No. 15-467

IN THE
Supreme Court of the United States

ALASKA,
Petitioner,
v.

ORGANIZED VILLAGE OF KAKE, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petition explains that the question presented is "whether the Ninth Circuit's decision contravenes the basic administrative law principle, established by this Court's decisions, that an executive agency may change the policies of a previous administration based on the new administration's different values and priorities, even though the relevant facts are unchanged." Pet. i. Respondents, like the court below, agree that a new administration may change existing policies. Here, however, the agency's factual findings *did* change. This case thus does not present the question posed by Petitioners, nor any other meriting the Court's review.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Organized Village of Kake, The Boat Company, Alaska Wilderness Recreation and Tourism Association, Sierra Club, Southeast Alaska Conservation Council, Natural Resources Defense Council, Tongass Conservation Society, Greenpeace, Inc., Wrangell Resource Council, Center for Biological Diversity, Defenders of Wildlife, and Cascadia Wildlands hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

BRIEF IN OPPOSITION

INTRODUCTION

Alaska's petition for a writ of certiorari presents a question on which the parties do not disagree. It asks whether "an executive agency may change the policies of a previous administration based on the new administration's different values and priorities, even though the relevant facts are unchanged." Pet. i. No one disputes—and the Ninth Circuit held—that the answer to that question is "yes." For that reason alone, the Court need not grant certiorari.

Equally significant, that question is not presented by this case because the agency's factual findings *did* change. The en banc court overturned the United States Department of Agriculture's 2003 decision, *see* Special Areas; Roadless Area Conservation, Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (Dec. 30, 2003) ("2003 Order"), because of that order's "direct, and entirely unexplained, contradiction" of the agency's prior factual findings. Pet. App. 26. In particular, as the en banc court explained, the Department's initial 2001 determination—*see* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) ("2001 Order")—had found that the Tongass National Forest should not be exempted from the "Roadless Rule" because that would "pose[] a high risk to the 'extraordinary ecological values of the Tongass.' " Pet. App. 26 (quoting 2001 Order at 3254). Two years later, the Department said, "in direct contradiction" to its 2001 finding, "that the Roadless Rule was 'unnecessary to maintain the roadless values.' " *Id*. at 25

Because USDA's decision rested on changed factual findings, the Ninth Circuit applied the settled rule of *FCC* v. *Fox Television Stations*, *Inc.*, 556 U.S. 502, 515 (2009). Under *Fox*, an agency changing position must always supply a reasoned explanation for the new policy, just as for the prior one. But if the "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must *also* "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id*. at 515. The Ninth Circuit found as a factual matter that USDA had made conflicting findings and failed to explain the change as *Fox* requires. That application of a settled standard to specific circumstances is precisely the kind of factbound dispute in which this Court routinely declines to intervene.

Nor is there a circuit split with *National Ass'n of Home Builders* v. *EPA*, 682 F.3d 1032 (D.C. Cir. 2012) for this Court to resolve. In that case, the D.C. Circuit applied the same legal standard at issue here, but found that the Environmental Protection Agency (EPA)—which had the benefit of *Fox* when it changed course—had adequately explained its policy change. *Id*. at 1038. Alaska's conflict claim ultimately rests on its mistaken view that the court below ruled that an agency may not change policy on account of a new administration's priorities, when the court actually concluded that the Department failed to explain a change predicated on new factual findings irreconcilable with prior ones.

In any event, this case lacks ongoing importance and is a poor vehicle for resolving the issues the Petition raises. Among other problems, a threshold standing issue that was not contested below would necessarily precede an inquiry into the merits. In addition, the

Roadless Rule remains under attack by Alaska in the D.C. District Court. *Alaska* v. *U.S. Dep't of Agric.*, 772 F.3d 899 (D.C. Cir. 2014). If Alaska prevails there, a decision in this case would have no practical effect. Finally, Petitioner and its amici are mistaken in their dire speculation about future community impacts from application of the Roadless Rule in Southeast Alaska.

COUNTERSTATEMENT

1. The Tongass National Forest is by far the nation's largest at nearly 17 million acres, and it plays an outsized role in the daily lives of many Alaskans. Numerous industries and uses—from tourism, hunting, fishing, and recreation to timber extraction and mining—benefit from the Tongass's wealth of natural resources. Pet. App. 5 n.1. So does the global environment; the Tongass alone contains one fourth of the world's coastal temperate rainforests. *Id.* The Tongass's economic and environmental benefits flow in large part from its many roadless areas, which protect both the "high degree of overall ecosystem health" and the natural resources that make tourism, recreation, hunting, and fishing in the area so attractive. C.A. Supp. E.R. 140, 141-143. Preserving roadless areas in the Tongass offers "the rare opportunity" to maintain the natural, social, and economic value of a "unique, and largely intact ecosystem." *Id.* at 160.

