No. 15-467

In the Supreme Court of the United States

STATE OF ALASKA, PETITIONER

v.

ORGANIZED VILLAGE OF KAKE, ALASKA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Department of Agriculture's reversal of a decision not to exempt the Tongass National Forest from the "Roadless Rule" was unsupported by the administrative record and therefore invalid under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-68) is reported at 795 F.3d 956. The opinion of the court of appeals panel (Pet. App. 69-105) is reported at 746 F.3d 970. The opinion of the district court (Pet. App. 106-145) is reported at 776 F. Supp. 2d 960.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2015. The petition for a writ of certiorari was filed on October 12, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 2001, the United States Department of Agriculture (USDA) promulgated the Roadless Area Conservation Rule (Roadless Rule or Rule). See 66 Fed. Reg. 3244 (Jan. 12, 2001); 36 C.F.R. 294.10-294.14 (2001). With certain exceptions, the Roadless Rule prohibits road construction, road reconstruction,

and timber harvesting in "Inventoried Roadless Areas" (Roadless Areas) on National Forest System lands. In promulgating the Rule, USDA specifically considered whether the Rule should apply to the Tongass National Forest (the Tongass) in Southeast Alaska. 66 Fed. Reg. at 3254-3255, 3266-3267. As explained in more detail below, after initially deciding in 2001 to exempt the Tongass only to a limited extent, USDA later decided in 2003 to exempt the Tongass entirely from the Roadless Rule. This litigation concerns that change in position.

1. The National Forest System (NFS) includes more than 190 million acres of land throughout the United States. 76 Fed. Reg. 8480 (Feb. 14, 2011). Roadless Areas comprise approximately 30% of that land (approximately 58.5 million acres). 66 Fed. Reg. at 3245. Numerous statutes govern USDA's management (through the United States Forest Service) of National Forests, including: the Organic Administration Act of 1897 (Organic Act), 16 U.S.C. 551; the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. 528 *et seq.*; the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*; the Wilderness Act of 1964, 16 U.S.C. 1131 *et seq.*; and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* The Organic Act, MUSYA, and NFMA (among other statutes) authorize USDA to administer the NFS. The Organic Act grants USDA broad authority to "make such rules and regulations * * * as will insure the objects of [national forest] reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. 551. MUSYA declares that National Forests "are established and shall be administered for

outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. 528. MUSYA also authorizes USDA "to develop and administer the renewable surface resources of national forests for multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. 529.

The substantive goals of the Organic Act and MUSYA are implemented in part through the planning framework established in NFMA. Under NFMA, USDA must develop for each administrative unit a land and resource management plan (Forest Plan), see 16 U.S.C. 1604(a), that "include[s] coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness" uses, 16 U.S.C. 1604(e)(1). All site-specific "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands [must] be consistent with" the applicable Forest Plan. 16 U.S.C. 1604(i).

NEPA is a procedural statute that does not mandate "that agencies achieve particular substantive environmental results." *Marsh* v. *Oregon Nat'l Res. Council*, 490 U.S. 360, 371 (1989). Rather, NEPA requires that federal agencies take a hard look at the environmental consequences of proposed major federal actions significantly affecting the quality of the human environment before making a final decision about whether to take the proposed action, by preparing an environmental assessment, an environmental impact statement (EIS), or determining that the action falls within a NEPA categorical exclusion. 42 U.S.C. 4332; 40 C.F.R. 1500-1508. NEPA serves the dual purpose of informing agency decision-makers of the environmental effects of proposed major federal

actions and ensuring that relevant information is made available to the public. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); 42 U.S.C. 4321; 40 C.F.R. 1501.1.

2. a. In both the draft EIS (prepared in May 2000) and the final EIS (prepared in November 2000) associated with issuance of the Roadless Rule, USDA considered several alternative courses of action with respect to the Tongass, including exempting the Tongass in whole or in part, not exempting the Tongass at all, or deferring a decision for several years. 66 Fed. Reg. at 3254. "Social and economic considerations were key factors in analyzing those alternatives, along with the unique and sensitive ecological character of the Tongass National Forest." *Ibid.* USDA ultimately concluded that the Roadless Rule provisions should apply to the Tongass. *Ibid.* In order to assure both "long-term protection and a smooth transition for forest dependent communities," USDA included a mitigation measure providing that the Roadless Rule prohibitions would "not apply to road construction, reconstruction, and the cutting, sale or removal of timber" from Roadless Areas in the Tongass if a draft EIS had been published with respect to such activities before the date of publication of the 2001 Roadless Rule. *Ibid.* As a result of the mitigation measure, the total amount of timber allowed to continue to be harvested from Roadless Areas in the Tongass after promulgation of the Roadless Rule was approximately 851 million board feet—"enough timber volume to satisfy about 7 years of estimated market demand." *Id.* at 3255; see *id.* at 3266.

