No. 15-467

In The Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

ORGANIZED VILLAGE OF KAKE; THE BOAT COMPANY; ALASKA WILDERNESS RECREATION AND TOURISM ASSOCIATION; SOUTHEAST ALASKA CONSERVATION COUNCIL; NATURAL RESOURCES DEFENSE COUNCIL; TONGASS CONSERVATION SOCIETY; GREENPEACE, INC.; WRANGELL RESOURCE COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; CASCADIA WILDLANDS; SIERRA CLUB; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; TOM VILSACK, in his official capacity as Secretary of Agriculture, et al.,

Respondents.

On Petition For Writ Of Certiorari To The U.S. Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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The Ninth Circuit has interpreted *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), not as a directive to defer to agency policy changes, but as a license to second-guess them. The newly elected Bush administration reversed the previous administration's decision to apply the nationwide Roadless Rule to the Tongass National Forest because it reached a different judgment about the ideal balance between environmental protections and economic opportunities. App. 202a. Yet rather than determining whether the new policy is reasonable in light of the relevant facts, the Ninth Circuit treated the two administrations' different value judgments as contradictory "factual findings" and, citing *Fox*, faulted the agency for not providing a reasoned explanation for rejecting the previous administration's conclusions. App. 26a-27a.

The Ninth Circuit's decision is not a mere misapplication of a correctly stated rule of law. Scrutinizing differences in judgment as if they are factual contradictions undermines the basic point of *Fox*: that an agency changing policy need only show that there are "good reasons" for the new policy, *not* "that the reasons for the new policy are *better* than the reasons for the old one." *Id.* at 515 (emphasis in original). Left uncorrected, the Ninth Circuit's logic could apply across the administrative spectrum, making it harder for new administrations to change course based solely on different values and priorities – the sort of change that is the very point of having elections and exactly what *Fox*'s standard is designed to permit.

I. The Ninth Circuit's decision conflicts with *Fox* and undermines the separation of powers.

Although all parties agree that the *Fox* decision governs this case, at stake is whether *Fox*'s rule of deference to agency policy changes will be a meaningful rule or one that can be easily evaded by the lower federal courts.

Tellingly, the United States does not contend that the Ninth Circuit's decision is correct. Nor does it dispute that the Ninth Circuit treated the new administration's value judgments as contradictory factual findings that, under *Fox*, require more justification than normal. Instead, the United States asserts that conflating an agency's value judgments with its factual findings does not conflict with *Fox* because *Fox* did not expressly distinguish between factual findings and "matters of opinion." U.S. Br. 15.

Yet that very distinction lies at the heart of *Fox*. *Fox* held that when an agency changes course, it need only show that "there are good reasons for [the new policy] and that the agency *believes* it to be better, which the conscious change of course adequately indicates." 556 U.S. at 515 (emphasis in original). The agency need not provide "more detailed justification" than normal unless "its new policy rests upon *factual findings* that contradict those which underlay its prior policy." 556 U.S. at 515 (emphasis added). This distinction makes sense; although ignoring contrary facts would be arbitrary, *id.* at 515-16, we expect a

newly elected administration to weigh facts differently in light of its own values and priorities. The entire point of *Fox* was to distinguish changes based on new facts from changes based on new values. When a court collapses the two, as the Ninth Circuit did here, it does precisely what *Fox* forbids: requiring the agency to "demonstrate to [the] court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Id.* at 515 (emphasis in original).

The United States' suggestion (U.S. Br. 15) that *Fox* does not clearly distinguish between facts and value judgments based on facts merely underscores the need for the Court to grant certiorari and resolve what *Fox* means. It also disposes of the argument by the Organized Village of Kake et al. ("Kake") that review is unnecessary because *Fox* already gives agencies enough guidance. Kake Br. 16-17. Kake is missing the point. The Court should grant review not because agencies need guidance on performing their role under the APA, but because the Ninth Circuit needs guidance on performing *its* role under the APA.

That is no less true simply because the Ninth Circuit mouthed *Fox*'s standard and purported to identify conflicting factual findings. *See* Kake Br. 10 (quoting App. 24a-25a). As discussed more fully in Part II below, the Forest Service expressly relied on the same facts that produced its initial rule, and it expressly stated that its change of course was based on its reweighing of those facts. App. 202a, 205a. A court of appeals should not be able to strike down an agency

rule for failing to explain "new" factual findings that the agency did not actually make. When a court does that, it prevents the agency from changing course based on changed value judgments, just as we expect new administrations to do. The State's challenge to the Ninth Circuit's decision thus presents a fundamental legal question: whether *Fox* requires federal courts to defer when an agency reasonably reaches a different judgment about the same facts.

The scope of federal court review of agency action is, of course, a foundational separation-of-powers issue. Kake suggests that Alaska's invocation of that doctrine is "hollow" because the current administration is willing to accept the outcome here. Kake Br. 22. But the current administration's acquiescence only highlights the concern raised in Judge Kozinski's dissenting opinion, which "note[d] the absurdity that we are in the home stretch of the Obama administration and still litigating the validity of policy changes implemented at the start of the George W. Bush administration." App. 68a. To prevent the improper "shift[ ]" of "authority from the political branches to the judiciary," *id.*, clear guidelines for judicial review of agency actions are needed. This case presents an opportunity for this Court to provide such guidelines.

