No. 16-610

IN THE

Supreme Court of the United States

ALASKA OIL AND GAS ASSOCIATION,
AMERICAN PETROLEUM INSTITUTE,

Petitioners,

v.

RYAN K. ZINKE, Secretary of the Interior,

Respondent.

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

REPLY BRIEF

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REPLY BRIEF

The Ninth Circuit's decision below eviscerates key statutory limits on the designation of "critical habitat" under the Endangered Species Act ("ESA"). Although the ESA strictly constrains critical habitat designations to "specific areas within the geographical area occupied by the species . . . on which are found those physical and biological features . . . essential to the conservation of the species," 16 U.S.C. § 1532(5)(A)(i), the Ninth Circuit's decision below renders this narrow definition meaningless, approving a vast designation because, in its view, "bears need room to roam." In the Ninth Circuit, the word "critical" is superfluous.

The U.S. Fish and Wildlife Service ("Service") has offered no legitimate justification as to why the Ninth Circuit's contrived "room to roam" standard does not present an issue of national importance warranting Supreme Court review. Instead, the Service tries to obfuscate the importance of this issue by dismissively labelling the Ninth Circuit's decision as "fact-bound" and claiming that Petitioners' objections are "policy arguments" about the size of critical habitat designations and reliant on "then-applicable" regulations. These arguments are meritless. The decision below is contrary to the plain language of the ESA and raises nationally important issues regarding express statutory limits on the Service's growing practice of setting aside huge tracts of land as "critical habitat." The Court should grant the petition.

A. The Service Offers No Reasonable Basis for Declining Review of This Nationally Important Issue.

It is difficult to overstate the precedential effect of the polar bear critical habitat designation. At 187,000

square miles, it was the largest-ever critical habitat designation. The polar bear is the Arctic's top predator and a rallying symbol for many environmental groups. And the location of the designation is central to nationally strategic energy needs and critical to Native peoples inhabiting the U.S. Arctic. It covers all the homelands of several Native communities, lands promised by Congress to States and Native groups under the Alaska Statehood Act and the Alaska Native Claims Settlement Act, the largest operating oil field in North America, and 10 of the nation's 50 largest discovered oil fields.

1. The Service marginalizes the importance of this case, asserting that Petitioners have only challenged Units 2 and 3, and "have identified no error in the scope of the Unit 1 designation" (sea-ice) which comprises nearly 96% of the designation, and thereby claims "references to the total size of the designation are irrelevant and misleading." Opposition Brief ("OB") 18. That is not true. Petitioners challenged the entire designation, and the district court vacated *the entire designation* because, *inter alia*, the "Final Rule's flaws go to the very heart of the ESA." Pet. App. 121a.

Moreover, this Petition focuses on Units 2 and 3 for sensible reasons. Units 2 and 3 (which by themselves are still larger than six states) are the principal areas where people live, work, and own property within the critical habitat designation. Units 2 and 3 contain all of the State, Native, and privately owned lands within the designation. Units 2 and 3 are also the areas where the absurdity of the Ninth Circuit's decision is in sharpest relief: the Ninth Circuit affirmed the designation of areas around industrial facilities, garbage dumps, airports, communities, and homes (from which bears are actively chased away) as "critical"

habitat that is purportedly free from "human disturbance" or otherwise "unobstructed." 75 Fed. Reg. 76,086, 76,133 (Dec. 7, 2010). These errors "go to the very heart of the ESA" (Pet. App. 121a) and are indicative of the cavalier nature of the Service's designation and the Ninth Circuit's exceedingly permissive review of critical habitat decisions.

2. The Service also marginalizes the designation's importance, claiming its massive area has *de minimis* economic impacts for those who live, work, and own property in and around the designation. OB 24-26. The Service contends that Petitioners have had multiple opportunities to "identify a specific project that would require greater mitigation because of the critical habitat designation" but "they have never done so." OB 25. This is also demonstrably false. The Declaration of Stephen G. Calder III (Pet. App. 98a-101a) provides a specific example showing how the polar bear critical habitat designation directly resulted in "increased incremental mitigation costs" of over $1 million for a *single* Army Corps Permit. Pet. App. 101a.