b. In the first year following promulgation of the Roadless Rule, the Rule was challenged in nine differ-

ent suits, including in a suit filed by the State of Alaska in the United States District Court for the District of Alaska. Pet. App. 9. In June 2003, USDA settled Alaska's suit by agreeing to publish (1) a proposed rule that, if adopted, would temporarily exempt the Tongass from the Roadless Rule; and (2) an advance notice of proposed rulemaking seeking comment on whether to permanently exempt the Tongass and the Chugach National Forest (also in Alaska) from the Roadless Rule. See 68 Fed. Reg. 41,864-41,866 (July 15, 2003). On July 15, 2003, pursuant to that agreement, USDA published a proposed rule temporarily exempting the Tongass from the Roadless Rule and an advance notice of proposed rulemaking, explaining that USDA was considering an amendment to the Roadless Rule that would permanently exempt the Tongass and Chugach National Forests from the Roadless Rule's requirements and restrictions. *Id.* at 41,864-41,865.

c. After considering public comments on the proposed rule, USDA issued a final rule "to temporarily exempt the Tongass" from the Roadless Rule (the Tongass Exemption). See 68 Fed. Reg. 75,136-75,146 (Dec. 20, 2003) (Tongass Exemption Final Rule and Record of Decision (ROD)). Under this temporary exemption from the Roadless Rule, approximately 300,000 acres of Roadless Areas—out of more than 9.34 million roadless acres within the Tongass—were made available for "forest management," including timber harvesting and road construction, provided that such activities are consistent with provisions of the Tongass Land and Resource Management Plan (Tongass Forest Plan) and other requirements. *Id.* at 75,136. USDA identified four principal reasons for

adopting the Tongass Exemption: (1) at least in the short term, roadless ecological values are sufficiently protected by the Tongass Forest Plan and by congressional designations, with or without the Roadless Rule; (2) the Roadless Rule significantly limits the ability of communities in Southeast Alaska to develop road and utility connections; (3) as estimated in the pre-2001 Final EIS, application of the Roadless Rule could cause the loss of approximately 900 jobs in Southeast Alaska, including direct job losses in the timber industry as well as indirect job losses in other sectors; and (4) the exemption would reduce litigation uncertainty caused by "conflicting judicial determinations" and the numerous challenges to and injunctions related to the Roadless Rule. *Id.* at 75,137-75,138.

In fulfilling its NEPA responsibilities with respect to the Tongass Exemption, USDA relied on the May 2000 draft EIS and November 2000 final EIS prepared for the 2001 Roadless Rule, as well as a Supplemental Environmental Impact Statement (SEIS) for the February 2003 ROD amending the 1997 Tongass Forest Plan. 68 Fed. Reg. at 75,145. In addition, USDA prepared a Supplemental Information Report (SIR) to determine whether new information or changed circumstances required supplementing the Roadless Rule EIS. *Ibid.* In the SIR, USDA concluded "that no significant new circumstances or information exist, and that no additional environmental analysis is warranted." *Ibid.* Thus, USDA based the 2003 Tongass Exemption rule on the factual record underlying the promulgation of the 2001 Roadless Rule and the new analyses included in the supplemental NEPA documents.

d. For many of the years since its promulgation in 2001, the Roadless Rule has not been in effect because it has either been enjoined by various courts or has been superseded by another rule (that was subsequently found to be invalid). Pet. App. 8-11. The last injunction was lifted in 2011, when the Tenth Circuit upheld the validity of the Roadless Rule. See *Wyoming* v. *United States Dep't of Agric.*, 661 F.3d 1209, 1272, cert. denied, 133 S. Ct. 144, and 133 S. Ct. 417 (2012).