2. For more than 40 years, USDA has grappled with whether and how to allow development in largely pristine, road-free portions of national forests. In 1972, the Department initiated the Roadless Area Review and Evaluation (RARE) and, subsequently, RARE II, which resulted in an inventory of roadless areas. *Id.*

at 78. After a number of additional inventories, many years of further study, and an exhaustive public process, *Wyoming* v. *U.S. Dep't of Agric.*, 661 F.3d 1209, 1224-26 (10th Cir. 2011), the Department adopted the "Roadless Rule" in 2001. 2001 Order at 3244.[1]

The Rule, adopted on approximately 58.5 million acres, generally prohibits, with some exceptions, logging, roadbuilding, and road reconstruction in inventoried roadless areas of national forests. *Id.* at 3245. It was designed to reduce cost, conflict, and litigation surrounding roadless area management, Pet. App. 147-148, an $8.4 billion backlog in forest road maintenance, damage to drinking water sources, and continuing erosion of environmental and cultural values. 2001 Order at 3245.

USDA included in the rule a series of exceptions, including carve-outs for public highways ("Federal Aid Highways"), emergency response, public safety, extension or renewal of mineral leases, effectuation of legal rights (including access for mineral exploration and development, *see* C.A. Supp. E.R. 138-139), and resource remediation, as well as tree cutting to improve habitat, abate wildfire risk, or where incidental to other activities. 2001 Order at 3272-3273. The Roadless Rule does not prohibit development generally. For example, it does not prohibit electric transmission lines, pipelines, mines, hydroelectric dams, visitor facilities, or motor vehicle use.

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[1] The current edition of the Code of Federal Regulations does not contain the Roadless Rule. Instead, it contains a 2005 rule that has been struck down. *See infra* at 6. This brief cites to the currently applicable Rule as printed originally in the Federal Register.

Throughout the rulemaking process, the Department focused particular attention on the Tongass, which, despite having a million and a half roaded acres, C.A. Supp. E.R. 167, remains largely roadless and undeveloped. USDA considered a number of options for the Tongass, including exempting the area or deferring a decision on whether the Roadless Rule should apply. As part of that inquiry, the Department prepared an environmental impact statement. Completed in 2000, that study concluded that, owing to conditions specific to Southeast Alaska, "inventoried roadless areas may be critical in maintaining ecosystem health," and loss of roadless conditions "may pose a high risk to species existence and persistence." C.A. Supp. E.R. 141. By contrast, applying the rule, the study found, would "maintain the wild nature of many inventoried roadless areas but would also sharply reduce timber harvest, eventually resulting in the loss of roughly 900 jobs in the region." Pet. at 8.

The Department applied the Roadless Rule to the Tongass as soon as it became effective, but it included a provision not considered in the study, grandfathering Tongass timber sales for which draft environmental impact statements had already been published. C.A. E.R. 97-98. That provision mitigated any initial economic impact on the state by making a pool of 851 million board feet of timber available for logging—enough to satisfy seven years of then-predicted demand. *Id.* at 98.

The Roadless Rule has been subject to extensive litigation, none of which has ultimately invalidated it. The Rule was adopted in 2001, but first went into effect in April 2003, when the Ninth Circuit lifted an Idaho district court's preliminary injunction. *See California ex rel. Lockyer* v. *U.S. Dep't of Agric.*, 575 F.3d

999, 1007 (9th Cir. 2009). Four months later, the Rule was permanently enjoined by a Wyoming district court. *Wyoming* v. *U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003). That ruling was in turn vacated as moot by the Tenth Circuit in 2005, after USDA repealed and replaced the Roadless Rule. *Wyoming* v. *U.S. Dep't of Agric.,* 414 F.3d 1207, 1211, 1214 (10th Cir. 2005). A federal court in California then struck down the attempted repeal and reinstated the Rule in 2006. *California ex rel. Lockyer* v. *U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 909, 912, 919 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009). In 2008, a Wyoming district court again permanently enjoined the Roadless Rule, *Wyoming* v. *U.S. Dep't of Agric.*, 570 F. Supp. 2d 1309, 1355 (D. Wyo. 2008), but the Tenth Circuit reversed in 2011, on the merits. *Wyoming* v. *U.S. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011). The second Wyoming injunction, while it was in force, was inconsistent with one in *Lockyer* requiring the Forest Service to comply with the Roadless Rule in the Ninth Circuit and New Mexico. *California ex rel. Lockyer* v. *U.S. Dep't of Agric.*, 710 F. Supp. 2d 916 (N.D. Cal. 2008). In sum, then, the Roadless Rule was enjoined from 2001 into 2003, then again from 2003 to 2005, replaced from 2005 to 2006, and then enjoined yet again (subject to an inconsistent order in the Ninth Circuit and New Mexico) from 2008 to 2011—while during the intervening years and after 2011 it was in force.