The Service's misguided refusal to even acknowledge this example (even though discussed in the Petition and provided in the Appendix) exemplifies the Service's attitude towards critical habitat designations. The Service designated huge portions of the nation's most strategic oil and gas reserves as critical habitat while simultaneously claiming that the *entire economic cost of these protections for the next 30 years will be a paltry $677,000*. Pet. App. 101a. The Service dismisses all industry estimates made *before* the critical habitat designation as "'layered assumptions,'" and now ignores uncontested evidence submitted *after* the

designation (confirming industry estimates) by claiming that such evidence was "never" provided. OB 25 (citation omitted). This head-in-the-sand approach is not credible. The polar bear critical habitat designation has had, and will continue to have, profound impacts for those who live and work in Alaska's Arctic.

3. The Service's argument that the Ninth Circuit's decision was "fact-bound," and therefore does not warrant review, also lacks merit. The district court decided that the Service "must determine that the area actually contains physical or biological features essential for the conservation of the species," that the determination must be supported by "substantial evidence in the record," and that the "agency cannot simply speculate as to the existence of such features." Pet. App. 83a. The Ninth Circuit reversed, holding that this is "a standard of specificity that the ESA does not require." Pet. App. 21a. Instead, the Ninth Circuit applied a "best available technology" standard (a standard in the Clean Air Act that appears nowhere in the ESA) and found sufficient specificity to support the listing based on the "unassailable fact that bears need room to roam." Pet. App. 21a, 28a.

This is not a fact-bound decision. The Ninth Circuit's newly crafted "standard of specificity" now applies to judicial review of all critical habitat designations within the broad geographic reach of that circuit. Whether the record *could* support the Service's critical habitat designation if the correct "standard of specificity" were applied (and the district found that it could not) is secondary to this threshold legal question.

Here, the Ninth Circuit effectively substituted required factual findings with *ipse dixit*: the "unassailable fact that bears need room to roam." Pet. App. 28a. In the Ninth Circuit's view, all that is needed to justify a

designation is that a bear can "move through" (roam) an area, or that bears are "allowed to exist" there. Pet. App. 29a. This conflates the *range* of a species or the areas *occupied* by a species with the habitat that is "critical" to a species' conservation. Just because a bear may travel through an area does not mean that the area has the specific features that are *essential* to polar bear conservation. Indeed, those features (unobstructed, undisturbed access) are absent from areas where bears are actively chased away with permissible deterrents such as loud horns, snowmobiles, firecrackers and non-lethal projectiles. Moreover, the Service never determined that the broader areas where polar bears "move through" or "roam" are essential, despite sweeping them into the designation.

4. The Ninth Circuit's new standard has national implications. For example, the monarch butterfly (currently under ESA listing review, 79 Fed. Reg. 78,775 (Dec. 31, 2014)) "moves through" all 48 states in long migration routes from Canada to Mexico. Monarch Watch, Migration & Tagging, http://monarchjointventure.org/images/uploads/documents/Monarch_Watch_Migration_Map.pdf (last visited Apr. 4, 2017). The butterfly is also "allowed to exist" in (or on) backyards, playgrounds, farms, sidewalks and rooftops. Under the Ninth Circuit's rationale, the Service will claim that virtually all of the lower 48 states is critical habitat for the butterfly (or other migratory species) simply because the butterfly may exist on or moves through these areas.

The Service is quick to point out that it excluded certain Native villages from the polar bear critical habitat designation. OB 9. But this only *confirms* the Service's backwards interpretation of the ESA. Rather than sensibly determining that the villages did

not meet the *definition* of critical habitat (because they lack features essential to the bear's conservation), the Service instead found that the villages themselves were "critical habitat" and then used its discretionary authority (under 16 U.S.C. § 1533(b)(2)) to exclude some of those areas from the designation. 75 Fed. Reg. at 76,098. This is a significant distinction because the Service believes, and the Ninth Circuit has held, that the discretionary decision not to exclude an area from a critical habitat designation under this provision *is beyond judicial review*. *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989-90 (9th Cir. 2015).