Significantly, a 2011 challenge to the Roadless Rule itself by petitioner remains pending in the United States District Court for the District of Columbia. Briefing on the parties' cross-motions for summary judgment was completed in September 2015, but the district court has not yet addressed the merits of Alaska's challenge to the Roadless Rule. See *State of Alaska* v. *United States Dep't of Agric.*, No. 11-cv-1122. This case concerns only the Tongass Exemption to the Roadless Rule.

e. Since 2010, USDA has been working on a "Tongass Transition Framework" to help communities in Southeast Alaska transition from a timber-based economy (which relied heavily on harvesting old-growth forests) to a more diversified economy featuring jobs in renewable energy, forest restoration, timber (focusing primarily on the harvest of young-growth forest stands), tourism, subsistence, and fisheries and mariculture. See, *e.g.*, *USDA, News Release No. 0288.10* (May 26, 2010).[1] One of the objectives of the Framework is to transition from harvesting tim-

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[1] See D. Ct. Doc. 54, Ex. 7 (Nov. 1, 2010); http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2010/05/0288.xml.

ber in old-growth forests to long-term stewardship contracts in young-growth areas, a change that would both conserve ecological resources and improve investment certainty for the forest industry businesses. *Ibid.*; *Secretary's Memorandum No. 1044-009* (July 2, 2013) (announcing Tongass transition to young-growth harvesting with goals to conserve ecological resources and preserve jobs for the regional industry)[2]; *USDA, News Release No. 0140.13* (July 3, 2105) (U.S. Forest Service Chief Tom Tidwell explaining that the "transition" in the Tongass "will maintain an integrated wood products industry and help sustain communities in southeast Alaska," so "[f]inally, we can move beyond the controversial debate on old-growth forests and focus our resources on supporting jobs").[3]

The proposed Tongass Transition Framework—which seeks to create a stable platform for future timber harvesting, to diversify economic opportunities in Southeast Alaska, and to conserve the temperate rainforest ecosystem—is set forth in the November 2015 Draft EIS accompanying the proposed Tongass Forest Plan Amendment. See *Improving Forest Health and Socioeconomic Opportunities on the Nation's Forest System: Hearing Before the Senate Comm. on the Energy and Natural Resources*, 114th Cong., 1st Sess. (2015) (statement of Robert Bonnie,

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[2] http//www.ocio.usda.gov/sites/default/files/docs/2012/Addressing%20Sustainable%20Forestry%20in%20Southeast%20Alaska.pdf.

[3] http//www.usda.gov/wps/portal/usda/usdahome?contentid=2013/07/0140.xml&navid=NEWS_RELEASE&navtype=RT&parentnav=LATEST_RELEASES&edeployment_action=retrievecontent.

Under Secretary, USDA)[4]; *2015 Draft EIS for the Proposed Tongass Forest Plan Amendment* (2015 DEIS).[5]

3. a. In December 2009, a federally recognized Indian tribe (the Organized Village of Kake), various environmental organizations, and other non-profit and/or tourism groups and associations (collectively, Kake) filed this suit challenging USDA's 2003 adoption of the Tongass Exemption. Pet. App. 119-120. Kake alleged that USDA's stated reasons for promulgating the Exemption—(1) that the Roadless Rule prevents the construction of roads needed to connect communities in Southeast Alaska; (2) that the Roadless Rule prevents the construction of utility lines to communities in Southeast Alaska; (3) that the Roadless Rule causes uncertainty for timber operators due to litigation; and (4) that the Roadless Rule could cause the loss of up to 900 jobs—were contrary to the record, arbitrary and capricious, and therefore inconsistent with the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 120, 126-143. Kake also argued that USDA violated NEPA by failing to study, develop, and describe reasonable alternatives that would accomplish the stated purpose of the 2003 Tongass Exemption. *Id.* at 143. Kake argued that, in promulgating the Tongass Exemption, USDA could not rely on the analysis of alternatives in the 2000 EIS related to the 2001 Roadless Rule because each action

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[4] http//www.usda.gov/documents/2015-march-14-bonnie-robert-SENR-forest-management-final.pdf.

[5] See http://www.fs.usda.gov/detail/tongass/landmanagement/?cid=STELPRD3801708 (DEIS); 80 Fed. Reg. 72719 (Nov. 20, 2015) (Notice of Availability of the DEIS for the Tongass Plan Amendment).

had a different purpose. *Ibid.* Kake sought vacatur of the Tongass Exemption and of all Forest Service decisions inconsistent with the Roadless Rule. *Id.* at 120. The State of Alaska and the Alaska Forest Association joined the suit as intervenor-defendants. See *id.* at 106.