3. While these lawsuits were pending, USDA, under new leadership, changed course on application of the Roadless Rule to the Tongass. In settling a case brought by the State of Alaska and the Alaska Forest Association, the Department agreed to request public

comment on whether to exempt the Tongass and another national forest in Alaska from the Rule permanently. Pet. App. 114, 161. The agreement also committed the Department to publish a proposed rule that, if adopted, would temporarily exempt the Tongass, pending completion of the permanent rulemaking. *Id*. The settlement agreement required USDA to move forward "in a timely manner," Pet. App. 114, but not to adopt any particular interim or final rule. *Id.*; Pet. App. 164.

USDA proceeded to propose and then adopt the 2003 temporary Exemption. Pet. App. 160. The Department stressed that doing so "in the short term does not foreclose options regarding the future rulemaking associated with the permanent statewide consideration of these issues." Pet. App. 170. Instead of conducting a new environmental impact study, USDA relied on its 2000 study and on a supplemental information report that found that there were no new facts or circumstances that would require a revision to the 2000 study. C.A. Supp. E.R. 213-231.

USDA offered three principal reasons for adopting the temporary Exemption. First, the Department concluded that timber-related jobs "could be lost in the long run" if the Roadless Rule were applied. Pet. App. 165. Second, USDA decided that the rule "significantly limits the ability of communities to develop road and utility connections." *Id.* (internal quotation marks omitted). Third, the agency cited the need to resolve "uncertainty" and "conflicts" resulting from litigation over the Rule. Pet. App. 169, 171.

USDA never proposed a permanent Tongass or Alaska-specific rule, but it later attempted to repeal the Roadless Rule in its entirety. That repeal was

stuck down by a federal court, which reinstated the Roadless Rule as it stood at the time of the repeal, including the Tongass Exemption. *California ex rel. Lockyer*, 459 F. Supp. 2d at 916-917. Thus, the 2003 "temporary" Exemption remained in effect six years after its adoption.

4. At that point, with no movement by USDA toward a permanent Tongass rule, a coalition of an Alaska Native tribal government (the Organized Village of Kake), tourism businesses, and conservation groups brought this lawsuit. It challenged the temporary Exemption as arbitrary under the Administrative Procedure Act (APA) and inconsistent with the National Environmental Policy Act (NEPA). Pet. App. 12. The State of Alaska intervened in support of the Department. *Id.*

The District Court ultimately granted summary judgment in favor of Kake, vacating the Exemption and reinstating the Roadless Rule in the Tongass. The court found that USDA's rationale violated the APA because "the Forest Service provided no reasoned explanation as to why the Tongass Forest Plan protections it found deficient in [2001], were deemed sufficient in [2003]." Pet. App. 138. It held that "the Forest Service's proffer that temporarily exempting the Tongass from the Roadless Rule was necessary to prevent significant job losses runs counter to the evidence," Pet. App. 132, and that claimed interference with roads and utility connections was equally unsupported by any record evidence. Pet. App. 134-135. It also rejected the assertion that a temporary rule would provide legal certainty. Pet. App. 140. The District Court did not reach the NEPA claim. *See* Pet. App. 145.

The Department accepted the District Court's decision, but Alaska decided to appeal on its own. Pet. App. 13. A divided three-judge panel of the Ninth Circuit reversed, finding that the Department had properly acknowledged that it was changing course and supplied the required reasoned explanation—decreasing the socioeconomic costs for Tongass communities, increasing the availability of timber, and ending litigation. *Id*. at 3, 13. Kake then petitioned for rehearing en banc, and a divided en banc court agreed with the District Court that the justifications offered by USDA were inadequate under the APA. Pet. App. 3. The en banc court split not only on the merits of the APA claim, but also on the threshold question whether the appeal was properly before the courts once USDA had declined to participate.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT OF AUTHORITY FOR THIS COURT TO RESOLVE.

Alaska has provided none of the "compelling reasons" certiorari requires: there is no conflict with this Court's decisions, no conflict among the circuits, and no overriding need for clarity on an important legal standard. *See* S. Ct. R. 10. The petition should be denied.

A. The Parties and the Ninth Circuit All Agree on the Applicable Legal Standard.

1. There is no disagreement—among either the members of the en banc panel or the courts of appeals—about the legal standard applicable here. Under *Fox*, an agency changing position must: (1) acknowledge the change; (2) provide a reasoned explanation for it, and (3) *also* supply a "more detailed

justification than what would suffice for a policy created on a blank slate," *Fox*, 556 U.S. at 515, if the "new policy rests upon factual findings that contradict those which underlay [the] prior policy." Pet. App. 21 (quoting *Fox*, 556 U.S. at 515-516) (internal quotation marks omitted); Pet. 2. There is no need for this Court to clarify these well-established requirements.