The Ninth Circuit has therefore left Native groups, States, and private landowners at the unreviewable mercy of the Service. Now, in the Ninth Circuit, if a species "move[s] through" a village, town, or industrial area, or is "allowed to exist" there, the area qualifies as "critical habitat." Pet. App. 29a. The burden then shifts to the property owner to request an exclusion under 16 U.S.C. § 1533(b)(2) from the designation, which the Service may deny for any reason or no reason at all, and any denial is unreviewable. *Bear Valley,* 790 F.3d at 990 ("[T]he statute cannot be read to say that the FWS is ever obligated to exclude habitat."). This toothless approach to review of critical habitat designations cannot be squared with the narrow definition of critical habitat provided by Congress in amending the ESA in 1978. *See* Pet. 8-12.

5. The Service's only discussion of the "room to roam" standard is relegated to a footnote arguing that the massive designation is justified because the average annual "active range" of a female polar bear is 92,500 square miles and that a "single bear used an area larger than the entire designation [(230,400 square miles)] *in a single year*." OB 17 & n.6 (emphasis added).

This is mathematical nonsense. A single bear cannot use 92,584 square miles (let alone 230,400 square miles) in a single year. For example, assume a bear could "use" an entire square mile merely by traveling a linear mile—the shortest distance through a square mile. In order to "use" 92,584 square miles, a bear would have to travel 253.65 miles *per day in a straight line for 365 consecutive days* (requiring an average speed of 10.56 miles per hour, 24 hours per day). To "use" 230,400 square miles in a single year, the bear would have to travel 631.2 miles per day in a straight line, requiring an average speed of 26.30 miles per hour for 24 hours (a velocity that far exceeds the polar bear's maximum short distance sprinting speed).

The Service's nonsensical numbers are not reflective of areas actually "used" by a polar bear or evidence that those massive areas possess the features *essential* to polar bear conservation, as required by the ESA. The Ninth Circuit's endorsement of this arbitrary (and mathematically absurd) rationale based on the "unassailable fact that bears need room to roam" gives the Service unchecked discretion to designate "critical habitat" anywhere the species may be found and renders the statutory definition meaningless.

6. The Service further downplays the need for this Court's review by arguing that there is no circuit conflict between the Ninth Circuit's decision here and the D.C. Circuit's decision in *Otay Mesa Property, L.P. v. United States Department of the Interior*, 646 F.3d 914 (2011). But Petitioners never claimed that there was a circuit split. Rather, Petitioners argued that Supreme Court review was urgently needed because (a) the designation will impair the use and development of strategically important national resources and State- and Native-owned lands, and (b) the Ninth

Circuit has adopted an overly permissive standard that results in critical habitat designations that are contrary to the plain language of the ESA. These are reasons enough to warrant review.

Moreover, the Service, again, misses the point. Petitioners cited *Otay* (and other cases outside the Ninth Circuit) to show how far the Ninth Circuit has departed from any meaningful judicial scrutiny of critical habitat designations. *See* Pet. 29-33. The Service does not dispute that challenges to critical habitat designations in Western states, such as the California designation at issue in *Otay*, are commonly filed in D.C. to avoid the Ninth Circuit's increasingly lax review of critical habitat designations. The Service does not dispute this central premise or that parties are actively engaged in forum shopping to avoid the Ninth Circuit's lax review of critical habitat designations. Instead, the Service argues that Supreme Court review is unneeded because Petitioners could have also forum-shopped their case by filing it in a district located 4,000 miles away from the critical habitat designation. Litigants should not have to engage in such behavior in order to obtain proper judicial review. The Service's argument only underscores the need for Supreme Court review.

B. The Ninth Circuit Decision Was Wrongly Decided.

The Service spends most of its briefing presenting a litany of carefully selected snippets from the record that supposedly support the Ninth Circuit's decision. However, the question presented is whether the lax standard applied by the Ninth Circuit is lawful as a threshold matter.