On March 4, 2011, the district court granted Kake's motion for summary judgment, vacated the Tongass Exemption, and reinstated the Roadless Rule's application to the Tongass. Pet. App. 106-145. The court denied, without prejudice, Kake's request for an order vacating specific timber sales. *Id.* at 145. The district court concluded that "the reasons proffered by the Forest Service in support of the Tongass Exemption were implausible [and] contrary to the evidence in the record" and that "promulgation of the Tongass Exemption was arbitrary and capricious." *Id.* at 142-143. In particular, the district court concluded that "the Forest Service's explanation that temporarily exempting the Tongass from the Roadless Rule was necessary to prevent significant job losses is not supported by the evidence, at least in the first seven years after adoption of the Roadless Rule." *Id.* at 131. The court explained that "neither the SIR nor the Tongass Exemption ROD offer[s] any evidence showing actual job loss due to application of the Roadless Rule and any resulting lower timber harvest levels on the Tongass" rather than a "decline in market demand." *Ibid.*

The district court also concluded that the record did not support USDA's 2003 determination that the Roadless Rule would significantly limit the development of roads and utility corridors in Southeast Alaska. Pet. App. 132-135. And the district court rejected USDA's conclusion that the Roadless Rule was not

necessary to protect roadless values in the Tongass, stating that "the Forest Service provided no reasoned explanation as to why the Tongass Forest Plan protections it found deficient in its 2001 FEIS and ROD, were deemed sufficient in its 2003 ROD." *Id.* at 138. The district court explained that "[w]hen an agency's 'new policy rests upon factual findings that contradict those which underlay its prior policy . . . a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.'" *Ibid* (quoting *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009) (*Fox*)).

The district court did not address Kake's NEPA claim, finding that unnecessary in light of its conclusion that the Tongass Exemption violated the APA. Pet. App. 143.

b. Petitioner (defendant-intervenor State of Alaska) was the only party to appeal. Pet. App. 73. Petitioner argued that USDA's promulgation of the Tongass Exemption was a reasonable exercise of the agency's discretion, supported by the record, and therefore consistent with the APA. Pet. C.A. Br. 3, 5, 9-10; Pet. C.A. Reply Br. 1-2, 8-9, 27. USDA did not appeal, and did not participate in the proceedings in the court of appeals.

A divided panel of the court of appeals reversed, holding that USDA's stated reasons for adopting the Tongass Exemption were sufficient. Pet. App. 69-105. Relying on this Court's decision in *Fox*, *supra*, the panel explained that, "[t]o prevent a claim it was acting in an arbitrary or capricious manner, where an agency changes its policy, the agency must show awareness that it is changing a policy and give a reasoned explanation for the adoption of the new policy"

—but, the panel emphasized, "[t]he agency *does not* always have to 'provide a more detailed justification than what would suffice for a new policy.'" *Id.* at 74 (quoting *Fox*, 556 U.S. at 515). The panel reversed the district court's holding that the Tongass Exemption violated the APA, and remanded the case for the district court to decide Kake's NEPA claim. *Id.* at 88.

Judge McKeown dissented, explaining that an agency that changes its position "must have 'good reasons' for the [new] policy and it must '*believe[]* it to be better.'" Pet. App. 90 (quoting *Fox*, 556 U.S. at 515). Judge McKeown would have affirmed the district court's judgment "because the administrative record does not support the reasons for the rule change that the USDA gave in its Tongass Exemption Record of Decision." *Id.* at 91.

c. A divided en banc panel of the court of appeals affirmed the district court's judgment vacating the Tongass Exemption. Pet. App. 1-68.

The en banc majority explained that the "central issue in this case is whether the 2003 ROD rests on factual findings contradicting those in the 2001 ROD, and thus must contain the 'more substantial justification' or reasoned explanation mandated by *Fox*." Pet. App. 22 (citation omitted). The court focused on USDA's change in view with respect to whether exempting the Tongass from the Roadless Rule would harm roadless area ecological values. *Id.* at 23-28. Based on the same factual record, USDA concluded in 2001 that an exemption would risk such values and then concluded in 2003 that it would not. *Ibid.*; see *id.* at 3. Because the court concluded that USDA did not provide a reasoned explanation for that change, it held that the 2003 determination violated the APA. *Ibid.*;

see *id.* at 31-33 (Christen, J., concurring) (stating that "when a new policy is contradicted by an agency's previous factual findings, the law does not allow the agency to simply ignore the earlier findings").