Against that backdrop of consensus, Alaska tries to create uncertainty where none exists. Specifically, Alaska misreads the en banc decision to suggest that the court of appeals held that a new administration cannot change policy based on different values and priorities. Pet. i. But the Ninth Circuit plainly did *not* so hold. In fact, the en banc decision squarely affirms agencies' ability to change policy based on a new administration's different values and priorities. Pet. App. 24-25.

Alaska acknowledges, as it must, that *Fox* unambiguously requires a "more detailed justification" when a policy change rests on a new factual conclusion contradicting an earlier finding. Pet. 19. The Ninth Circuit identified and applied that standard to USDA statements that the court held to be new factual conclusions rather than "differing judgments about the appropriate balance between environmental and socio-economic interests." *Id.*; *see* Pet. App. 25 (en banc majority holding that the 2003 record of decision (ROD) "made factual findings directly contrary to the 2001 ROD and expressly relied on those findings to justify the policy change").

2. The record supports the Ninth Circuit's finding that the Department's reversal on the Tongass Exemption rests on facts contrary to earlier agency findings. When USDA reversed position in 2003, it did

much more than merely express different policy priorities. As the en banc court recognized, the Department balanced the costs and benefits of the Rule on the basis of factual findings entirely at odds with its earlier conclusions. In 2001, for example, USDA concluded that "[a]llowing road construction and reconstruction on the Tongass National Forest to continue unabated would risk the loss of important roadless area values." 2001 Order at 3254; *see also* C.A. Supp. E.R. 141 (loss of Tongass roadless conditions "may pose a high risk to species existence"). In 2003, in contrast, USDA found that "[a]pplication of the roadless rule to the Tongass is unnecessary to maintain the roadless values of these areas." 2003 Order at 75,137. These unexplained conflicting predictions about the factual consequences of the choices the agency made are what the Ninth Circuit focused on first and foremost. *See* Pet. App. 3.

3. While the Ninth Circuit was *correct* that USDA based its policy change on new factual findings, that is not the critical point here. Certiorari should be denied because the en banc court *found as a factual matter* based on the evidentiary record that that was what USDA did, and applied the standard indisputably applicable to contradictory factual findings. Alaska's real quarrel is with the en banc court's characterization of the record in this specific case, and not the choice of a legal standard. *See, e.g.*, Pet. 4 (arguing that the Ninth Circuit treated policy judgments as factual findings). But reexamining the Ninth Circuit's reading of the agency decision as involving new factual findings is precisely the kind of evidentiary and fact-based review in which this Court declines to engage. *See, e.g.*, S. Ct. R. 10; *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

Alaska tries to create larger significance where there is none, by alleging that the Ninth Circuit's reading "set a nearly impossible bar for an agency to clear." Pet. App. 4. In fact, all the en banc decision required was that USDA provide a reasoned explanation for disregarding prior conflicting factual determinations. Pet. App. 26. Far from setting an impossible bar, it simply followed *Fox*.

4. Moreover, the record shows that USDA relied on other factual contradictions also requiring an explanation under *Fox* that the Ninth Circuit did not reach. Thus, both of USDA's socioeconomic rationales contradicted prior findings. In the 2001 ROD, the Department permanently exempted from the Roadless Rule Tongass timber sales on which planning had begun, creating a reliable timber supply the agency found would satisfy then-projected market demand for seven years. Pet. App. 152. In 2003, however, USDA asserted that Alaska would suffer the "potential loss of approximately 900 jobs" due to reduced logging if the Roadless Rule applied to the Tongass, citing the earlier 2000 environmental impact study. Pet. App. 189. In so doing, it ignored and contradicted its 2001 finding predicting that market demand would be met for many years and instead found that the purely interim Tongass Exemption had "utility in temporarily preventing socioeconomic dislocation in Southeast Alaska * * * regardless of whether the agency ultimately decides to exempt both [Alaska] national forests from the prohibitions of the roadless rule on a permanent basis." Pet. App. 198. The district court held the Exemption arbitrary on these grounds. *See* Pet. App. 129-131; *see also* Pet. App. 100-101 (three-judge panel, McKeown, J., dissenting). In fact, by the time the agency made its contradictory finding in 2003, it

was clear that the grandfathered supply would fully meet demand far longer, since demand had drastically declined starting in 2001. *See* Pet. App. 185. As the district judge noted, in 2003 the agency offered 71 million board feet for sale, but found purchasers for only 25 million. *Id.* at 132.