1. The Service cannot cure the fundamental errors in the Ninth Circuit's opinion. Areas where residents and workers are allowed to actively haze bears away using 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)) *cannot* provide the claimed essential features of "unobstructed, undisturbed access" or "the absence of disturbance from humans." Pet. App. 84a.

To attempt to justify the absurdity of designating areas where polar bears are indisputably disturbed on the basis that these same areas provide "undisturbed access," the Service argues that polar bears "use those areas" and that bears "exist in and routinely pass through those areas." OB 23-24. But this rationale just rephrases the Ninth Circuit's impermissible "room to roam" standard. The fact that bears *may* pass through an area does not mean that the area has the features *essential* to the bear's conservation—particularly when bears can be, and are, intentionally hazed out of the area.

2. Likewise, the Service repeats the Ninth Circuit's misguided criticism that the "district court failed to take into account, inter alia 'the radio-telemetry data tracking female bear movements'" and studies that "showed that polar bears move through all of unit 2." OB 21 (quoting Pet. App. 25a). The district reviewed those studies and concluded that "there is no way to know if ninety-nine percent of Unit 2 contains the essential features because there is no evidence in the record or cited by the Service that shows where such features are located." Pet. App. 88a. Studies showing where polar bears "move through" provide no evidence that those areas actually contain *essential features*.

This is especially true, the district court explained, when the essential feature is "unobstructed, undisturbed access" and the area that is designated is "rife with humans, human structures, and human activity." Pet. App. 86a.

3. The Service repeats another Ninth Circuit error by arguing that the district court must have misunderstood the record in holding that the Service only had evidence of the essential features in 1% of Unit 2. According to the Service, the denning habitat unit was not limited to habitat suitable for dens (approximately 1% of Unit 2), but also included access between den sites and the coast. OB 20. However, the district court plainly addressed all four features of denning habitat, *including* "'unobstructed, undisturbed access between den sites and the coast.'" Pet. App. 84a (citation omitted). The problem, the district court explained, is that "evidence is entirely lacking in support of the second and fourth features outlined by the Service, namely 'unobstructed, undisturbed access between den sites and the coast' and 'the absence of disturbance from humans . . . .'" Pet. App. 86a (citation omitted).[1] The Ninth Circuit overlooked these errors, deciding it was enough that the species could "move through" all of Unit 2 or otherwise needs "room to roam." This holding warrants review because it eviscerates the limiting definition of critical habitat.

[1] The Service also falsely asserts that only "'actual den sites'" make up 1% of Unit 2. OB 20 (citation omitted). The record clearly states that "*habitat suitable for*" den building (not just "actual den sites") makes up 1% of Unit 2. Pet. App. 32a (emphasis added).

C. The Changes to the Critical Habitat Regulations Do Not Affect the Issues on Appeal.

Lastly, the Service contends that review is unwarranted because the critical habitat designation relied on regulations (50 C.F.R. part 424) that have since been amended. This is a red herring.

1. The question presented here goes to the Ninth Circuit's lax standard for reviewing critical habitat designations and its incompatibility with the *statutory* definition of critical habitat. The prior regulations defined "critical habitat" exactly the same as the statute, and the new regulations delete the definition because "these terms are defined in the Act and the existing regulatory definitions do not add meaning to the terms." 79 Fed. Reg. 27,066, 27,068 (May 12, 2014). Neither these regulatory changes nor related litigation affect the issues on appeal.

2. The new regulations also do not inform the question of whether the Service properly designated only those "specific areas" that contain "essential features" because these are statutory requirements that are not addressed by the new regulations. Moreover, deletion of the term "primary constituent elements" in the new regulations has no bearing here because the Service's elimination of the phrase was "not intended to substantively alter anything about the designation of critical habitat, but to eliminate redundancy." 81 Fed. Reg. 7414, 7426 (Feb. 11, 2016). The Service's arguments provide no reason to deny certiorari.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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