Five judges dissented. They would have held that, because USDA's explanation for the Tongass Exemption "*easily* meets the requirements of *Fox*," the exemption did not violate the APA. Pet. App. 56; see *id.* at 52-67. The dissent explained that "the two administrations looked at some of the same facts, and reached different conclusions about the meaning of what they saw. The second administration simply concluded that the facts called for different regulations than those proposed by the previous administration." *Id.* at 57; see also *id.* at 59 (noting that in 2003, "USDA concluded that it was important to give greater weight to *some* adverse socioeconomic effects than was done when the original Roadless Rule was promulgated"). The dissent credited four "good" and "independent" reasons USDA identified for its policy change, namely the protection of "wildlife, recreation, sustained use, and other values." *Id.* at 60, 63. The dissenters would have remanded the case to the district court to consider the NEPA claim. *Id.* at 67.

In addition, Judge Callahan (who joined the opinion of the other dissenting judges on the merits) would have held that, because USDA did not appeal, the court lacked appellate jurisdiction over petitioner's appeal. Pet. App. 34-51.

ARGUMENT

Petitioner seeks review of the en banc court of appeals' conclusion that USDA's 2003 reversal of its 2001 decision not to exempt the Tongass from the Roadless Rule violated the Administrative Procedure

Act, 5 U.S.C. 701 *et seq.*, because it was not supported by a sufficient justification. Review of that fact-bound and case-specific conclusion is unwarranted because it does not conflict with any decision of this Court or of any other court of appeals. The court of appeals' decision is likely to have little practical effect going forward because USDA is developing new policies to govern the Tongass. Moreover, petitioner's challenge to application of the Roadless Rule in the Tongass could become moot when the D.C. district court rules on petitioner's currently pending motion for summary judgment in petitioner's challenge to the Roadless Rule itself.

1. Petitioner errs in arguing (Pet. 17-22) that the court of appeals' decision conflicts with this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Court in *Fox* held that an agency may adopt a change in position without running afoul of the APA if it "provide[s] a reasoned explanation for its action," including by "display[ing] awareness that it *is* changing position" and "show[ing] that there are good reasons for the new policy." *Ibid.* The Court explained that "the agency need not *always* provide a more detailed justification than what would suffice for a new policy created on a blank slate"—but specified that "[s]ometimes it must," including when "its new policy rests upon factual findings that contradict those which underlay its prior policy." *Ibid.* (emphasis added). "In such cases," the Court reasoned, "it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay * * * the prior policy." *Id.* at 515-516.

Petitioner, the court of appeals majority, and the court of appeals dissenters all agree that the validity of USDA's rescission of the Tongass Exemption must be governed by the standard articulated in *Fox*. Pet. 17-22; Pet. App. 20-25 (recognizing that agencies may change positions, that agencies may rebalance factors considered in the original rulemaking, that agencies must give a reasoned explanation for a change in position, and that courts may not substitute their own policy judgments for those of an agency); Pet. App. 60-67 (M. Smith, J., dissenting) (same). The only disagreement between the majority and the dissenters on the court of appeals (and between petitioner and the court of appeals majority) is about how to apply that standard to the particular circumstances of this case—*i.e.*, whether USDA's explanation for this particular change was sufficient. Petitioner argues (Pet. 19) that the court of appeals majority treated "differing judgments about the appropriate balance between environmental and socio-economic interests" as factual determinations rather than as matters of opinion. See Pet. 19-22. Even if that is true, that would not create a conflict with this Court's decision in *Fox*, which did not discuss the difference between a factual finding and a matter of opinion. Nor would a court of appeals' misapplication of a correct legal standard to the circumstances of a particular case supply a sufficient reason to grant the petition for a writ of certiorari. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

Nor is there any merit in petitioner's further suggestions (Pet. 26-28) that the court of appeals' decision

"upsets the separation of powers balance established by this Court's decisions," including *Fox*, and that the court of appeals' decision "threatens th[e] flexibility" agencies should have "to carry out changes in policy that are the legitimate result of democratic elections." Pet. 26.[6] This Court's decision in *Fox* strikes the appropriate balance (codified in the APA) between permitting agencies sufficient flexibility to change their minds and requiring agencies to avoid changes in position that are arbitrary and capricious. In the government's view, the court of appeals' application of the APA standard (as articulated in *Fox*) to the facts of this case does not raise significant concerns about judicial review of future agency actions, including those involving changes in policy. Nor does the court of appeals' decision raise concerns with respect to USDA's prospective management of the Tongass. In its recent efforts to set new management direction for the Tongass, USDA is in the process of considering an updated factual record regarding resource management in the Tongass.