Kake's objection that this Court would have to "reexamin[e] the Ninth Circuit's reading of the agency decision" to decide this case is equally ill-founded. Kake Br. 11. Any time this Court clarifies administrative law by reviewing a lower court's decision it examines the underlying agency action. *See, e.g.*, *Fox*,

556 U.S. at 517-18 (applying the standards it enunciated to the FCC's "new enforcement policy"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 46-57 (1983) (reviewing whether administrative record sufficiently supported agency's decision to rescind rule requiring airbags and automatic seatbelts in passenger vehicles). That is not a basis to deny certiorari.

II. The Forest Service did not rely on unexplained new factual findings in adopting the Tongass Exemption.

The Ninth Circuit was wrong to conclude that the agency relied on contradictory new factual findings, especially considering that the 2003 decision was based on the very same factual record as the 2001 decision. The EIS prepared in 2000 for the Roadless Rule decision specifically analyzed the effects of exempting the Tongass. App. 205a. In considering this option again in 2003, the agency prepared a supplemental information report to determine whether there was new relevant information. It concluded that "no significant new circumstances or information exist, and that no additional environmental analysis is warranted." App. 205a. The decision to exempt the Tongass was therefore based on the same factual record as before, as the rulemaking expressly noted: "This decision reflects the fact, as displayed in the FEIS for the Roadless Rule and the FEIS for the 1997 Tongass Forest Plan[,] that roadless values are plentiful on

the Tongass and are well protected by the Tongass Forest Plan." App. 202a.

Given the agency's explicit statement that it was not relying on new facts, it is hardly surprising that the United States does not even attempt to defend the Ninth Circuit's contrary determination. Kake, however, insists that the Ninth Circuit correctly found a factual contradiction between the 2001 conclusion that exempting the Tongass from the Roadless Rule "would risk the loss of important roadless area values" and the 2003 conclusion that the Roadless Rule is "unnecessary to maintain the roadless values of these areas." Kake Br. 11. As the State's petition points out (at Pet. 20), the Ninth Circuit selectively quoted the latter statement in a way that obscures the agency's reasoning. The full passage shows that the agency concluded in 2003 that the Roadless Rule is unnecessary to protect the roadless values of the 9.34 million acres of inventoried roadless areas *already protected from timber harvest and road construction by existing law*. App. 166a. That conclusion is perfectly consistent with the recognition that allowing timber harvest in *some* roadless areas – areas not already protected from road construction by existing law – could result in loss of roadless area values in *those* areas. App. 153a. Kake's uncritical reliance on the Ninth Circuit's misleading quotation merely highlights how flimsy the court's decision is.

Not finding much to work with in the Ninth Circuit's decision, Kake argues (at Kake Br. 12-13) that the Tongass Exemption rests on unexplained factual

contradictions that the Ninth Circuit did not even mention. App. 22a-30a. Kake asserts that the agency's discussion of job losses fails to account for the mitigating effect of grandfathered timber, but the Roadless Rule decision itself acknowledged that grandfathering timber would merely delay, not eliminate, job losses. App. 154a. Kake suggests (at Kake Br. 11) that the Tongass Exemption failed to account for the FEIS's general statement that "loss of inventoried roadless areas may pose a high risk of species existence," but fails to mention that the FEIS specifically evaluated the effect of exempting the Tongass from the Roadless Rule and found that "there is a moderate to high likelihood that habitat conditions will support well-distributed species." C.A. Supp. E.R. 149. Finally, Kake argues that a lack of specific road or utility proposals in the record contradicts the agency's belief that the Roadless Rule's limits on roadbuilding would hamper economic development. Kake Br. 13. Yet the agency's conclusion rests not on the existence of specific proposals that the Roadless Rule would prevent, but on the history of organic growth from logging roads in Southeast Alaska and on concern about discouraging opportunities for new transmission lines and hydropower facilities that are "on the horizon." App. 193a-95a.

The reason why Kake cannot show factual contradictions is simple: the agency relied on the same factual record in 2003 as it did in 2001. App. 205a. The agency just reached a different judgment about the best policy.

III. The Roadless Rule still stymies Southeast Alaska's potential for growth.

Having tied up the 2003 rule in litigation for years, Kake now argues that time has passed the rule by. Kake Br. 20-21. The United States supports this contention by pointing to a recent Forest Service initiative designed to reduce old-growth timber harvest in the Tongass. U.S. Br. 17-18. But these initiatives do not supplant the Tongass Exemption, their ultimate content is uncertain, and they pertain solely to timber, not to the other sectors of the Southeast Alaska economy stunted by the Roadless Rule. The outcome of this case thus remains very important to the communities of the Tongass.