Likewise, in 2003, USDA found that the Rule would significantly restrict communities from building road and utility connections, Pet. App. 165, which it found were "closely linked" to their economic development potential, Pet. App. 177, and "may be critical to economic survival of many of the smaller communities." Pet. App. 195. That finding contradicted the Department's earlier conclusion that none of the transportation routes proposed in the forest plan "received serious local or State support," C.A. Supp. E.R. 157, and that "only a couple of proposed [utility] corridors in western states may be affected." C.A. Supp. E.R. 136. Indeed, an agency analysis found in December of 2000 that any major transportation routes would almost certainly be Federal Aid Highways allowed under the Roadless Rule, and that most remaining isolated communities were unlikely ever to have road connection proposals in any event. C.A. Supp. E.R. 168; *see also* C.A. Supp. E.R. 100. It also found that Tongass utility connectors were designed without roads for economic reasons. C.A. Supp. E.R. 168. But the Department's 2003 decision did not discuss these findings or identify any proposed road or utility corridor, let alone such a proposal that could actually be blocked by the Roadless Rule, either during an interim exemption or even over the longer term. *See* Pet. App. 132-135 (district court decision), 102-103 (three-judge panel, McKeown, J., dissenting).

B. There Is No Conflict with the D.C. Circuit.

In its search for a conflict for this Court to resolve, Alaska clings to a single D.C. Circuit case, *National Ass'n of Home Builders* v. *EPA*, 682 F.3d 1032 (D.C. Cir. 2012) ("*Home Builders*"). Pet. 22. Alaska contends that this Court should intervene *not* because the two courts of appeals applied different legal standards, but because "the D.C. Circuit rejected the invitation to conflate policy judgments with facts the way the Ninth Circuit did here." Pet. 23. This misrepresents the Ninth Circuit decision and does not create a circuit split.[2]

In *Home Builders*, the D.C. Circuit considered a policy change implemented by EPA. 682 F.3d at 1034. In 2008, EPA adopted a rule governing lead paint hazards arising during renovation and remodeling activities. *Id.* Those hazards were found to be particularly harmful to pregnant women and children, and the rule included an "opt-out" provision that "exempted owner-occupied housing from the rule's requirements if the homeowner certified that no pregnant women or young children lived there." *Id.* EPA later eliminated that exemption when it amended the rule in 2010. *Id.*

Trade associations sued, arguing among other things that EPA's decision to remove the opt-out provision was arbitrary and capricious in violation of the APA. *Id.* The D.C. Circuit acknowledged the *Fox* standard that "an agency changing course is sometimes obligated to 'provide a more detailed justification than what would suffice for a new policy created

[2] The Ninth Circuit certainly saw no split. The en banc court approvingly cited *Home Builders* and found no conflicting legal principle. Pet. App. 25.

on a blank slate * * * when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy.' " *Id.* at 1037 (quoting *Fox*, 556 U.S. at 515). But the D.C. Circuit found that holding inapplicable to the trade associations' claims because the petitioners could not "point to any new findings, let alone contradictory ones, upon which EPA relied." *Id.* at 1037-1038 (internal quotation and citation omitted). Instead, the policy change was justified by "a reevaluation of which policy would be better in light of the facts"—and such reevaluation was "well within [EPA's] discretion." *Id.*

This case is completely different. Again, when USDA began developing the Roadless Rule in 2001, it outlined certain "roadless values" that needed the Rule's protection. The Department then examined economic and environmental data to make predictions about how those values would be affected by the construction of new roads. Those projections about future conditions were factual conclusions. *See* Pet. App. 25. Two years later, the Department said "in direct contradiction" to its 2001 finding "that the Roadless Rule was 'unnecessary to maintain the roadless values.' " *Id.* (citing 2003 Order at 75,137). The Ninth Circuit overturned the Department's 2003 decision because of this "direct, and entirely unexplained, contradiction" of the agency's prior factual findings. *Id.* at 26.

In short, then, the Ninth Circuit found in this case that the Department changed its view of the facts, while, again, the D.C. Circuit expressly held in *Home Builders* that the petitioners could not "point to any new findings, let alone contradictory ones, upon which EPA relied." Accordingly, any divergence between the cases stems from the courts' interpretations of the very different agency decisions before them, not from

any legal disagreement. And, of course, even if one court of appeals or the other erred in its view of the facts of the cases, this Court "rarely" grants certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10.