2. Petitioner also errs in contending (Pet. 22-24) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *National Ass'n of Home Builders* v. *EPA*, 682 F.3d 1032 (2012). Relying on this Court's decision in *Fox*, the D.C. Circuit explained that an agency need not provide a more detailed explanation for a change in position than for its

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[6] Petitioner's contentions in this regard are somewhat in tension with petitioner's pursuit of an appeal in this case and its filing of a petition for a writ of certiorari. Those actions are different from the agency's preferred course of action, *i.e.*, developing a *new* approach to managing the Tongass rather than continuing to litigate about the application of the Roadless Rule to the Tongass.

initial adoption of a contrary position when the agency's change in position does not depend on new or contradictory factual findings. 682 F.3d at 1037-1038. That is the same legal rule that the court of appeals (and the court of appeals dissenters) applied in this case. The different outcomes merely reflect the unremarkable fact that application of one legal rule to different situations will inevitably yield different outcomes depending on the circumstances of the particular case.

3. Petitioner also argues (Pet. 24-26) that this Court should grant the petition for a writ of certiorari because the application of the Roadless Rule to the Tongass "harms the isolated communities of the Tongass." Pet. 24. That argument is misplaced.

As noted, USDA chose not to appeal the district court's vacatur of the Tongass Exemption. In this case, petitioner has not argued either that USDA was *required* to adopt the exemption in the first place or that a reversal of the court of appeals' decision would necessarily affect USDA's management of the Tongass. Since at least 2010, USDA has been developing new policies for managing the Tongass that emphasize protecting roadless areas, including by amending the Tongass Forest Plan. See *USDA, News Release No. 0288.10* (May 26, 2010). As USDA moves forward in developing a new approach to managing the Tongass, review of the court of appeals' decision would accomplish little.

In addition, petitioner's contentions about the ill effects of applying the Roadless Rule to the Tongass are overblown. Neither petitioner nor its amici identify a single project that USDA has denied or modified based on application of the Roadless Rule to the Ton-

gass.[7] The 2015 DEIS extensively analyzes the potential effects of various alternatives (that involve application of the Roadless Rule in differing degrees or not at all) on the communities in Alaska. 2015 DEIS 3-501 to 3-657. Any contributions petitioner may wish to make to USDA's consideration of those effects should be submitted in the notice-and-public-comment process that is currently underway. Even after the planning process with respect to the proposed amendments to the Tongass Forest Plan (and any implementing actions) is complete, those amendments (and actions) will be subject to judicial review, as appropriate, under the APA, NEPA, and other applicable legal requirements. See *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726 (1998). Concerns about the socioeconomic conditions in Southeast Alaska are of critical concern to USDA. But those matters are not appropriate for review by the Court in this case.

4. Finally, review of the court of appeals' decision is particularly unwarranted because petitioners have another legal challenge to the Roadless Rule's application in Alaska pending in the United States District Court for the District of Columbia. *State of Alaska* v. *United States Dep't of Agric.*, No. 11-cv-1122. Briefing on cross-motions for summary judgment in that case was completed in September 2015. If petitioner

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[7] One of the amicus briefs claims that development of the Kensington Mine "will be adversely impacted * * * by the reinstated 2001 Roadless Rule." City of Craig Amicus Br. 20. In fact, however, USDA approved expansion into roadless areas to develop the Kensington Mine in 2015. See *Decision Memo 2015 Surface Exploration Annual Work Plan* (May 5, 2015), http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/100816_FSPLT3_2537969.pdf.

prevails in that suit, and the Roadless Rule is vacated in Alaska, any decision regarding the validity of the Tongass Exemption would have no effect. This Court's intervention at this point is thus particularly unwarranted while petitioner simultaneously seeks the same relief (*i.e.*, exemption of USDA's Tongass resource-management decisions from the effects of the Roadless Rule) in another case.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] In addition, before this Court could address petitioner's arguments in this case, it would need to determine whether petitioner had and continues to have standing to pursue its appeal of the district court's judgment and its quest for further review of the en banc court of appeals' judgment given that USDA (the losing defendant in the case) has exercised its discretion not to appeal or to seek this Court's review. See Pet. App. 34-51 (Callahan, J., dissenting) (expressing the view that the court of appeals lacked appellate jurisdiction and that petitioner's claims are nonjusticiable).