The outcome of the Forest Service's planning process for timber harvest is not pre-ordained, as Kake suggests. Among other things, the administration's discretion to transition away from old-growth harvest is limited by a statutory duty to seek to meet market demand for Tongass timber. 16 U.S.C. § 539d(a). As recently as 2014, the agency estimated demand of 127 MMBF annually. U.S. Dep't of Agric., *Fiscal Year 2014 Tongass Nat'l Forest Annual Monitoring and Evaluation Report* at 23-24 (Sept. 2015).[1] Yet the draft EIS that sought to implement the advisory committee's recommendations proposes forest plan amendments premised on annual demand of

[1] http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3856206.pdf.

46 MMBF. *2015 Draft EIS for Tongass Land and Resource Management Plan Amendment* ("Draft EIS") at 2-9 (Nov. 2015).[2] The Draft EIS does not acknowledge, let alone explain, the precipitous decline in its demand estimate. *2015 Draft EIS* at 3-449–3-463. In the final plan, the agency will either have to reconcile these figures, change its approach, or be vulnerable to legal challenge. Given the uncertain outcome of the planning process, it is sheer speculation to presume that the outcome of this case will have no effect on the health of Southeast Alaska's remaining timber industry.

Moreover, the proposed amendments to the forest plan mainly concern timber harvest. *2015 Draft EIS* at 1-1–1-2. Overturning the Ninth Circuit's decision would still benefit other sectors of Southeast Alaska's economy, as explained in the briefs of the State's amici. For example, the Roadless Rule hinders mineral development because it does not permit roads in connection with mining claims unless the Forest Service decides they are "needed." 36 C.F.R. § 294.12(b)(7) (2001). And even Federal Aid Highways are permitted only if the Secretary of Agriculture decides that "no other reasonable and prudent alternative exists." 36 C.F.R. § 294.12(b)(6) (2001). The inability to use roads to construct and maintain utility lines will make proposed hydropower projects in Southeast Alaska more expensive and possibly

[2] http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd480660.pdf.

completely uneconomic.[3] Eight projects under consideration are in inventoried roadless areas. *Draft EIS* at 3-282. And even though a goal of the proposed plan amendments is to increase use of renewable resources like wind power, the Forest Service has determined that the Tongass's wind resources are unlikely to be developed because they tend to be located in inventoried roadless areas. *Draft EIS* at 3-285.

The absence of projects or permits denied due to the Roadless Rule does not mean that the rule has no practical impact. This kind of evidence does not exist because (1) the Tongass was exempted from the rule until the district court's decision in 2011 and (2) rational economic actors are unlikely to propose projects that are not consistent with federal regulations. All told, the Roadless Rule remains a major obstacle to Southeast Alaska developing the infrastructure that, as the Forest Service recognized, "almost all other communities in the United States take for granted." App. 165a.

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[3] Kake claims that the Forest Service did not find any powerlines in Southeast Alaska built with roads, but the document it cites to does not support this assertion at all. Kake Br. 19 (citing C.A. Supp. E.R. 168). It states only that an already-constructed section of the proposed Southeast Alaska Electrical Intertie did not require a road and that "[h]ow much more difficult it would be to complete all sections of the intertie without constructing any new roads in inventoried roadless areas is not known." C.A. Supp. E.R. 168.

IV. This case does not have justiciability problems.

The State's standing to maintain this appeal is not in serious question. Neither Kake nor the United States disputed the State's standing below. Even now, neither party asserts that Alaska actually lacks standing. U.S. Br. 19 n.8; Kake Br. 22-25. And ten of the eleven judges on the *en banc* panel concluded the State has standing to pursue this case.

The State's injury is "concrete" and "particularized." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). Like other states, Alaska has a right to 25% of gross receipts from timber sales from national forests within its boundaries. 16 U.S.C. § 500. The sharp decrease in timber harvest necessitated by the Roadless Rule decreases the amount of money available to the State under this program. This financial injury is not only concrete, it is also particular to the State and its subdivisions because it is not shared by other entities or the population at large.

This injury is also sufficiently imminent to give the State standing. The Secure Rural Schools and Community Self-Determination Act is a temporary measure by Congress to hold States harmless against fluctuations in timber receipts. These hold-harmless payments have been authorized for fiscal years 2014 and 2015, Pub. L. No. 114-10 § 524(a), 129 Stat. 178, 178-79 (2015), but whether Congress will authorize similar payments in the future is unknown. A direct

financial injury to the State from judicial invalidation of the Tongass is thus set to occur at the end of the current fiscal year. Kake's argument that reinstating the Tongass Exemption would not result in greater timber harvest ignores the Forest Service's statutory duty to seek to meet market demand for Tongass timber, 16 U.S.C. § 539d(a), and relies on an unexplained figure from the most recent Draft EIS that conflicts with the Forest Service's most recent official demand estimate of 127 MMBF annually, *see 2014 Annual Report*, *supra*, at 24.

Finally, the State's separate legal challenge to the Roadless Rule does not make this case a poor vehicle for the question presented. Major federal actions frequently give rise to multiple lawsuits; that does not mean this Court should not review any of them. And if the State's challenge prevails in the district court, the United States will almost certainly appeal the decision to the D.C. Circuit, keeping the practical significance of this case alive.

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CONCLUSION

For these reasons, the State of Alaska respectfully requests the Court to issue a writ of certiorari to review the decision of Ninth Circuit below.

Respectfully submitted,

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