II. THIS CASE LACKS CONTINUING NATIONWIDE IMPORTANCE.

A. Resolving the Question Presented Here Would Not Advance the State of the Law.

During the years since the Department's decision at issue in this case, this Court has provided clear guidance to administrative agencies that makes similar questions unlikely to arise in the future. Specifically, the changes to the Tongass Exemption at issue here date back to 2003, before the Court's pivotal *Fox* decision. As discussed above, that case has made clear what agencies must do when shifting policies in reliance on changed factual findings.

In *Fox*, this Court considered whether the Federal Communications Commission (FCC) improperly changed its policy to ban "fleeting expletives." The majority found that the FCC had complied with the APA by displaying awareness of the change, expressly disavowing its prior rulings, and offering "good reasons for the new policy." *Fox*, 556 U.S. at 515. While not all regulatory changes require "a more detailed justification than what would suffice for a new policy created on a blank slate," the Court clearly instructed regulators that they must provide additional justification when the "new policy rests upon factual findings that contradict those which underlay [the] prior policy." *Id.*

There is no evidence that agencies are failing to apply *Fox* faithfully. To the contrary, for example, the FCC's recent policy shift in its regulatory categorization of broadband Internet access services was accompanied by an express acknowledgement of the *Fox* requirements. *See Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601, 5745 ¶ 335 (2015) (finding "changed factual circumstances" and setting forth justifications for reexamining the Commission's prior classification). In that proceeding, after acknowledging the change in policy, the agency satisfied *Fox* by providing detailed reasoning in support of the new rules and specifically describing the relevant factual changes, including evidence about how the market for broadband services and consumer expectations had changed during the years prior to the FCC's policy shift. Other agencies have similarly acknowledged *Fox*'s requirement. *See, e.g.*, *City of Las Vegas, Nevada et al.*, 184 I.B.L.A. 13 (2013) (Department of the Interior, Interior Board of Land Appeals); Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 77 Fed. Reg. 29,875-02 (May 21, 2012) (International Trade Administration).

Even if agencies or courts were misconstruing *Fox*—and there is no evidence that they are—this case would offer a poor vehicle for corrective instruction. An appropriate case to review would be one in which the agency applied *Fox*. Today, more than six years after *Fox* was decided, awareness of that decision within federal agencies makes it unlikely that circumstances akin to those in the pre-*Fox* agency action at issue here would arise again.

B. Intervening Events Have Blunted the Real-World Impact of the Ninth Circuit's Decision.

1. According to Alaska, certiorari is warranted because application of the Roadless Rule to the Tongass will harm smaller communities in the region. Pet. 24. Using the Department's 2003 projections, which contradicted without explanation the Department's factual findings from 2001, Alaska paints a dire picture of lost jobs and communities cut off from utility connections and their neighbors if the Ninth Circuit's decision stands. *Id.* at 25. (For other harms, like the slowing of the development of alternative energy options, *id.*, Alaska offers nothing but pure speculation.) Even if the 2003 conclusions were reconcilable with the record, Alaska's arguments about the importance of review in this case must square with facts on the ground today. Those facts undermine the state's arguments that there is a practical need for review.

Real-world experience with the Roadless Rule demonstrates that Alaska's concerns are overblown. The reduced demand for Tongass timber over the 15 years since the Roadless Rule was adopted makes clear that continued application of the Rule will not cause any job losses. Alaska's claim of 900 jobs lost is a November 2000 estimate, Pet. App. 165, which in turn was based on a 1997 projection that the annual market demand for Tongass timber would be 124 million board-feet (mmbf). Pet. App. 184. USDA expected job losses due to the fact that it would be feasible to log only 50 mmbf per year under the Roadless Rule. Pet. App. 183-184; *see* Pet. 16. Since 1997, though, the demand for Tongass timber has plummeted, with an average cut of only 36 mmbf from 2002-2014. *See* Tongass Land and Resource Management Plan, Draft

EIS, Nov. 2015, at 3-304.[3] Recently, the Forest Service published a proposed forest plan estimating market demand of 46 mmbf per year for the next 15 years for each of the alternatives. *See id.* at 2-9. This is within the 50 mmbf available under the Roadless Rule, with the result that continued application of the Rule will not cause any predictable job losses.

Nor will the Roadless Rule plausibly impede community road access, renewable energy, or other economic development, as evidenced by the fact that neither Alaska nor amici, despite lengthy speculation, can identify even one actual example of a blocked project to support their claims. As discussed above, the Roadless Rule prohibits only timber harvest and roads, not other development, and contains numerous exceptions even to the two general prohibitions. *See supra* at 4. Any future major road connections are all but certain to be Federal Aid Highways allowed under the Roadless Rule, and most of the remaining unconnected communities "are so isolated that roaded access is unlikely to be proposed." C.A. Supp. E.R. 168. Statutorily required reasonable access for mining may include temporary or permanent roads, and that is allowed under an exception to the Rule. C.A. Supp. E.R. 138-139. Nor is there much evidence that the Roadless Rule will impede power lines to new hydro facilities. In adopting the Rule, the Forest Service looked at existing power lines in Southeast Alaska and found not one that was built with new roads. C.A. Supp. E.R. 168. The other harms postulated by amici City of Craig, *et al.*, are either derived from these misplaced concerns or simply unsupported speculation.

