulatory-cost-burdens-on-employment/. As a consequence, States also suffer a subsequent loss of tax revenue, both as a result of reduced employment as well as foreclosed industrial and recreational use of areas designated critical habitat. For instance, proposals to conserve the sage grouse "could cost up to 31,000 jobs, up to $5.6 billion in annual economic activity and more than $262 million in lost state and local revenue every year . . . ." Reid Wilson, *Western States Worry Decision On Bird's Fate Could Cost Billions In Development*, WASH. POST, May 11, 2014, https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/.

While the ESA may certainly require sacrifices in order to preserve endangered species, the decision to impose those costs on States and the public must conform with the requirements of the statute. That did not happen here.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

Luther Strange
Ala. Attorney General

Andrew L. Brasher
Solicitor General
Counsel of Record

Brett J. Talley
Deputy Solicitor General

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Peter K. Michael
Wyoming Attorney General

James Kaste
Deputy Attorney General

Erik E. Petersen
Senior Assistant Attorney General

Office of the Wyoming
Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-7841
James.kaste@wyo.gov

Counsel for Amici Curiae

COUNSEL FOR ADDITIONAL *AMICI*

LESLIE RUTLEDGE
Attorney General
State of Arkansas
323 Center Street,
Suite 200
Little Rock, AR 72201

CYNTHIA H. COFFMAN
Attorney General
State of Colorado
1300 Broadway, 10th Floor
Denver, CO 80203

CHRISTOPHER M. CARR
Attorney General
State of Georgia
40 Capitol Square, SW
Atlanta, GA 30334

LAWRENCE WASDEN
Attorney General
State of Idaho
700 W. Jefferson Street,
Suite 210
Boise, ID 83720

DEREK SCHMIDT
Attorney General
State of Kansas
120 SW 10th Avenue,
2nd Floor
Topeka, KS 66612

JEFF LANDRY
Attorney General
State of Louisiana
1885 N. Third Street
Baton Rouge, LA 70802

TIM FOX
Attorney General
State of Montana
215 North Sanders
Helena, MT 59620

DOUG PETERSON
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

ADAM PAUL LAXALT
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

ALEXANDRA SANDOVAL
New Mexico Department
of Game and Fish Director
1 Wildlife Way
Santa Fe, NM 87507

WAYNE STENEHJEM
Attorney General
State of North Dakota
600 E. Boulevard
Avenue, Dept. 125
Bismarck, ND 58505

ALAN WILSON
Attorney General
State of South Carolina
1000 Assembly Street,
Room 519
Columbia, S.C. 29201

KEN PAXTON
Attorney General
State of Texas
300 W. 15th Street
Austin, TX 78701

SEAN D. REYES
Attorney General
State of Utah
350 N. State Street, #230
Salt Lake City, UT 84114

PATRICK MORRISEY
Attorney General
State of West Virginia
State Capitol Complex
Bldg. 1, Room E-26
Charleston, WV 25305

BRAD D. SCHIMEL
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, WI 53707-7857