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[3] *Available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd480660.pdf.

2. In any event, recently proposed administrative changes make clear that there is little chance the Forest Service would resume timber sales or their associated roads in Tongass roadless areas regardless of the fate of the Roadless Rule or of this case. The Exemption was never intended to be permanent. Even before the district court reinstated the Rule in this case, USDA announced its intent to "transition[] quickly away from timber harvesting in roadless areas" in the Tongass. USDA News Release No. 0288.10 (May 26, 2010).[4] Subsequently, USDA assembled an advisory committee consisting of representatives of the State of Alaska, the timber industry, local communities, conservation groups, and others that published a consensus report recommending no further logging—old growth or young growth—in roadless areas. *See* Tongass Advisory Committee, Draft Recommendations at 6, 12 (May 2015).[5] Thereafter, the Forest Service published a draft EIS for an amendment to the Tongass forest plan, the preferred alternative for which would implement the advisory committee's recommendations and preclude logging in roadless areas irrespective of the outcome of litigation. *See* Tongass Land and Resource Management Plan, Draft EIS, November 2015, at 2-31.[6]

In short, a broad consensus exists in Southeast Alaska that roadless-area logging is a thing of the

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[4] *Available at* www.usda.gov/wps/portal/usda/usdamediafb?contentid=2010/05/0288.xml.

[5] *Available at* www.merid.org/~/media/Files/Projects/tongass/TAC%20Recommendations%20Final%20Report-formatted.pdf.

[6] *Available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd480660.pdf.

past, and USDA is taking measures to implement that consensus. This Court's review of an Exemption adopted 12 years ago, temporarily altering a rule adopted 15 years ago, would not change that fact.

C. The Ninth Circuit's Application of the Well-Settled *Fox* Standard to this Case Does Not Endanger the Separation of Powers.

Although the executive branch itself opted not to participate below, Alaska invokes the specter of a presidency held hostage by overbearing courts that block "purely value-based" regulatory change. Pet. 27. Alaska recites familiar principles requiring the judicial branch to defer to the policy choices of the political branches. Pet. 26. It argues that the Ninth Circuit, in defiance of those principles, refused to let USDA "change course for the sole reason that it has different values and priorities than the previous administration" "without being second-guessed by the judiciary." *Id.*

Alaska's purported concern rests on a fundamental misreading of the en banc decision. Though Alaska has strained to characterize this case as one about the consequences of elections for agencies, no version of that question is implicated here. The Ninth Circuit, noting that "[e]lections have policy consequences," was unequivocal that "the Department was entitled in 2003 to give more weight to socioeconomic concerns than it had in 2001." Pet. App. 24-25. Because it determined that the record showed USDA advanced justifications for the change that contradicted its earlier factual findings, it applied the *Fox* standard and found the decision lacked the thus-necessary explanation. That factbound application of a settled standard

to the Department's particular justifications here neither impinges on the Executive Branch's prerogatives nor presents any occasion for certiorari review.

Alaska's invocation of separation-of-powers concerns rings particularly hollow here, where the Executive Branch has acquiesced in the judgment and is pursuing policies consistent with it. The state is attempting to substitute its own policy objectives through judicial avenues rather than an available administrative remedy. Other states have successfully sought state-specific permanent amendments of the Roadless Rule from both the Bush and the Obama administrations. *See* Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61,456 (Oct. 16, 2008); Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 77 Fed. Reg. 39,576 (July 3, 2012).

III. THIS CASE IS A POOR VEHICLE FOR THE QUESTION PRESENTED.

A. Standing Issues Present an Obstacle to Reaching the Merits of Alaska's Claims.

As discussed above, the "Question Presented" advanced by Alaska is not presented by this case at all—it revolves around a potential explanation for USDA's change in course that USDA itself failed to offer. But even if that question *were* presented here, this case would represent a poor vehicle by which to reach it. This Court will have to resolve a significant constitutional standing question before turning to the merits of the case. *See Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013) (explaining that constitutional

standing requirements "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance"). USDA declined to appeal the district court's decision. Alaska, which had joined the case as an intervenor, sought review in the court of appeals on its own.

Intervenors are, of course, parties entitled to seek review even when the party they support declines to proceed. *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986). But they still must demonstrate that their participation meets the requirements of Article III: "injury in fact," causation, and redressability. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). Because "Alaska has not lost any revenue or even alleged that it will receive less money from the federal government" because of the Tongass Exemption, Pet. App. 34, there are serious questions about whether the Ninth Circuit should have heard Alaska's appeal at all.

While Alaska makes only a passing footnote reference to its standing difficulties, Pet. 16 n. 4, the Article III inquiry formed an important part of the Ninth Circuit's analysis, even though the issue had never been fully briefed. *See* Pet. App. 13 (explaining that Kake did not challenge Alaska's standing). Indeed, the en banc court split on the question. In support of its standing claim, Alaska asserted three interests that had been injured by the Roadless Rule: an interest in the income stream awarded to the state by statute under the National Forest Receipts Program; a procedural interest in the USDA proceedings stemming from a settlement agreement in prior litigation; and a *parens patriae* interest in jobs for Alaskans created by the timber industries.

The majority concluded that applying the Roadless Rule to the Tongass would injure the state by limiting timbering and reducing Alaska's statutory entitlement to fractional receipts under the National Forest Receipts program. Pet. App. 18-19. Judge Callahan dissented from the ruling, concluding that even if Congress had intended the National Forest Receipts program to confer on Alaska a statutory right to some revenue, that right had not actually been invaded by the Tongass Exemption. Pet. App. 39-40.

The record makes clear that Alaska has never suffered any actual loss of timber receipts—because it elected to receive far greater payments through an alternative mechanism—and several things would have to happen before Alaska would suffer an actual loss. First, Congress would have to decline to reauthorize the Secure Rural Schools and Community Self-Determination Act, contrary to its consistent practice since 2000. Pet. App. 19 n.9. Second, the demand for timber in the Tongass would have to grow to a long-term level that could not be met under the Roadless Rule, contrary to experience over the last 15 years and to the Department's current projections. *See supra* at 12. Then, the Forest Service would have to have both the funding (with the added expense of building costly new roads) and the willingness to offer timber sales in roadless areas, contrary to the current regional consensus and management direction. *See supra* at 20. As a result, the dissenting opinion found too much conjecture to constitute an imminent injury. Pet. App. 46.

Alaska's other asserted grounds for standing, not addressed by the Ninth Circuit majority, are also problematic. Its reliance on a settlement agreement from a prior lawsuit suffers from the fact that Alaska

alleges no violation of that agreement—USDA has implemented it fully. Pet. App. 47, 141-142. Nor is it clear that Alaska may claim *parens patriae* standing based on its residents' interests in timber jobs, since the federal government is the principal defendant in this case. "[I]t is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Alfred L. Snapp & Son* v. *Puerto Rico, ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (quoting *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)); *see* Pet. App. 47-49.

Whatever the merits of its standing analysis, the dissent's doubts about Alaska's role in the case present a significant prudential barrier to certiorari. Before resolving the question presented, the Court would be obliged to wade into a thorny analysis that was never fully briefed below and that has not been scrutinized by other courts of appeals. The standing question is simply not in a posture appropriate for this Court's review, and the Court should therefore on those grounds also deny the petition.

B. Alaska's Challenge to the Entire Roadless Rule Remains Under Consideration in the Federal Courts.

On account of pending litigation, this case could lose any practical significance. In 2011, the State of Alaska filed a complaint for declaratory and injunctive relief against the USDA and the Forest Service on the grounds that applying the Roadless Rule to the Tongass and the Chugach National Forests would violate the Alaska National Interest Lands Conservation Act, the Tongass Timber Reform Act, the Wilderness Act,

the National Forest Management Act, the National Environment Policy Act, the Multiple-Use Sustained-Yield Act, the Organic Administration Act, and the APA. *See* Complaint for Declaratory and Injunctive Relief at 2, 21-32, *Alaska* v. *U.S. Dep't of Agric.*, 932 F. Supp. 2d. 30, No. 11-1122 (D.D.C. June 17, 2011). In March 2013, the District Court for the District of Columbia granted the federal defendants' Motion to Dismiss for lack of subject-matter jurisdiction. *See Alaska* v. *U.S. Dep't of Agric.*, 932 F. Supp. 2d. 30 (D.D.C. 2013). Alaska appealed.

In 2014, the D.C. Circuit revived the State of Alaska's challenge to the entire Roadless Rule on APA and other grounds in *Alaska* v. *U.S. Dep't of Agric.*, 772 F.3d 899, 900 (D.C. Cir. 2014). Without commenting on the merits of Alaska's case, the D.C. Circuit reversed the district court's decision to dismiss the case as untimely.

That case thus continues to be litigated in the district court, which has before it pending cross-motions for summary judgment. Alaska's success in that challenge would vacate the entire Roadless Rule, depriving any decision on the Tongass Exemption of practical effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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